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

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| In the Matter of | ) | |
| | ) | |
| Time Warner Cable Inc. | ) | CSR 8360-E |
| | ) | |
| Petition for Determination of Effective Competition in Four Texas Communities | ) | |

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 25, 2013** **Released: December 2, 2013**

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

## I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc. ("Time Warner" or "the Company"), 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 the Company is subject to effective competition in the communities listed on Attachment A.[1] Those Communities are three incorporated cities in Webb County, Texas – El Cenizo, Laredo, and Rio Bravo ("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"),[2] and the Commission's implementing rules,[3] and is therefore exempt from cable rate regulation there because of the competing service provided by two direct broadcast satellite ("DBS") providers, DIRECTV, Inc., and DISH Network. Time Warner also claims to be exempt from cable rate regulation in the Community listed on Attachment B, pursuant to Section 623(l)(1)(A) of the Communications Act[4] and Section 76.905(b)(1) of the Commission's rules,[5] because the Company serves fewer than 30 percent of the households there. The Attachment B Community is unincorporated Webb County. An Opposition to the petition was filed by the local government in one of the Attachment A Communities, the City of Laredo ("the City").[6] Time Warner filed a reply to it.[7] By letter dated May 27, 2011, Time Warner filed new data, most notably from the 2010 Census, about the Attachment A Communities and the Attachment B Community.[8] No Community responded to the Company's May 27 Letter.[9]

[1] Petition for Special Relief ("Petition").

[2] *See* 47 U.S.C. § 543(l)(1)(B).

[3] 47 C.F.R. § 76.905(b)(2).

[4] *See* 47 U.S.C. § 543(l)(1)(A).

[5] 47 C.F.R. § 76.905(b)(1).

[6] Opposition to Petition for Special Relief ("Opposition").

[7] Time Warner's reply is titled "Petition for Special Relief" but is obviously a reply to the Opposition. We will refer to it as "Reply."

[8] Letter from Craig A. Gilley, Esq., Edwards Angell Palmer & Dodge LLP, Counsel for Time Warner, to Steven A. Broeckaert, Senior Deputy Chief, Policy Division, Media Bureau (dated May 27, 2011) ("May 27 Letter").

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,[10] as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.[11] 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.[12] For the reasons set forth below, we grant the petition based on our finding that Time Warner is subject to effective competition in the Communities listed on Attachment A and B.

## 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 multi-channel 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.[13] This test is referred to as the "competing provider" test.

### A. The First Part

4. The first part 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.[14] It is undisputed that the Attachment A Communities are "served by" both DBS providers and that these two MVPD providers are unaffiliated with Time Warner 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 its availability.[15] The Commission has held that a party may use evidence of penetration rates in the franchise area (the second part 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.[16] We further find that Time Warner has provided sufficient evidence to support its assertion that potential customers in the Attachment A Communities are reasonably aware that they may purchase the service of these MVPD providers.[17] 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 programming,[18] and is supported in the petition with citations to the

(...continued from previous page)

[9] The City expressly declined the opportunity to respond to the Company's May 27 Letter. E-Mail from Joseph Van Eaton, Esq., Best Best & Krieger, LLP, Counsel for the City, to John W. Berresford, Esq., Media Bureau (1:39 P.M., July 15, 2011).

[10] 47 C.F.R. § 76.906.

[11] *See* 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

[12] *See* 47 C.F.R. §§ 76.906-.907(b).

[13] 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

[14] 47 C.F.R. § 76.905(b)(2)(i).

[15] *See* Petition at 3-4.

[16] *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

[17] 47 C.F.R. § 76.905(e)(2).

[18] *See* 47 C.F.R. § 76.905(g); *see also* Petition at 5.

channel lineups for both DIRECTV and DISH.[19] Time Warner asserts without dispute that both DBS providers offer service to at least "50 percent" of the households in the Attachment A Communities because of their national satellite footprint.[20]

5. The City's only objection to Time Warner's showings under the first part of the competing provider test is that DBS programming is not "comparable" to Time Warner's because, for example, DBS does not include Public, Educational, and Government channels.[21] We have rejected this objection in numerous past decisions, and we do so again for the reasons stated in those decisions.[22] Accordingly, we find that the first part of the competing provider test is satisfied for the Attachment A Communities.

### B. The Second Part

6. The second part 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. Time Warner asserts that it is the largest MVPD in each of the Attachment A Communities.[23] The Company's assertion is undisputed and we accept it. The second part of the competing provider test thus requires the Company to calculate a ratio for each Attachment A Community the numerator of which is the number of DBS subscribers in the Community and the denominator of which is the number of households there.

#### 1. Time Warner's Evidence

7. For its numerators, Time Warner learned from Media Business Corporation the five-digit zip codes all or parts of which covered each Attachment A Community and the number of households in each such zip code.[24] Second, from the Satellite Broadcasting and Communications Association ("SBCA"), the Company learned the number of DBS subscribers in each of those five-digit zip codes.[25] Third, Time Warner allocated the DBS subscribers in those zip codes between those that lived within an Attachment A Community and those that lived outside it. It did this by dividing the number of households in the Community by the number of households in the zip code(s) that covered all or part of the Community.[26] This produced an estimate, stated as a percentage, of the DBS subscribers in the zip code(s) that lived within the Attachment A Community. Finally, Time Warner multiplied that percentage by the number of DBS subscribers in the zip code(s), producing its estimate of the number of DBS subscribers living within each Attachment A Community.[27] For its denominators, Time Warner obtained household counts for each Attachment A Community – originally from the 2000 Census and, in the

[19] Petition at 4 n.12, 6.

[20] *Id.* at 6.

[21] Opposition at 11. Concerning "PEG" channels generally, *see* FCC, *Guide: Public, Educational, and Governmental Access Channels ("PEG Channels")*, http://www.fcc.gov/guides/public-educational-and-governmental-access-channels-peg-channels (visited July 18, 2011).

[22] *See, e.g.*, *Time Warner Entertainment-Advance/Newhouse Partnership*, 26 FCC Rcd 3840, 3842, ¶ 8 (2011); *Comcast Cable Commc'n, LLC*, 25 FCC Rcd 13340, 13342, ¶ 9 (2010); *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 17012, 17013-14, ¶ 6 (2008), *application for review pending*.

[23] *See* Petition at 7.

[24] Petition at 7 n.24; Reply at 6 n.13.

[25] Petition at 7 n.24; May 27 Letter at Exh. E.

[26] May 27 Letter at Exh. B, col.C.

[27] *Id.* at col.E.

Company's May 27 Letter, from the 2010 Census.[28] The resulting ratios, if accepted, show DBS subscribership in each Attachment A Community well above the minimum of 15 percent that the competing provider test requires. For example, Time Warner claims DBS subscribership in Laredo of 21.84 percent.[29]

### 2. The City's Evidentiary Objections

8. The City objects to Time Warner relying on household counts from the 2000 Census.[30] The Company's May 27 Letter, with household numbers from the 2010 Census, renders the City's objection moot.[31] The City also objects to Time Warner estimating DBS subscribership in Laredo by using five-digit zip code-based numbers and an allocation percentage. The City argues that we should require the Company to use relatively precise nine-digit zip code-based data, which removes the need for an allocation.[32] We have rejected this proposal in past decisions, and we do so again for the reasons stated in those decisions.[33] The City could have purchased its own nine-digit report from SBCA in the hopes of refuting the Company's five-digit-based estimations. In the absence of such evidence from the City, we will not dismiss the numbers introduced by Time Warner.

9. The City makes a diffuse attack on Time Warner's allocation of DBS subscribers among the Attachment A Communities. Its Opposition first alleges that the Company assumes "that satellite penetration is roughly the same within and without" Laredo;[34] then it alleges that the Company assumes that DBS subscribers are "evenly distributed throughout the Five-Digit Zip Codes" that are involved in this proceeding;[35] and later the City alleges that the Company assumes the same subscription rate to DBS in all three Cities involved in this proceeding.[36] While making these possibly inconsistent allegations, the City notes that Webb County encompasses over 3,000 square miles, but Laredo accounts for only 80 of them. The City also asserts that there is no cable service in "vast swaths" of Webb County outside Laredo.[37] The City's factual assertions are not accompanied by the supporting affidavit that our rules require.[38] Rather than dismiss them, however, we will consider them and the City's related allegations as informal comments in the interests of discerning whether the petition is meritorious.

10. We understand the City to be faulting Time Warner's allocation formula for assuming

[28] Petition at Exh. D; May 27 Letter at Exh. D.

[29] May 27 Letter at Exh. B, col.F.

[30] Opposition at 2-4.

[31] The City proposes several numbers of households in Laredo. Opposition at 3-4. The only one of them that is higher than the 2010 Census number that we use in Attachment A is a projection based on an estimate of population (not households) made by the Texas State Data Center. We reject this projection in favor of an actual count of households by the U.S. Census, as we have before. *Charter Commc'n Entertainment I LLC*, 26 FCC Rcd 5975, 5980, ¶ 17 (2011); *Time Warner Entertainment-Advance/Newhouse Partnership*, 26 FCC Rcd 3829, 3835-36, ¶ 22 (2011); *Comcast Cable Commc'n, LLC*, 26 FCC Rcd 3733, 3735, ¶ 8 (2011).

[32] Opposition at 5.

[33] *Time Warner Cable Inc.*, Memorandum Opinion and Order DA 11-948 at ¶ 10 (rel. May 31, 2011), 2011 WL 2132900; *Time Warner Cable Inc.*, 25 FCC Rcd 5457, 5462, ¶ 16 (2010); *Subsidiaries of Cablevision Systems Corp*., 23 FCC Rcd 14141, 14151, ¶ 34 (2008) *application for review pending*.

[34] Opposition at ii.

[35] *Id.* at 5.

[36] *Id.* at 8.

[37] *Id.* at 5.

[38] 47 C.F.R. § 76.7(b)(1).

that DBS subscribers within a zip code are distributed in proportion to the households in the zip code – that, for example, if 40 percent of a zip code's households are in a community and 60 percent are outside it, then 40 percent of the DBS subscribers in the zip code are in the community and 60 percent are outside it. The City appears to challenge the accuracy of that assumption in this case; it believes that DBS subscription is higher outside Laredo, especially where there is no cable service. The City would, therefore, have us lower DBS subscribership in Laredo, hopefully to 15 percent or further beneath the minimum for competing provider effective competition.

11. The City's request is fatally undermined by actual numbers in the record. Laredo contains the overwhelming majority of the households in Webb County, almost 95 percent.[39] There are so few households in Webb County outside Laredo that, even if we deducted from the number of DBS subscribers in Laredo enough to give every household in the rest of the County a DBS subscription, the number of DBS subscribers left in Laredo would still exceed 15 percent of the households there.[40] Such a deduction would be overly generous to the City because it would ignore the hundreds of DBS subscribers already attributed to the Communities outside Laredo in Time Warner's numbers; and it would assume 100 percent DBS subscribership outside Laredo, which is highly unlikely. In sum, even if we made the kinds of adjustments that the City seems to be proposing, the number of DBS subscribers in Laredo would still be well above the minimum needed to show competing provider effective competition.[41]

### C. The City's Policy Objection

12. Finally, the City objects to the petition on policy grounds, disputing the degree of competition between cable and DBS systems and whether deregulation of Time Warner's cable rates is in the public interest on grounds not stated in the competing provider test.[42] We have discussed and dismissed these objections in past decisions, and we do so here again for the reasons stated in those decisions.[43]

### D. Conclusion

13. Based upon the aggregate DBS subscription levels that were calculated using Census 2010 household data,[44] as reflected in Attachment A, we find that Time Warner 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 Attachment A Communities. Therefore, the second

[39] May 27 Letter, Exh. A, Exh. D at 2.

[40] According to Time Warner's data, there are 13,877 DBS subscribers and 63,545 households in Laredo (resulting in DBS subscribership of 21.84%) and only 3,561 households elsewhere in Webb County. May 27 Letter at Exh. B, Exh. D at 2. Even if we deduct 3,561 DBS subscribers from Laredo, there are still enough left (10,316) for DBS subscribership there (10,316 ÷ 63,545, or 16.23%) to exceed the statutory minimum. *See also* Reply at 7.

[41] Our finding of effective competition in Laredo is thus consistent with our past statements that we will reject showings by cable operators that are "highly questionable" and do not have a sufficient margin of error to overcome legitimate concerns about their accuracy. *Commission Clarifies Standards for Evidence of Competing Provider Effective Competition for Cable Service*, 24 FCC Rcd 8198 (2009) ("highly questionable"); *Adelphia Cable Commc'n*, 22 FCC Rcd 4412, 4415, ¶ 8 (2007) (sufficient margin of error). Time Warner's evidence, even when altered favorably to the City, is neither highly questionable nor lacking a sufficient margin of error.

[42] Opposition at 9-11.

[43] *See, e.g.*, *Comcast Cable Commc'n, LLC*, Memorandum Opinion and Order DA 11-958 at ¶¶ 9-10 (rel. June 1, 2011), 2011 WL 2156005; *Comcast Cable Commc'n, LLC*, 26 FCC Rcd 2471, 2475-76, ¶ 14 (2011); *Comcast Cable Commc'n, LLC*, 25 FCC Rcd 13340, 13343-44, ¶¶ 12-14 (2010).

[44] May 27 Letter at Exhs. B, D.

part of the competing provider test is satisfied for each of the Attachment A Communities.[45] Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied in the Attachment A Communities and that the Company is subject to effective competition there.

## III. THE LOW PENETRATION TEST

14. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition if it serves fewer than 30 percent of the households in the franchise area. This test is referred to as the "low penetration" test.[46] We understand that Time Warner alleges that it is subject to low penetration effective competition in unincorporated Webb County, Texas (TX0331).[47] Based upon the three percent subscription calculated by Time Warner, as reflected in Attachment B, we find that the Company has demonstrated the percentage of households subscribing to its cable service is less than 30 percent in unincorporated Webb County, Texas. Therefore, the low penetration test is satisfied there.

## IV. ORDERING CLAUSES

15. 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.**

16. **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 Attachment A and Attachment B **IS REVOKED**.

17. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.[48]

FEDERAL COMMUNICATIONS COMMISSION

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

[45] Because we find that Time Warner is subject to competing provider effective competition in El Cenizo and Rio Bravo, we need not address its claim that it is also subject to "low penetration" effective competition there. *See* May 27 Letter at Exh. A.

[46] 47 U.S.C. § 543(l)(1)(A).

[47] The petition lists Unincorporated Webb County on its title page and contains pertinent data in its exhibits, but neither discusses the low penetration test in the body of the petition nor formally asks for a finding pursuant to it. We grant Time Warner's apparent request, but we caution it to be more complete in future filings.

[48] 47 C.F.R. § 0.283.

**ATTACHMENT A**

**CSR 8360-E**

**COMMUNITIES SERVED BY TIME WARNER CABLE INC.**

| Communities | CUIDs | CPR* | 2010 Census Households | Estimated DBS Subscribers |
|---|---|---|---|---|
| City of El Cenizo | TX2374 | 21.83 | 733 | 160 |
| City of Laredo | TX0181 | 21.84 | 63,545 | 13,877 |
| City of Rio Bravo | TX2109 | 21.83 | 1,129 | 246 |

*CPR = Percent of competitive DBS penetration rate. CPRs may be not precisely accurate because of the use of fractional MVPD subscribers and rounding not stated above.

**ATTACHMENT B**

**CSR 8360-E**

**COMMUNITY SERVED BY TIME WARNER CABLE INC.**

| Community | CUID | Franchise Area Households | Cable Subscribers | Penetration Percentage |
|---|---|---|---|---|
| Unincorporated Webb County | TX0331 | 1,699 | 51 | 3.00 |