

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

In the Matter of)
Time Warner Cable Inc.) CSR 7820-E and 7821-E
Petition for Determination of Effective)
Competition in various Wisconsin Communities)

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 2008

Released: July 31, 2008

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 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(1) 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(l)(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.

¹²*See* Petition at 6.

¹³*Id.*

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.

¹⁶*Id.*

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

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

¹⁸47 C.F.R. § 0.283.

ATTACHMENT A

CSR(s) 7820-E and 7821-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)
<u>CSR 7820-E</u>	
Abrams	WI1245
Algoma	WI1209
Appleton	WI0054
Ashwaubenon	WI0228
Bellevue	WI0477
Brillion	WI0769
Buchanan	WI0683
Cato	WI1014
Center	WI0770
Chase	WI1192
Clayton	WI0714
Combined Locks	WI0143
Dale	WI0716
De Pere	WI0226
Ellington	WI0768
Freedom	WI0437
Grand Chute	WI0116
Green Bay	WI0234
Greenville	WI0684
Harrison	WI0685
Hilbert	WI0735
Hobart	WI0544
Holland	WI1012
Howard	WI0327
Kaukauna City	WI0261
Kaukauna Town	WI1016
Kimberly	WI0144
Lawrence	WI0984
Ledgeview	WI0799
Liberty	WI1062
Little Chute	WI0262
Little Suamico	WI1011
Menasha City	WI0061
Menasha Town	WI0263
Oneida	WI1004
Osborn	WI1127
Pittsfield	WI0926
Reedsville	WI0529
Rockland	WI1168
Scott	WI1227
Seymour	WI0412
Sherwood	WI0736
St. Nazianz	WI0905
Stiles	WI1243
Stockbridge Town	WI0733
Stockbridge Village	WI0734

Suamico	WI0675
Valders	WI0906
Vandenbroek	WI1015
Vinland	WI0654
Winchester	WI0715
Woodville	WI1013
Wrightstown Town	WI0520
Wrightstown Village	WI1246

CSR 7821-E

Adell	WI0941
Ashippun	WI0765
Belgium Town	WI0553
Belgium Village	WI0530
Cascade	WI0942
Cedar Grove	WI0531
Cleveland	WI0598
Delafield	WI0345
Dousman	WI0572
Eagle Town	WI0568
Eagle Village	WI0546
East Troy Town	WI0699
East Troy Village	WI0548
Elkhart Lake	WI0432
Fredonia Town	WI0554
Fredonia Village	WI0532
Germantown	WI0347
Glenbeulah	WI0433
Grafton	WI1020
Greenbush	WI0943
Hartland	WI0348
Herman	WI0945
Holland	WI0555
Howards Grove	WI0536
Ixonia	WI0766
Lac La Belle	WI0764
Lannon	WI0284
Lima	WI0944
Merton Town	WI0640
Merton Village	WI0349
Mosel	WI1056
Nashotah	WI0639
Newburg	WI0574
North Prairie	WI0545
Norway	WI0541
Oconowoc Lake	WI0638
Oconomowoc	WI0637
Oostburg	WI0533
Ottawa	WI0626
Port Washington	WI0352
Random Lake	WI0534
Rhine	WI0434
Saukville Town	WI1213
Saukville Village	WI0353
Scott	WI1072
Sherman	WI0556
Sullivan	WI1061
Summit	WI0625

Troy	WI1060
Waldo	WI0940
West Milwaukee	WI0357

ATTACHMENT B

CSR(s) 7820-E and 7821-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	CPR*	2000 Census Household	Estimated DBS Subscribers
<u>CSR 7820-E</u> Appleton	WI0054	15.87%	26,884	4,266
Ashwaubenon	WI0228	17.19%	7,137	1,227
Bellevue	WI0477	20.13%	4,624	931
Buchanan	WI0683	18.42%	1,846	340
Center	WI0770	24.57%	1,095	269
Combined Locks	WI0143	18.77%	884	166
Dale	WI0716	41.02%	785	322
De Pere	WI0226	19.14%	7,724	1,478
Freedom	WI0437	22.80%	1,833	418
Grand Chute	WI0116	15.30%	7,586	1,161
Green Bay	WI0234	17.12%	41,591	7,122
Greenville	WI0684	18.73%	2,301	431
Harrison	WI0685	18.42%	1,998	368
Hilbert	WI0735	33.25%	430	143
Hobart	WI0544	18.57%	1,717	319
Howard	WI0327	15.54%	5,236	814
Kaukauna City	WI0261	21.61%	4,971	1,074
Kaukauna Town	WI1016	22.70%	370	84
Kimberly	WI0144	15.32%	2,507	384
Lawrence	WI0984	19.21%	531	102
Ledgeview	WI0799	19.66%	1,180	232
Little Chute	WI0262	17.53%	3,878	680

Menasha City	WI0061	15.83%	6,951	1,101
Oneida	WI1004	20.33%	359	73
Pittsfield	WI0926	22.62%	818	185
Reedsville	WI0529	44.16%	471	208
Seymour	WI0412	33.99%	406	138
Sherwood	WI0736	25.87%	572	148
St. Nazianz	WI0905	37.84%	296	112
Stockbridge Village	WI0734	35.85%	265	95
Valders	WI0906	41.86%	375	157
Vandenbroek	WI1015	20.65%	460	95
Vinland	WI0654	15.00%	693	104
Wrightstown Village	WI1246	20.83%	701	146
<u>CSR 7821-E</u>				
Adell	WI0941	42.51%	207	88
Ashippun	WI0765	21.54%	845	182
Belgium Town	WI0553	26.63%	582	155
Belgium Village	WI0530	29.62%	547	162
Cascade	WI0942	43.14%	255	110
Cedar Grove	WI0531	23.75%	699	166
Cleveland	WI0598	38.06%	536	204
Delafield	WI0345	16.18%	2,553	413
Dousman	WI0572	19.30%	575	111
Eagle Town	WI0568	15.72%	1,049	165
Eagle Village	WI0546	23.99%	592	142
East Troy Town	WI0699	17.48%	1,350	236
East Troy Village	WI0548	17.94%	1,427	256
Elkhart Lake	WI0432	46.10%	436	201
Fredonia Village	WI0532	29.02%	727	211
Germantown	WI0347	17.41%	6,904	1,202
Glenbeulah	WI0433	45.10%	153	69

Hartland	WI0348	18.35%	3,002	551
Herman	WI0945	25.26%	574	145
Howards Grove	WI0536	19.20%	1,007	193
Ixonia	WI0766	20.82%	1,047	218
Lac La Belle	WI0764	17.94%	117	21
Lannon	WI0284	15.29%	425	65
Merton Town	WI0640	16.19%	2,706	438
Merton Village	WI0349	18.27%	591	108
Nashotah	WI0639	15.51%	445	69
Newburg	WI0574	17.11%	398	68
North Prairie	WI0545	15.82%	531	84
Norway	WI0541	21.13%	2,641	558
Oconomowoc Lake	WI0638	18.31%	208	38
Oconomowoc	WI0637	18.60%	2,765	514
Oostburg	WI0533	23.06%	980	226
Ottawa	WI0626	18.98%	1,375	261
Port Washington	WI0352	18.43%	4,071	750
Random Lake	WI0534	33.81%	613	207
Saukville Village	WI0353	17.85%	622	111
Summit	WI0625	16.87%	1,747	295
Troy	WI1060	31.54%	837	264
Waldo	WI0940	31.95%	169	54
West Milwaukee	WI0357	19.91%	2,059	410

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT C

CSR(s) 7820-E and 7821-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	Franchise Area Households	Cable Subscribers	Penetration Percentage
<u>CSR 7820-E</u>				
Abrams	WI1245	652	12	1.84%
Algoma	WI1209	1,940	9	0.46%
Brillion	WI0769	501	110	21.96%
Cato	WI1014	548	38	6.93%
Chase	WI1192	683	168	24.60%
Clayton	WI0714	1,071	33	3.08%
Ellington	WI0768	847	215	25.38%
Holland	WI1012	828	110	13.29%
Liberty	WI1062	456	64	14.04%
Little Suamico	WI1011	1,358	406	29.90%
Menasha Town	WI0263	6,298	1,119	17.77%
Osborn	WI1127	334	24	7.19%
Rockland	WI1168	483	81	16.77%
Scott	WI1227	658	94	14.29%
Stiles	WI1243	578	4	0.69%
Stockbridge Town	WI0733	506	86	17.00%
Suamico	WI0675	2,966	494	16.66%
Winchester	WI0715	620	183	29.52%
Woodville	WI1013	333	27	8.11%
Wrightstown Town	WI0520	666	1	0.15%
<u>CSR 7821-E</u>				
Fredonia Town	WI0554	727	149	21.26%
Grafton	WI1020	4,048	910	22.48%

Greenbush	WI0943	526	127	24.14%
Holland	WI0555	433	110	25.40%
Lima	WI0944	1,008	236	23.41%
Mosel	WI1056	310	47	15.16%
Rhine	WI0434	829	178	21.47%
Saukville Town	WI1213	1,583	55	3.47%
Scott	WI1072	1,145	94	8.21%
Sherman	WI0556	533	77	14.45%
Sullivan	WI1061	819	131	16.00%