

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

In the Matter of
Time Warner Cable Inc.
Petition for Determination of Effective
Competition in various Michigan and Wisconsin
Communities
CSR 7816-E and 7817-E

MEMORANDUM OPINION AND ORDER

Adopted: July 10, 2008

Released: July 11, 2008

By the Associate Chief, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc., hereinafter referred to as "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(1) 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 "Communities." Petitioner alleges that its cable system serving the communities listed on Attachment B and hereinafter referred to as Group B Communities is subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended ("Communications Act") and the Commission's implementing rules, and 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"). Petitioner additionally claims to be exempt from cable rate regulation in the Communities listed on Attachment C and hereinafter referred to as Group C Communities 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, as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules. 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. For the reasons set forth below, we grant the petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

1See 47 U.S.C. § 543(a)(1).

247 C.F.R. § 76.905(b)(2) and 47 C.F.R. § 76.905(b)(1).

347 C.F.R. § 76.906.

4See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

5See 47 C.F.R. §§ 76.906 & 907.

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 multi-channel video programming distributors (“MVPD”) 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;⁶ this test is otherwise 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.⁷

5. Turning to the first prong of this test, it is undisputed that these Group B 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.⁸ 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.⁹ We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Group B Communities to support their assertion that potential customers in the Group B Communities are reasonably aware that they may purchase the service of these MVPD providers.¹⁰ 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 programming¹¹ and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.¹² Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Group B Communities because of their national satellite footprint.¹³ 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 Group B Communities.¹⁴ Petitioner sought to determine the competing provider penetration in the Group B Communities by purchasing a subscriber

⁶47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁷47 C.F.R. § 76.905(b)(2)(i).

⁸*See* Petition at 4.

⁹Mediacom Illinois LLC et al., *Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

¹⁰47 C.F.R. § 76.905(e)(2).

¹¹*See* 47 C.F.R. § 76.905(g). *See also* Petition at 5-6.

¹²*See* Petition at 6.

¹³*See* Petition at 6-7.

¹⁴*Id.* at 7.

tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Group B Communities on a zip code and zip code plus four basis where necessary.¹⁵

7. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data,¹⁶ as reflected in Attachment B, 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 the Group B Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Group B Communities.

8. 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 Group B Communities.

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 otherwise referred to as the “low penetration” test.¹⁷ 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 franchise area.

10. Based upon the subscriber penetration level calculated by Petitioner, as reflected in Attachment C, we find that Petitioner has demonstrated the percentage of households subscribing to its cable service is less than 30 percent of the households in the Group C Communities. Therefore, the low penetration test is also satisfied as to the Group C Communities.

¹⁵Petition at 7-8.

¹⁶Petition at 8.

¹⁷47 U.S.C. § 543(l)(1)(A).

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 GRANTED**.

12. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁸

FEDERAL COMMUNICATIONS COMMISSION

Nancy Murphy
Associate Chief, Media Bureau

¹⁸47 C.F.R. § 0.283.

ATTACHMENT A

CSR(s) 7816-E and 7817-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)
<u>CSR 7816-E</u>	
Ingallston	MI1836
Marinette	WI0028
Menominee City	MI0090
Menominee Town	MI0947
Peshtigo City	WI0181
Peshtigo Town	WI0513
Porterfield	WI1079
<u>CSR 7817-E</u>	
Bloomfield	WI0932
Burlington City	WI0285
Burlington Town	WI0478
Dover	WI0946
Geneva	WI0931
Lake Geneva	WI0070
Linn	WI0933
Lyons	WI0934
Paddock Lake	WI0549
Randall	WI1057
Rochester Town	WI1058
Rochester Village	WI0600
Salem	WI0624
Spring Prairie	WI1059
Sturtevant	WI0232
Union Grove	WI0497
Waterford Town	WI0696
Waterford Village	WI0537
Wheatland	WI0627
Yorkville	WI0602

ATTACHMENT B

CSR(s) 7816-E and 7817-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	CPR*	2000 Census Household	Estimated DBS Subscribers
<u>CSR 7816-E</u>				
Marinette	WI0028	16.43%	5,095	837
Menominee City	MI0090	18.71%	4,063	760
Menominee Town	MI0947	23.12%	1,570	363
Peshtigo City	WI0181	25.93%	1,315	341
Peshtigo Town	WI0513	18.86%	1,416	267
<u>CSR 7817-E</u>				
Burlington City	WI0285	20.71%	3,838	795
Burlington Town	WI0478	20.73%	2,354	488
Dover	WI0946	21.29%	1,193	254
Geneva	WI0931	29.28%	1,660	486
Lake Geneva	WI0070	19.16%	3,053	585
Lyons	WI0934	20.06%	1,231	247
Paddock Lake	WI0549	15.25%	1,056	161
Rochester Town	WI1058	19.57%	782	153
Rochester Village	WI0600	19.51%	410	80
Salem	WI0624	18.14%	3,529	640
Spring Prairie	WI1059	28.93%	726	210
Sturtevant	WI0232	16.81%	1,477	248
Union Grove	WI0497	28.76%	1,631	469
Waterford Town	WI0696	17.51%	2,086	365
Wheatland	WI0627	19.44%	1,209	235

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT C

CSR(s) 7816-E and 7817-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	Franchise Area Households	Cable Subscribers	Penetration Percentage
<u>CSR 7816-E</u> Ingallston	MI1836	456	96	21.05%
Porterfield	WI1079	770	156	20.26%
<u>CSR 7817-E</u> Bloomfield	WI0932	2,067	186	9.00%
Linn	WI0933	910	258	28.35%
Randall	WI1057	1,031	190	18.43%
Waterford Village	WI0537	1,561	1	0.06%
Yorkville	WI0602	1,123	177	15.76%