

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

In the Matter of	)	
	)	
Time Warner Cable Inc.	)	CSR 8336-E
	)	
Petition for Determination of Effective	)	
Competition in Eight Ohio Franchise Areas	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 29, 2016**

**Released: March 1, 2016**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION AND BACKGROUND**

1. Time Warner Cable Inc. (“Time Warner”) has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2), and 76.907 of the Commission’s rules for a determination that Time Warner is subject to effective competition in those communities listed on Attachment A (the “Attachment A Communities”). Time Warner alleges that its cable system serving the Attachment A Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”)<sup>1</sup> and the Commission’s implementing rules,<sup>2</sup> and it is therefore exempt from cable rate regulation in the Attachment A Communities because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc. (“DIRECTV”) and DISH Network (“DISH”). Time Warner additionally claims that it is exempt from cable rate regulation in the community listed on Attachment B (the “Attachment B Community”), pursuant 623(l)(1)(A) of the Communications Act<sup>3</sup> and Section 76.905(b)(1) of the Commission’s rules,<sup>4</sup> because Time Warner serves fewer than 30 percent of the households in that franchise area. The Villages of Cleves and North Bend, Ohio (the “Villages”) filed Oppositions and Time Warner filed a Reply.<sup>5</sup> The Media Bureau sent Time Warner a letter requesting supplemental information in this case.<sup>6</sup> Time Warner responded to the Bureau’s letter and submitted updated information.<sup>7</sup> The Village of North Bend submitted a reply to Time Warner’s letter.<sup>8</sup> The Village of North Bend filed Supplemental Objections and Time Warner filed

<sup>1</sup> See 47 U.S.C. § 543(l)(1)(B).

<sup>2</sup> 47 C.F.R. § 76.905(b)(2).

<sup>3</sup> See 47 U.S.C. § 543(l)(1)(A).

<sup>4</sup> 47 C.F.R. § 76.905(b)(1).

<sup>5</sup> Village of Cleves Objection, filed August 5, 2010 and Village of North Bend Objection, filed August 2, 2010; Time Warner Reply, filed August 12, 2010.

<sup>6</sup> See Letter from Steven A. Broeckaert, Esq., Senior Deputy Chief, Policy Division, Media Bureau, to Craig A. Gilley, Esq., Fleischman and Harding LLP, counsel for Time Warner (Nov. 23, 2010) (“November 23, 2010 Bureau Letter”).

<sup>7</sup> See Letter from Craig A. Gilley, Esq., Edwards, Angell, Palmer & Dodge LLP, to Steven Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau (May 17, 2011) (“Time Warner’s May 17, 2011 Letter”).

<sup>8</sup> See Letter from James A. Reichert, Esq., counsel to the Village of North Bend, to Steven Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau (May 31, 2011) (“North Bend’s May 31, 2011 Letter”).

a Response to those Objections.<sup>9</sup>

2. In June 2015, a Commission order adopted a rebuttable presumption that cable operators are subject to one type of effective competition, commonly referred to as competing provider effective competition.<sup>10</sup> Accordingly, in the absence of a demonstration to the contrary, the Commission now presumes that cable systems are subject to competing provider effective competition, and it continues to presume that cable systems are not subject to any of the other three types of effective competition, as defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.<sup>11</sup> For the reasons set forth below, we grant Time Warner's petition.

## II. 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 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 (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.<sup>12</sup> This test is referred to as the "competing provider" test. Pursuant to the *Effective Competition Order*, absent evidence to the contrary, the Commission presumes that the competing provider test is met.

### A. The First Part

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.<sup>13</sup> As explained in the *Effective Competition Order*, "we find that the ubiquitous nationwide presence of DBS providers, DIRECTV and DISH, presumptively satisfies the" first part of the test for competing provider effective competition, absent evidence to the contrary.<sup>14</sup> The Villages have not put forth any information to rebut the first part of the competing provider effective competition test. In accordance with the presumption of competing provider effective competition, and based on the information submitted by Time Warner, we thus find that the first part of the test is satisfied.

### B. The Second Part

5. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area.<sup>15</sup> As explained in the *Effective Competition Order*, "[w]ith regard to the second prong of the test, we will presume that more than 15 percent of the households in a franchise area subscribe to programming services offered by MVPDs other than the largest MVPD."<sup>16</sup> The Villages argue that Time Warner has

<sup>9</sup> North Bend Supplemental Objections, filed September 1, 2010; Time Warner Response to Supplemental Objections, filed October 25, 2010.

<sup>10</sup> 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*").

<sup>11</sup> See 47 U.S.C. § 543(l)(1); 47 C.F.R. §§ 76.905(b), 76.906.

<sup>12</sup> 47 U.S.C. § 543(l)(1)(B); see also 47 C.F.R. § 76.905(b)(2).

<sup>13</sup> 47 C.F.R. § 76.905(b)(2)(i).

<sup>14</sup> *Effective Competition Order*, 30 FCC Rcd at 6580-81, ¶ 8.

<sup>15</sup> 47 C.F.R. § 76.905(b)(2)(ii).

<sup>16</sup> *Effective Competition Order*, 30 FCC Rcd at 6581-82, ¶ 9.

not satisfied the second part of the competing provider test for several reasons. First, the Villages argue that the 2000 Census data used by Time Warner is out of date and inadequate due to significant population growth in the respective Villages.<sup>17</sup> Time Warner's May 17, 2011 Letter contains 2010 Census data and renders the Villages' argument moot.<sup>18</sup>

6. Second, the Villages argue that the data Time Warner used from the Satellite Broadcasting and Communications Association ("SBCA") and the Media Business Corp. ("MBC"), based on zip code plus four areas, is flawed.<sup>19</sup> The Village of Cleves neither offers evidence to demonstrate that Time Warner submitted erroneous data nor suggests an alternative method to better trace the zip code plus four data, and accordingly, its objection is not persuasive. The Village of North Bend claims that Time Warner submitted an inflated DBS subscriber count, but North Bend advocates conflicting approaches in its May 31, 2011 Letter and attached affidavit as compared to its Supplemental Objections and attached affidavit. In contrast, Time Warner submits a comprehensive list of each zip plus four zip code located in North Bend, which MBC identified by using mapping software based on data derived from the U.S. Census Bureau and the U.S. Postal Service.<sup>20</sup> We also find no reason to question the accuracy of the subscribership figures provided by SBCA, which has previously provided the figures used in numerous effective competition cases. Having considered the DBS subscriber numbers that Time Warner submitted and the differing approaches that North Bend has put forth, we find that Time Warner has submitted the most reliable DBS subscriber numbers in this proceeding to determine the DBS penetration rate. For the above reasons, the arguments put forth by the Villages fail to rebut the presumption of competing provider effective competition. In accordance with the presumption of competing provider effective competition, and based on the information submitted by Time Warner and the Villages, we find that the second prong of the test is satisfied.

### III. THE LOW PENETRATION TEST

7. Finally, Time Warner seeks a finding of low penetration effective competition for the Attachment B Community. No oppositions were filed. Pursuant to the *Effective Competition Order*, we now presume that Time Warner is subject to competing provider effective competition in the Attachment B Community. Even if any party attempted to rebut that presumption, which has not occurred, Time Warner still has satisfied its burden of demonstrating low penetration effective competition based upon the subscriber penetration level calculated by Time Warner, as reflected in Attachment B. We find that Time Warner has demonstrated that the percentage of households subscribing to its cable service is less than 30 percent of the households in the Attachment B Community, as required by the low penetration test.

### IV. ORDERING CLAUSES

8. 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** as to the Communities listed on Attachments A and B hereto.

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<sup>17</sup> Village of Cleves Objection at 1-2; Village of North Bend Objection at 1-2.

<sup>18</sup> Time Warner's May 17, 2011 Letter at 1-2 and Attachments. The November 23, 2010 Bureau Letter cited a number of flaws in Time Warner's numbers for four of the seven Attachment A Communities. Time Warner's submission of updated 2010 household figures for the Communities resolved all outstanding issues raised in the November 23, 2010 Bureau Letter. The Village of North Bend's reply to Time Warner's May 17, 2011 Letter did not rebut this conclusion. See North Bend's May 31, 2011 Letter at 1-2.

<sup>19</sup> Village of Cleves Objection at 1; Village of North Bend Objection at 2.

<sup>20</sup> Petition at 8.

9. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to or on behalf of any of the Communities set forth on Attachments A and B **ARE REVOKED**.

10. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>21</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>21</sup> 47 C.F.R. § 0.283.

## ATTACHMENT A

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## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

<b>Communities</b>	<b>CUIDs</b>	<b>CPR*</b>	<b>2010 Census Households</b>	<b>Estimated DBS Subscribers</b>
Butlerville	OH1871	30.36%	56	17
Chilo	OH2698	32.14%	28	9
Cleves	OH0674	34.11%	1,079	368
Deerfield	OH2278	20.75%	13,419	2,784
Manchester	OH0002	34.11%	818	279
North Bend	OH0676	24.32%	370	90
Russellville	OH1895	39.71%	209	83

\*CPR = Percent of competitive DBS penetration rate.

## ATTACHMENT B

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## COMMUNITIES SERVED BY TIME WARNER CABLE INC.

<b>Community</b>	<b>CUID</b>	<b>Franchise Area Households</b>	<b>Cable Subscribers</b>	<b>Penetration Percentage</b>
Ripley	OH0003	759	77	10.14%