

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

In the Matter of	)	
	)	
Time Warner Cable, Inc.	)	CSR 8134-E
	)	
Petition for Determination of Effective	)	
Competition in Two Communities in Ohio	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 17, 2016**

**Released: February 18, 2016**

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 a petition<sup>1</sup> 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 the communities listed on Attachment A and hereinafter referred to as the Communities. Petitioner alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (Communications Act),<sup>2</sup> and the Commission's implementing rules,<sup>3</sup> and that it is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite (DBS) providers, DIRECTV, Inc. (DIRECTV), and DISH Network (DISH). A letter opposing the petition was filed by the Village of Yellow Springs (the Village).<sup>4</sup> Petitioner filed a reply.<sup>5</sup>

2. In June 2015, a Commission order adopted a rebuttable presumption that cable operators are subject to one type of effective competition, commonly referred to as competing provider effective competition.<sup>6</sup> Accordingly, in the absence of a demonstration to the contrary, the Commission now presumes that cable systems are subject to competing provider effective competition, and it continues to presume that cable systems are not subject to any of the other three types of effective competition, as defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.<sup>7</sup>

<sup>1</sup> Time Warner Cable, Inc. Petition for Special Relief (Feb. 12, 2009) (Petition).

<sup>2</sup> See 47 U.S.C. § 543(l)(1)(B).

<sup>3</sup> 47 C.F.R. § 76.905(b)(2).

<sup>4</sup> Letter from Mark S. Cundiff, Village Manager, Village of Yellow Springs, to Ms. Monica Shah Desai, Chief, Media Bureau (Feb. 27, 2009) (Village Opposition).

<sup>5</sup> Petitioner states that it was not served a copy of the Village Opposition and only became aware of its existence when requesting a status update from Commission staff regarding the disposition of its Petition. Although Commission rules require replies to be filed within ten days after the submission of a responsive pleading, 47 C.F.R. § 76.7(c)(3), Petitioner requests that the Commission allow this Reply for purposes of a complete and accurate record in this proceeding. See Time Warner Cable, Inc. Reply (April 1, 2011) at 1 n.2 (Reply). Finding no prejudice to the parties, we will consider Petitioner's Reply to be timely.

<sup>6</sup> See *Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574 (2015) (*Effective Competition Order*).

<sup>7</sup> See 47 U.S.C. § 543(l)(1); 47 C.F.R. §§ 76.905(b), 76.906.

For the reasons set forth below, we grant Petitioner's petition.

## II. 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.<sup>8</sup> This test is referred to as the "competing provider" test. Pursuant to the *Effective Competition Order*, absent evidence to the contrary, the Commission presumes that the competing provider test is met.

### A. The First Part

4. 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.<sup>9</sup> As explained in the *Effective Competition Order*, "we find that the ubiquitous nationwide presence of DBS providers, DIRECTV and DISH Network, presumptively satisfies" the first part of the test for competing provider effective competition, absent evidence to the contrary.<sup>10</sup> The Village has not presented evidence to rebut the first part of the competing provider effective competition test. In accordance with the presumption of competing provider effective competition, and based on the information submitted by Petitioner and the Village, we thus find that the first part of the test is satisfied.

### B. The Second Part

5. 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.<sup>11</sup> As explained in the *Effective Competition Order*, "[w]ith regard to the second prong of the test, we will presume that more than 15 percent of the households in a franchise area subscribe to programming services offered by MVPDs other than the largest MVPD."<sup>12</sup> The Village argues that Petitioner has not satisfied the second part of the competing provider effective competition test.

6. Petitioner purchased a subscriber tracking report from the Satellite Broadcasting and Communications Association that identified the number of subscribers to DBS service in each five-digit zip code that lay partly within one of the Communities.<sup>13</sup> Petitioner allocated the DBS subscribers in the zip code that pertains to Yellow Springs, 45387, between those inside Yellow Springs and those outside it.<sup>14</sup> The Village theorizes that the DBS providers' subscribership is likely to be higher outside Yellow

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<sup>8</sup> 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

<sup>9</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>10</sup> *Effective Competition Order*, 30 FCC Rcd at 6580-81, para. 8.

<sup>11</sup> 47 C.F.R. § 76.905(b)(2)(ii).

<sup>12</sup> *Effective Competition Order*, 30 FCC Rcd at 6581-82, para. 9. Petitioner asserts that it is the largest MVPD in the Communities. *See* Petition at 7.

<sup>13</sup> Petition at 7; *id.* at Exh. D. Neither of the Communities contained an entire five-digit zip code.

<sup>14</sup> Petition at 7; *id.* at Exh. E. Petitioner filed a Supplement with updated household data from the 2010 Census. Letter from Craig A. Gilley, Counsel for Time Warner Cable, Inc., to Mr. Steven Broecker, Senior Deputy Chief, Policy Division, Media Bureau (April 29, 2011) ("Supplement"). The Supplement indicates the Village was served

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Springs and Petitioner's estimate of the percentage of DBS subscribership within Yellow Springs is excessive. The Village argues that Petitioner should have used "Zip+4" or nine-digit zip codes, which the Village believes would show DBS subscribership in Yellow Springs at 15 percent or less.<sup>15</sup> In reply, Petitioner argues that using the five-digit zip code allocation formula is sufficiently reliable for determining DBS subscribership penetration.<sup>16</sup> Therefore, Petitioner states there is no need for it to submit a revised penetration calculation based on nine-digit zip code data.<sup>17</sup>

7. The Village's objections lack merit. We do not require cable operators to use nine-digit zip code-based DBS subscriber numbers in effective competition petitions.<sup>18</sup> Additionally, it is insufficient for the Village to advance only general, theoretical objections. Without more substantive evidence, the Village's arguments fail to rebut the presumption of competing provider effective competition. For the above reasons, the arguments put forth by the Village fail to rebut the presumption of competing provider effective competition. In accordance with the presumption of competing provider effective competition, and based on the information submitted by Petitioner and the Village, we thus find that the second prong of the test is satisfied.

### III. ORDERING CLAUSES

8. 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** as to the Communities listed on Attachment A hereto.

9. **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 Attachment A **IS REVOKED**.

10. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>19</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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a copy, but the Village did not file a reply. The Supplement's data confirm that DBS penetration rates exceed the statutory 15 percent level in each community.

<sup>15</sup> Village Opposition.

<sup>16</sup> Reply at 2-4.

<sup>17</sup> *Id.* at 4-5.

<sup>18</sup> *Comcast Cable Commc'ns, LLC*, Memorandum Opinion and Order, DA 11-496, 26 FCC Rcd 3850, 3854, para. 18 (MB 2011); *Commission Clarifies Standards for Evidence of Competing Provider Effective Competition for Cable Service*, Public Notice, DA 09-1361, 24 FCC Rcd 8198 (MB 2009); *Comcast Cable Commc'ns, LLC*, Memorandum Opinion and Order, DA 07-160, 22 FCC Rcd 694, 699, para. 12 (MB 2007).

<sup>19</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

## CSR 8134-E

## COMMUNITIES SERVED BY TIME WARNER CABLE, INC.

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>2010 Census Households</b>	<b>Estimated DBS Subscribers</b>
Piqua	OH0134	18.51%	8,318	1,540
Yellow Springs	OH1060	15.79%	1,672	264

\*CPR = Percent of competitive DBS penetration rate. A CPR may not be exactly correct because of fractional DBS subscribers used in Petitioner's calculations but not reproduced above.