

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

In the Matter of)
Time Warner Cable Inc.) CSR 8029-E
Petition for Determination of Effective)
Competition in Twenty Three North Carolina)
Communities)

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 2009

Released: February 10, 2009

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 City of Fayetteville, North Carolina ("Fayetteville") filed an opposition to the petition for special relief. Petitioner filed a reply.

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 petition 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.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(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 4-5.

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 6. While Petitioner did not provide copies of channel lineups for either DIRECTV or Dish, Petitioner did provide links to the relevant DBS websites where listings are available. Petitioner is correct to note that we have consistently found that the programming of both DBS providers satisfies the programming compatibility component of the test.

¹³*See* Petition at 6.

¹⁴*See* Petition at 7.

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 the basis of a five-digit zip code allocation formula previously approved by the Commission in other decisions.¹⁵

7. In its Opposition, Fayetteville asserts that Petitioner relies upon flawed data to demonstrate that the number of households subscribing to programming services offered by MVPDs, other than Petitioner, exceeds 15 percent of the households in the Community of Fayetteville.¹⁶ Fayetteville argues Petitioner erred in relying on “severely out of date” 2000 Census household data and in omitting the 28307 zip code from its calculations.¹⁷ Fayetteville maintains that the Census 2007 American Community Survey (“2007 Survey”) includes more current housing data which should be used instead of the 2000 Census data.¹⁸ Fayetteville also maintains that Petitioner must use “Nine-Digit Zip Code” data rather than “Five-Digit Zip Code” data to demonstrate competitive penetration levels.¹⁹ Fayetteville therefore asserts that Petitioner has failed to meet its burden under the Competing Provider Test.²⁰

8. In its Reply, Petitioner correctly points out that while the Commission has recently issued a public notice indicating that future cable operator petitions relying on the competing provider test will be required to use only nine digit zip code data, this new policy is pending and not final.²¹ Until the effective date of the clarified zip code data requirements is published in the Federal Register, the Commission will continue processing effective competition competing provider petitions that are supported by any reliable data as we have in the past.²² Petitioner correctly shows that Fayetteville’s claims are moot. In recalculating to account for zip code 28307 and the 2007 Survey data, Petitioner is still able to meet the competing provider effective competition threshold in Fayetteville.²³

9. Based upon the aggregate DBS subscriber penetration levels that were calculated on a five-digit zip code basis using Census 2000 household data,²⁴ 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.

10. 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

¹⁵See Petition at 7, Exhibit C.

¹⁶Opposition at 4.

¹⁷*Id.* at 4-6.

¹⁸Opposition at 4, Exhibit C.

¹⁹*Id.* at 7.

²⁰*Id.* at 8.

²¹Reply at 3.

²²*Commission Revises and Suspends Pending OMB Approval New Standards for Showings of Effective Competition for Cable Service*, DA 08-2030, released September 2, 2008.

²³See Reply at 4, Exhibits A-C.

²⁴Petition at 7, Exhibit D; *see also* Reply at 4, Exhibit C. For the Community of Fayetteville, Attachment B reflects the 2007 Survey occupied household figure and the updated household and DBS subscriber data that include zip code 28307 as proposed by Fayetteville in its Opposition and applied by Petitioner in its Reply.

effective competition in the Group B Communities.

B. The Low Penetration Test

11. 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.²⁵ 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 remaining five franchise areas.

12. 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.²⁶ Therefore, the low penetration test is also satisfied as to the Group C Communities.

III. ORDERING CLAUSES

13. 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**.

14. **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**.

15. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.²⁷

FEDERAL COMMUNICATIONS COMMISSION

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

²⁵47 U.S.C. § 543(l)(1)(A).

²⁶ Petition at Exhibit E.

²⁷47 C.F.R. § 0.283.

ATTACHMENT A

CSR 8029-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)
Carthage, Town of	NC0722
Cumberland, County of (uninc.)	NC0081
Erwin, Town of	NC0009
Fayetteville, City of	NC0001
Hoke, County of (uninc.)	NC0271
Lumber Bridge, Town of	NC0942
Moore, County of (uninc.)	NC0315
	NC0721
	NC0892
	NC0045
	NC0933
Pembroke, Town of	NC0245
	NC0207
Red Springs, Town of	NC0100
Rennert, Town of	NC0969
Robeson, County of (uninc.)	NC0760
	NC0567
	NC1005
	NC1033
	NC0580
Spring Lake, Town of	NC0082
St. Pauls, Town of	NC0101
Taylortown, Town of	NC0891

ATTACHMENT B

CSR 8029-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	CPR*	2000 Census Households	Estimated DBS Subscribers
Carthage, Town of	NC0722	49.09%	658	323
Cumberland, County of (uninc.)	NC0081	21.90%	46,277	10,136
Fayetteville, City of**	NC0001	16.02%	70,512	11,293
Pembroke, Town of	NC0207	29.66%	961	285
	NC0245			
Red Springs, Town of	NC0100	35.08%	1,257	441
Rennert, Town of	NC0969	38.46%	91	35
Spring Lake, Town of	NC0082	18.72%	3,050	571
St. Pauls, Town of	NC0101	35.92%	863	310
Taylortown, Town of	NC0891	19.34%	243	47

*CPR = Percent of competitive DBS penetration rate.

** For the Community of Fayetteville, Attachment B reflects the 2007 Survey occupied household figure and the updated household and DBS subscriber data that include zip code 28307 as proposed by Fayetteville in its Opposition and applied by Petitioner in its Reply.

ATTACHMENT C

CSR 8029-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUID(S)	Franchise Area Households	Cable Subscribers	Penetration Percentage
Erwin, Town of	NC0009	1,889	196	10.38%
Hoke, County of (uninc.)	NC0271	10,050	493	4.91%
Lumber Bridge, Town of	NC0942	695	16	2.30%
Moore, County of (uninc.)	NC0315	16,528	1,108	6.70%
	NC0721			
	NC0892			
	NC0045			
	NC0933			
Robeson, County of (uninc.)	NC0760	29,705	15	0.05%
	NC0567			
	NC1005			
	NC1033			
	NC0580			