

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

In the Matter of)	
)	
Time Warner Cable Inc.)	CSR 7547-E
)	
Petition for Determination of Effective)	
Competition in 8 Communities in New)	
Jersey)	
)	
Application for Review)	

MEMORANDUM OPINION AND ORDER

Adopted: September 18, 2018**Released: September 19, 2018**

By the Commission:

I. INTRODUCTION

1. The New Jersey Division of Rate Counsel (DRC)¹ has filed an Application for Review (AFR)² of the Media Bureau (Bureau) *Order* in the above-captioned proceeding.³ The New Jersey Board of Public Utilities (BPU) is the franchising authority whose jurisdiction includes the five New Jersey franchise areas at issue in this proceeding (the Communities).⁴ The *Order* granted a petition for a determination of effective competition filed by Time Warner Cable Inc. (TWC)⁵ in the Communities, revoking BPU's previous certification to regulate basic cable service rates.⁶ For the reasons set forth below, we deny DRC's AFR.

¹ DRC explains that it is part of the New Jersey Department of the Public Advocate, and "is statutorily authorized to represent the public interest of New Jersey ratepayers, including cable television subscribers, before state and federal regulatory agencies." New Jersey Division of Rate Counsel, Reply to Opposition to Application for Review at 1, n.1 (filed Nov. 17, 2008) (Reply).

² New Jersey Division of Rate Counsel, Application for Review (filed Sept. 15, 2008) (AFR). The AFR was filed pursuant to Section 1.115 of the Commission's rules. 47 CFR § 1.115.

³ *Time Warner Cable Inc., Petition for Determination of Effective Competition in 8 Communities in New Jersey*, Memorandum Opinion and Order, 23 FCC Rcd 12210 (MB 2008) (*Order*).

⁴ The Communities and their associated Community Unit Identification (CUID) numbers are Fairview (NJ 0253), Guttenberg (NJ 0338), Little Ferry (NJ 0339), Moonachie (NJ 0427), and Ridgefield Park (NJ 0254).

⁵ Charter has since acquired TWC. *See Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership, For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 31 FCC Rcd 6327 (2016).

⁶ The *Order* denied TWC's petition for a determination of effective competition in Englewood (NJ 0251), Ridgefield (NJ 0203), and Teterboro (NJ 0484). *Id.* at 12212, para. 8. These three communities are not at issue in the AFR. *See also Time Warner Cable Inc., and Time Warner Entertainment-Advance/Newhouse Partnership; 25 Petitions for*

II. BACKGROUND

2. A franchising authority may regulate basic cable service tier rates and equipment only if the Commission finds that the cable system is not subject to effective competition.⁷ Under the Communications Act of 1934, as amended (the Act), a cable operator will be deemed subject to effective competition if it is shown that one of four statutory tests is satisfied.⁸ The type of effective competition relevant to this proceeding is known as “competing provider effective competition.”⁹ Section 623(l)(1)(B) of the Act provides that the test for competing provider effective competition is satisfied if the franchise area is “(i) 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 (ii) 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[.]”¹⁰

3. BPU previously was certified by the Commission to regulate basic cable service rates in the Communities.¹¹ In September 2007, TWC filed a petition requesting that the Commission make a finding of competing provider effective competition and revoke BPU’s certification.¹² In August 2008, the Bureau revoked BPU’s certification to regulate cable rates in the Communities, finding that the presence of competing provider effective competition precluded such regulation.¹³ The *Order* concluded that TWC’s cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Act and the Commission’s implementing rules, and is therefore exempt from cable rate regulation by BPU in the Communities, because of the competing service provided by two direct broadcast satellite (DBS) providers, DIRECTV, Inc. (DIRECTV) and DISH Network (DISH).¹⁴ In response to the *Order*, DRC filed the AFR in September 2008. TWC then filed an opposition,¹⁵ to which DRC filed a reply.

4. In June 2015, the Commission reversed its decades-old rebuttable presumption that cable operators were not subject to effective competition and adopted a new rebuttable presumption that cable operators are subject to

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Determination of Effective Competition in 229 Communities in New Jersey and New York, Memorandum Opinion and Order on Reconsideration, 23 FCC Rcd 16483 (MB 2008) (*Order on Reconsideration*) (denying Time Warner Cable Inc.’s petition for reconsideration regarding these three communities).

⁷ See 47 U.S.C. § 543(a)(2)(A).

⁸ *Id.* § 543(l); see also 47 CFR § 76.905(b).

⁹ 47 U.S.C. § 543(l)(1)(B); see also 47 CFR § 76.905(b)(2).

¹⁰ 47 U.S.C. § 543(l)(1)(B); 47 CFR § 76.905(b)(2).

¹¹ See *Order*, 23 FCC Rcd at 12216, para. 22.

¹² Time Warner Cable Inc., Petition for Special Relief (filed Sep. 5, 2007) (Petition).

¹³ *Order*, 23 FCC Rcd at 12215, para. 18.

¹⁴ *Id.* at 12215, para. 17 and 12218, Attach. B (finding that DBS penetration in the Communities ranged from 15.86% to 22.94%).

¹⁵ Time Warner Cable Inc., Opposition to Application for Review (filed Sep. 26, 2008) (Opposition).

competing provider effective competition.¹⁶ In the absence of a demonstration to the contrary, the Commission now presumes that cable systems are subject to competing provider effective competition.¹⁷ For those effective competition cases that were pending when the Commission adopted its new rebuttable presumption, and for which the franchising authority did not file a revised recertification (Form 328) containing new evidence, the Commission considers only the record before it in deciding the cable operator's petition.¹⁸ Here, BPU did not file a revised Form 328.¹⁹ Accordingly, we consider the record before us to resolve the AFR.

III. DISCUSSION

5. Upon consideration of the AFR and the record before us, we affirm the conclusion in the *Order* that TWC is subject to effective competition because it has satisfied its burden under the Commission's prior presumption with respect to both parts of the competing provider test for effective competition in the Communities.

6. DRC does not dispute that TWC satisfied the first part of the competing provider test, which is whether the franchise area is served by at least two unaffiliated MVPDs, each of which offers comparable video programming to at least 50 percent of the households in the franchise area.²⁰ Instead, on review, DRC argues that there are several reasons the Commission should overturn the Bureau's finding that TWC has satisfied the second part of the competing provider effective competition test, which is whether more than 15 percent of the households in the franchise area subscribe to competing providers.

7. *Five-Digit Zip Code Data.* First, DRC argues that the Bureau erred because "prior Bureau orders required and sanctioned the use of zip code+4 [household data]," while TWC used "unreliable" five-digit zip code household

¹⁶ 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*), *aff'd sub nom. Nat'l Ass'n of Telecomms. Officers and Advisors v. FCC*, 862 F.3d 18 (D.C. Cir. 2017). The Commission continues to presume that cable systems are not subject to any of the other three types of effective competition, as defined by Sections 623(l)(1)(A), (C), and (D) of the Act and Sections 76.905(b)(1), (3) and (4) of the Commission's rules. 47 CFR § 76.906(b). See also *Effective Competition Order*, 30 FCC Rcd at 6587, para. 18.

¹⁷ See 47 U.S.C. § 543(l)(1); 47 CFR §§ 76.905(b), 76.906. Pursuant to the *Effective Competition Order*, any franchising authority that was certified to regulate the basic service tier rates and equipment that wished to remain certified after the new presumption went into effect was required to file a revised certification (Form 328) within 90 days of the effective date of the new rules. *Effective Competition Order*, 30 FCC Rcd at 6592, para. 27.

¹⁸ *Effective Competition Order*, 30 FCC Rcd at 6594, para. 30. Where a pending application for review involves a franchising authority that filed a revised Form 328 during the 90-day time frame, the Commission will consider the existing record along with the new certification. *Id.* at 6593, para. 28.

¹⁹ See *Findings of Competing Provider Effective Competition Following December 8, 2015 Filing Deadline for Existing Franchise Authority Recertification*, Public Notice, 30 FCC Rcd 14293 at App. E (MB 2015).

²⁰ See AFR at 2-12. See also *Order*, 23 FCC Rcd at 12211, para. 5 (finding the first part of the competing provider test satisfied).

data.²¹ We affirm the Bureau's acceptance of DBS numbers based on five-digit zip codes as providing sufficiently precise subscriber data.²² We reject DRC's assertion that the Bureau allows five-digit zip code data to be used in calculating DBS subscribership only when a franchise is located entirely within one five-digit zip code, and that nine-digit zip code data is otherwise required.²³ To the contrary, the Commission recently affirmed the Bureau's longstanding practice of allowing the use of five-digit zip code data to determine DBS subscribership.²⁴ Therefore,

²¹ AFR at 5. DRC argues that "Five digit zip code data usually encompasses a larger area than the franchise area which leads to incongruous and distorted results, i.e., the true measure of households in the particular franchise area is not properly demonstrated." AFR at 7-8; *see also* Reply at 2-3. We agree with the Bureau that any such concerns have been resolved by TWC's use of a Commission-approved allocation methodology, and DRC did not demonstrate that this methodology resulted "in any double counting and over-estimation of DBS subscribership in any Community." *See Order*, 23 FCC Rcd at 12213, para. 11; *see also* Opposition at 4-5 ("this is the precise problem that the allocation methodology addresses so that an accurate penetration calculation can be ascertained for any community").

²² *Order*, 23 FCC Rcd at 12213-12215, paras. 10-12, 17.

²³ AFR at 5, 7. To support its argument, DRC points to the Public Notice released two days before the *Order* that would prospectively require nine-digit zip code data to support competing provider effective competition petitions. *Id.* at 5, n. 8. *See Commission Announces New Standards for Showings of Effective Competition for Cable Service*, Public Notice, 23 FCC Rcd 12067, 12068 (MB 2008) ("The Commission will continue processing effective competition competing provider petitions currently pending at the Commission that rely on Five-Digit Zip Code data, but if the Five-Digit Zip Code data leads to inaccurate or questionable reports of penetration, the request will be denied without prejudice to refile using the Nine-Digit Zip Code Plus Four data") (August 13, 2008 Notice). DRC correctly acknowledges that the Bureau suspended the new standards pending approval of the Office of Management and Budget (OMB). *See* AFR at 5, n. 8; *Commission Revises and Suspends Pending OMB Approval New Standards for Showings of Effective Competition for Cable Service*, Public Notice, 23 FCC Rcd 13252 (MB 2008). While OMB approval remained pending, the Bureau subsequently concluded that, "[a]fter further consideration," it would not require the use of nine-digit zip code data, but rather, would continue permitting the use of five-digit data, nine-digit data, and other kinds of evidence to support claims of competing provider effective competition. *Commission Clarifies Standards for Evidence of Competing Provider Effective Competition for Cable Service*, Public Notice, 24 FCC Rcd 8198 (MB 2009). Thus, the nine-digit zip code standard never took effect. In any case, under the terms of the August 13, 2008 Notice, the new standard would not have applied to TWC's petition, which was pending at the time the notice was released, because DRC provides no basis for concluding that the five-digit zip code data led to inaccurate or questionable reports of penetration with respect to the New Jersey Communities that are subject to the AFR. *See* August 13, 2008 Notice, 23 FCC Rcd at 12068; *see also infra* ¶ 8.

²⁴ *See, e.g., Comcast Cable Commun., LLC, on behalf of its subsidiaries and affiliates; Petition for Determination of Effective Competition in Six Blaine, Minnesota Franchise Areas; Application for Review*, Memorandum Opinion and Order, FCC 18-49 at 3-5, para. 8, n. 36 (rel. Apr. 18, 2018) (*Blaine Effective Competition Order*) (finding that it was proper for Comcast initially to submit subscribership data based on five-digit zip codes and that such data was sufficient to demonstrate that the competing provider effective competition test was met.). *See also Comcast Cable Commun., LLC, Petitions for Determination of Effective Competition in Ten Communities in Washington*, Memorandum Opinion and Order, 28 FCC Rcd 16292, 16295, para. 10 (MB 2013) (noting the longstanding practice of accepting five-digit zip code data in effective competition proceedings); *Time Warner Entertainment-Advance/Newhouse Partnership, Petition for Determination of Effective Competition in South Carolina Communities*, Memorandum Opinion and Order, 26 FCC Rcd

we find that the Bureau properly considered and rejected concerns about TWC's use of five-digit zip code data.²⁵ DRC also asserts that the Bureau should not assume that the Satellite Broadcast and Communications Association (SBCA) subscribership estimates are reliable and correct.²⁶ We reject this argument as well. The Commission finds no reason to depart from the Bureau's longstanding practice of relying on SBCA data as accurate unless proven otherwise, given that SBCA data appears to be the most accurate source for DBS subscribership data unless proven otherwise. DRC asserts only that the SBCA data may not be accurate, but it presents no evidence to contradict the SBCA data.²⁷

8. DRC argues that because the Bureau determined that the submitted five-digit zip code data was unreliable with regard to the three communities for which it rejected the petition,²⁸ it also should have determined that the five-digit zip code data regarding the remaining Communities was unreliable.²⁹ We disagree. The Bureau reasonably determined that because the combined TWC and DBS subscribership data exceeded 100 percent of the households in Englewood, Ridgefield, and Teterboro, the five-digit zip code data was unreliable with regard to those communities.³⁰ In contrast, the combined DBS and TWC subscribership in the remaining Communities did not exceed 100 percent of the households.³¹ The Bureau's denial of the petition with regard to three communities has no impact on the reliability of five-digit zip code use in the remaining Communities, for which TWC produced sufficient evidence showing DBS penetration rates in excess of the 15 percent statutory threshold.³² DRC has continuously failed to offer factual support for its claim that the five-digit zip code data for the Communities is suspect, alleging only that the Bureau "cannot assume" data irregularities do not exist.³³ To the contrary, the Bureau did not make any assumptions as to the

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3840, 3843, para. 11 (MB 2011) (*Time Warner-Advance/Newhouse Effective Competition Petition*) ("We have repeatedly held that a cable operator's evidence is not invalid merely because...its DBS numbers are based on five-digit zip code data and an allocation factor instead of nine-digit data"). See also Opposition at 5.

²⁵ Order, 23 FCC Rcd at 12213-12214, paras. 10-12.

²⁶ AFR at 8-9. SBCA subscribership estimates are contained in the SBCA's subscriber tracking reports, which identify the number of subscribers that the DBS providers have on a zip code basis. See Order, 23 FCC Rcd at 12212, para. 7. See also Opposition at 3 (explaining that the SBCA is "the entity that has been charged by the DBS Providers with the task of providing DBS Provider subscriber data for effective competition purposes").

²⁷ See *supra* n.24.

²⁸ See *supra* n. 6.

²⁹ AFR at 4, 7-8; Reply at 2-3.

³⁰ See Order, 23 FCC Rcd at 12212, para. 8.

³¹ See Opposition at 6. See also Order, 23 FCC Rcd at 12212, para. 8, n.21.

³² See Order, 23 FCC Rcd at 12213, para. 11 ("To prevent double counting, Petitioner uses a method to allocate DBS subscribers in such zip codes among the Communities it spans. This method is one that we have allowed in previous decisions.") (footnotes omitted). See also Opposition at 3.

³³ AFR at 8.

reliability of the five-digit zip code data, but rather it examined the raw data³⁴ and calculations³⁵ presented by TWC, and came to the reasonable conclusion that TWC met its burden of proof.³⁶ As TWC states, “the Bureau has repeatedly rejected challenges to five digit only petitions that simply claim that zip code plus four data is more accurate and should have been used.”³⁷

9. *Census Data.* Second, we reject DRC’s request that, as a matter of due process, we adopt a so-called “complete when filed” rule, pursuant to which Census household data and DBS subscribership data would be required to be “contemporaneous to one another and current to the date of the Petition.”³⁸ We agree with the Bureau that it is a reasonable practice to use the Census household data that was most recent at the time an effective competition petition was filed, given that “Census household data is most consistent with Congress’s intent, even if the applicable subscribership figures are from a different year than the data.”³⁹ Here, TWC filed its petition in 2007 with data from the 2000 Census, which was the most recent Census. Numerous effective competition findings have been based on household and DBS subscribership data that are years apart in time.⁴⁰ DRC

³⁴ See *Order*, 23 FCC Rcd at 12212, 12215, paras. 7, 16 (noting the scope and sufficiency of the raw data provided by TWC in its Petition at Exhs. B-D).

³⁵ See *id.* at 12212-13, 12215, paras. 7, 11, 16 (reviewing TWC’s utilization of the Commission-approved allocation method); Opposition at 3-5 (describing in detail the Commission-approved allocation formula).

³⁶ See *Order*, 23 FCC Rcd at 12212-13, 12215, paras. 7, 11, 17. The Bureau addressed DRC’s arguments and recognized that, in accordance with the rules in effect at that time, “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.” See *id.* at 12210, para. 2; 47 CFR §§ 76.906, 76.907(b) (2013). TWC submitted evidence that rebutted the presumption in effect at that time. We thus reject DRC’s claim that the Bureau erred by “improperly shifting the burden of proof to Rate Counsel.” See AFR at 2.

³⁷ Opposition at 5. See *e.g.*, *Time Warner-Advance/Newhouse Partnership d/b/a Time Warner Cable; Petition for Determination of Effective Competition in Thirty-Three North Carolina Communities*, Memorandum Opinion and Order, 20 FCC Rcd 5225, 5228, para. 11 (MB 2005) (rejecting a challenge from the franchising authority and finding that Time Warner met its initial burden using five-digit zip code data); *Charter Commun.; Petition for Determination of Effective Competition in Fourteen North Carolina Communities and Petition for Determination of Effective Competition in Thirteen North Carolina Communities*, Memorandum Opinion and Order, 19 FCC Rcd 7003, 7006, para. 7 (MB 2004) (“Although the Commission accepts Zip Code plus four data, it has not expressed a preference for one form of data over another and accepts five digit Zip Code data as reliable for purposes of determining effective competition.”).

³⁸ AFR at 10-12; Reply at 3.

³⁹ *Blaine Effective Competition Order*, FCC 18-49 at 4, para. 9. See *Order*, 23 FCC Rcd at 12214, para. 15; Petition at Exhs. B-E.

⁴⁰ See, *e.g.*, *Order*, 23 FCC Rcd at 12214, para. 15; *Time Warner Entertainment-Advance/Newhouse Effective Competition Petition*, 26 FCC Rcd at 3843, para. 11 (“We have repeatedly held that a cable operator’s evidence is not invalid merely because its DBS and household numbers are several years apart”); *Cablevision of Rockland/Ramapo Inc., et al.; Petitions for Determination of Effective Competition*, Memorandum Opinion and Order, 22 FCC Rcd 11487, 11493, para. 16 (MB 2007) (“The Commission has relied upon Census

complains about consideration of the 2000 Census data but fails to offer any evidence undermining its reliability for purposes of this proceeding. Indeed, we see no reasoned basis for excluding Census data depending upon the year a petition for determination of effective competition is filed. As stated in the *Order*, parties are permitted but not required to present “household data that is more recent than, and as reliable as, the most recent Census data,”⁴¹ and DRC has not submitted such data. DRC claims that Commission precedent supports its argument, but in fact, the cases it cites support the Bureau’s position that more contemporaneous household figures are not required, but simply are permissible if they are shown to be at least as reliable as the most recent Census data.⁴² DRC was not denied due process where it failed to avail itself of the opportunity to rebut TWC’s Census household data with updated evidence of its own.

10. *Other Arguments.* DRC makes additional arguments that it claims justify reversal of the Bureau’s decision, none of which we find persuasive. DRC claims that the Bureau erred by failing to require TWC to provide the underlying data it relied upon.⁴³ We conclude that the Bureau did not err. Rather, all of the raw data used by TWC and the relevant calculations were submitted with the Petition.⁴⁴ DRC does not indicate what specific additional data should be added to the record.⁴⁵ DRC also argues that the Bureau failed “to hold further proceedings to resolve disputes of material facts as to the number of households and the number of satellite subscribers in each franchise,” and failed “to dismiss the Petition for lack of information necessary to apply the ‘competing provider test.’”⁴⁶ We disagree with both arguments. TWC submitted all of the data necessary to apply the competing provider test, and DRC did not submit alternate data for our consideration. We do not see any evidence that disputes of material facts exist.

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data in effective competition cases where the differential between the dat[e] of the Census information and the date of the petition was greater than five years”).

⁴¹ *Order*, 23 FCC Rcd at 12214, para. 15.

⁴² See AFR at 10-11; Opposition at 8; Reply at 3; *Falcon Cable Systems Co. II d/b/a Charter Commun.; Petitions for Determination of Effective Competition in Twelve Oregon Cities*, Memorandum Opinion and Order, 17 FCC Rcd 4648 (CSB 2002); *Texas Cable Partners, L.P.; Petition for Determination of Effective Competition*, Memorandum Opinion and Order, 16 FCC Rcd 4718 (CSB 2001); *Mountain Cable Co., et al., d/b/a Adelphia Cable Commun.; Petitions for Revocation of the Certification of the Vermont Public Service Board to Regulate Basic Cable Service Rates*, Memorandum Opinion and Order, 14 FCC Rcd 13994 (CSB 1999).

⁴³ AFR at 9. Because we find that TWC provided sufficient information to support its subscriber data and that DRC failed to show that any material evidence was not produced, we reject DRC’s due process argument. AFR at 9. See also *Order*, 23 FCC Rcd at 12215, para. 16; Opposition at 9 (“all of the necessary data inputs, which were obtained from reliable and Commission approved third party sources, were contained in the Petition as Exhibits B through D.” TWC’s “worksheet applying the data to allocation methodology was included as Exhibit E,” which “plainly broke down each step in the formula, properly applying all of the data inputs to produce accurate DBS Provider penetration figures for each of the eight Franchise Areas.” DRC “points [to] no flaw in this worksheet and its calculations, and gives no indication of precisely what additional data it seeks”).

⁴⁴ *Order*, 23 FCC Rcd at 12215, para. 16. See also Opposition at 9.

⁴⁵ See *Order*, 23 FCC Rcd at 12215, para. 16.

⁴⁶ AFR at 2.

DRC has not presented alternate figures, but rather, it simply criticizes the figures that TWC submitted without providing any evidence that they are inaccurate.

11. Upon review of the Application for Review and the entire record, we conclude that DRC has failed to demonstrate the Bureau erred. We therefore affirm the Bureau's finding of effective competition.

IV. ORDERING CLAUSE

12. Accordingly, **IT IS ORDERED** that the Application for Review filed by the New Jersey Division of Rate Counsel in the above-captioned proceeding **IS DENIED**.

COMMISSION

FEDERAL COMMUNICATIONS

Marlene H. Dortch
Secretary