

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

In the Matter of)	
)	
Time Warner Cable Inc.)	MB Docket No. 12-136, CSR 8634-E
)	MB Docket No. 12-141, CSR 8639-E
Petitions for Determination of Effective)	
Competition in Communities in Indiana and)	
Kentucky)	

MEMORANDUM OPINION AND ORDER

Adopted: March 26, 2013

Released: March 27, 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 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 Taylorsville, Kentucky. Except for that community, the petitions are granted.

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 3-5.

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 5-6.

¹⁴ See Petitions at 6 & n.17.

¹⁵ See *id.* at 6.

¹⁶ *Id.* at 7.

¹⁷ See *id.* at 7-8.

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 all but one of the Attachment A Communities.

7. In the City of Taylorsville, Petitioner claims to be subject to competing provider effective competition based on evidence of 49 DBS subscribers and 325 households.¹⁹ Using those numbers, Petitioner claims DBS subscribership of 15.08 percent.²⁰ Although a chart provided by Petitioner indicates that there are 325 occupied housing units in the City of Taylorsville, Kentucky,²¹ data on the U.S. Census Bureau website reflects that there are 330 occupied housing units in this locality.²² Using the correct figure for occupied housing units, our calculations show DBS subscribership in the City of Taylorsville to be 14.85 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 Taylorsville, Kentucky.

8. In sum, the second prong of the competing provider test is satisfied for each of the Attachment A Communities except for the City of Taylorsville. 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 Taylorsville.

B. The Low Penetration Test

9. 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.²³ 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.²⁴

10. 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.

¹⁸ *Id.* 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) (“Nov. 14 Supplement”) (attaching page 8 of the Petition in CSR 8634-E).

¹⁹ *See* Petition in CSR 8634-E at 8; Nov. 14 Supplement.

²⁰ *Id.*

²¹ *See* Petition in CSR 8634-E at Exh. B.

²² *See* U.S. Census Bureau, 2010 Census Interactive Population Search for KY - Taylorsville city, *available at* <http://www.census.gov/2010census/popmap/ipmtext.php?fl=2175810>.

²³ 47 U.S.C. § 543(l)(1)(A).

²⁴ *See* Petition in CSR 8634-E at 9; Petition in CSR 8639-E at 8-9.

III. ORDERING CLAUSES

11. 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 Taylorsville, Kentucky, and **ARE GRANTED** for all the other Attachment A and B Communities.

12. **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 Taylorsville, Kentucky, **IS REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²⁵

FEDERAL COMMUNICATIONS COMMISSION

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

²⁵ 47 C.F.R. § 0.283.

ATTACHMENT A

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

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Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers
Town of Austin	IN0243	17.03	1,674	285
City of Bedford	KY1016	39.57	230	91
Town of Campbellsburg	IN0938	32.89	228	75
City of Crestwood	KY0576	16.05	1,626	261
City of Milton	KY1042	32.80	250	82
Town of New Pekin	IN0640	17.23	563	97
City of Orchard Grass Hills	KY0636	22.64	508	115
City of Salem	IN0056	25.10	2,622	658
Town of Saltillo	IN0939	45.24	42	19
Town of Scottsburg	IN0244	21.24	2,768	588
City of Shelbyville	KY0427 KY0428	24.30	5,235	1,272
City of Simpsonville	KY1258	26.31	935	246
City of Taylorsville	KY0730	14.85	330	49

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Communities	CUIDs	CPR*	2010 Census Households	Estimated DBS Subscribers
Town of Borden	IN0636	29.28	321	94
City of Charlestown	IN0083	20.28	2,884	585
Town of Clarksville	IN0085	15.85	9,175	1,454
Town of Corydon	IN0101	21.40	1,341	287
Town of Georgetown	IN0255	20.96	1,088	228
Town of Greenville	IN0256	32.42	219	71
Town of Lanesville	IN0792	33.20	241	80
Monroe Township	IN1073	46.53	1,975	919
City of New Albany	IN0194	15.59	15,575	2,428
Town of Palmyra	IN0791	19.85	388	77
City of Radcliff	KY0396	15.54	8,660	1,346
Town of Sellersburg	IN0084	26.44	2,443	646
Town of Utica	IN0652	17.07	328	56
City of West Point	KY0657	17.16	338	58

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT B

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

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Communities	CUIDs	Franchise Area Households	Cable Subscribers	Penetration Percentage
Spencer County (Uninc.)	KY0729 KY0876	5,835	218	3.74
Trimble County (Uninc.)	KY1001 KY1171	2,940	355	12.07

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Communities	CUIDs	Franchise Area Households	Cable Subscribers	Penetration Percentage
Hardin County (Uninc.)	KY0330	16,517	358	2.17