

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

In the Matter of)
Time Warner Cable Inc.) CSR 7105-E, 7778-E, 7792-E
Petition for Determination of Effective)
Competition in various Ohio 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

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 4-5.

⁹*Mediacom 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 5-7.

¹³*See* Petition at 6-7.

¹⁴*Id.* at 7-8. In the Communities of Hamler, Holgate, Pleasant, Cecil and Latty (CSR 7792-E), both the Time Warner penetration figure and the aggregate DBS penetration figure clearly exceed 15 percent. Time Warner argues that it is subject to effective competition because in addition to DBS penetration exceeding 15 percent of the

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determine the competing provider penetration in the Group B Communities by purchasing a subscriber 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.

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occupied households, the number of Time Warner subscribers also exceed 15 percent and the Commission has recognized that in such cases the second prong of the competing provider test is satisfied.

¹⁵Petition at 7-9.

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) 7105-E, 7778-E, 7792-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)
<u>CSR 7105-E</u>	
Celina	OH0292
<u>CSR 7778-E</u>	
Bennington	OH2544
Buckeye Lake	OH1012
Burlington	OH2536
Eden	OH2545
Franklin	OH1016
Granville Township	OH0702
Granville Village	OH0655
Hanover Township	OH0600
Hanover Village	OH1889
Heath	OH0586
Hebron	OH0890
Liberty	OH2618
Licking	OH0656
Madison	OH0701
Mary Ann	OH2093
McKean	OH2546
Newark Township	OH0224
Newark City	OH0654
Newton Township	OH1014
Salt Creek	OH2541
St. Louisville	OH1178
Union	OH1015
Walnut	OH1013
<u>CSR 7792-E</u>	
Bartlow	OH1160
Cecil	OH2382
Crane	OH2383
Deshler	OH1157
Dover	OH2491
Emerald	OH2419
Flatrock	OH2627
Florida	OH2462
Freedom	OH2783
Fulton	OH2104
Grand Rapids Township	OH1264
Grand Rapids Village	OH1265
Hamler	OH1158
Harding	OH1636
Haskins	OH1261
Holgate	OH1159

Jackson	OH2387
Jerusalem	OH1656
Lake	OH1340
Latty	OH0485
Liberty Center	OH1353
Liberty	OH2631
Luckey	OH1339
Lyons	OH1416
Malinta	OH2460
Marion	OH1161
Metamora	OH1415
Middleton	OH1135
Monclova	OH1136
Monroe	OH2622
Napoleon City	OH0077
Napoleon Township	OH2732
Paulding Township	OH0931
Paulding Village	OH0485
Perrysburg	OH1134
	OH2529
Pike	OH2524
Pleasant	OH1162
Providence	OH1466
	OH2531
Springfield	OH1260
Swan Creek	OH1396
	OH2624
Swanton	OH0338
	OH0345
Troy	OH1341
Washington	OH1263
Waterville	OH1078
	OH1085
Wauseon	OH0057
Whitehouse	OH1084
York	OH1637
	OH2648

ATTACHMENT B

CSR(s) 7105-E, 7778-E, 7792-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	CPR*	2000 Census Household	Estimated DBS Subscribers
<u>CSR 7105-E</u> Celina	OH0292	21.55%	4,191	903
<u>CSR 7778-E</u> Buckeye Lake	OH1012	20.80%	1,240	258
Eden	OH2545	46.89%	418	196
Franklin	OH1016	35.53%	622	221
Granville Township	OH0702	29.17%	2,671	779
Granville Village	OH0655	24.29%	1,309	318
Hanover Village	OH1889	22.61%	314	71
Heath	OH0586	35.03%	3,403	1,192
Hebron	OH0890	22.45%	882	198
Licking	OH0656	32.99%	1,570	518
Madison	OH0701	25.32%	1,090	276
Mary Ann	OH2093	23.79%	744	177
Newark City	OH0654	22.56%	19,312	4,356
Newark Township	OH0224	22.53%	790	178
Newton Township	OH1014	23.83%	1,179	281
St. Louisville	OH1178	57.98%	119	69
Walnut	OH1013	31.13%	2,525	786
<u>CSR 7792-E</u> Lyons	OH1416	55.45%	220	122
Metamora	OH1415	44.00%	200	88
Swanton Township	OH0338	34.80%	1,204	419
Swanton Village	OH0345	39.80%	1,241	494

Wauseon	OH0057	38.32%	2,706	1,037
Whitehouse	OH1084	24.32%	1,036	252
Deshler	OH1157	41.31%	702	290
Florida	OH2462	33.67%	98	33
Grand Rapids Village	OH1265	40.05%	402	161
Hamler	OH1158	52.12%	236	123
Haskins	OH1261	23.24%	241	56
Holgate	OH1159	50.72%	441	224
Jerusalem	OH1656	31.45%	1,113	350
Lake	OH1340	17.03%	4,169	710
Liberty Center	OH1353	50.47%	424	214
Luckey	OH1339	39.77%	357	142
Malinta	OH2460	46.90%	113	53
Monclova	OH1136	18.47%	2,360	436
Napoleon City	OH0077	33.23%	3,813	1,267
Pleasant	OH1162	53.72%	819	440
Cecil	OH2382	55.84%	77	43
Latty	OH0485	38.96%	77	30
Paulding Township	OH0931	38.34%	1,466	562
Paulding Village	OH0485	39.62%	1,580	626

*CPR = Percent of competitive DBS penetration rate.

ATTACHMENT C

CSR(s) 7778-E and 7792-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	Franchise Area Households	Cable Subscribers	Penetration Percentage
<u>CSR 7778-E</u>				
Bennington	OH2544	433	74	17.09%
Burlington	OH2536	402	85	21.14%
Hanover Township	OH0600	975	194	19.90%
Liberty	OH2618	623	36	5.78%
McKean	OH2546	576	138	23.96%
Salt Creek	OH2541	405	114	28.15%
Union	OH1015	3,270	187	5.72%
<u>CSR 7792-E</u>				
Dover	OH2491	512	150	29.30%
Fulton	OH2104	1,215	149	12.26%
Pike	OH2524	633	19	3.00%
Providence	OH1466 OH2531	1,206	240	19.90%
Swan Creek	OH1396 OH2624	2,988	609	20.38%
Bartlow	OH1160	928	19	2.05%
Flatrock	OH2627	453	4	0.88%
Freedom	OH2783	321	5	1.56%
Grand Rapids Township	OH1264	632	63	9.97%
Harding	OH1636	266	15	5.64%
Liberty Township	OH2631	999	53	5.31%
Marion	OH1161	509	6	1.18%
Middleton	OH1135	956	173	18.10%
Monroe	OH2622	439	8	1.82%

Napoleon Township	OH2732	4,051	70	1.73%
Perrysburg	OH1134 OH2529	6,592	524	7.95%
Springfield	OH1260	9,453	981	10.38%
Troy	OH1341	1,616	343	21.23%
Washington	OH1263	612	159	25.98%
Waterville	OH1078 OH1085	3,395	163	4.80%
York	OH1637 OH2648	1,570	25	1.59%
Crane	OH2383	549	18	3.28%
Emerald	OH2419	319	17	5.33%
Jackson	OH2387	707	58	8.20%