

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re: Petition of	)	MB Docket No. 12-8	HI0022; HI0040; HI0079;
	)	CSR-8562-E	HI0096; HI0101; HI0102;
Time Warner Cable Inc.	)		HI0103; HI0104; HI0105;
	)	PSID No. 000320	HI0106; HI0109; HI0110;
For Determination of	)	Island of Hawaii	HI0111
Effective Competition)		
	)	MB Docket No. 12-16	HI0020; HI0023; HI0024;
	)	CSR-8579-E	HI0025; HI0026; HI0027;
	)		HI0028; HI0029; HI0030;
	)	PSID No. 000295	HI0031; HI0032; HI0056;
	)	Island of Hawaii	HI0075; HI0078; HI0083;
	)		HI0093
)		

To: Chief, Media Bureau

**OPPOSITION OF THE STATE OF HAWAII
TO PETITIONS FOR SPECIAL RELIEF**

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SUMMARY

The State of Hawaii (the “State”) requests that the Federal Communications Commission’s (“Commission’s”) Media Bureau deny Time Warner Cable Inc.’s (“Time Warner Cable’s”) Petitions for Special Relief (“Petitions”) seeking determinations that it faces effective competition in the Island of Hawaii franchise areas (“the Franchise Areas”). Time Warner Cable has failed to meet its burden to prove that effective competition exists. The Petitions fail to satisfy the requirements of the “competing provider” test in Section 76.905(b)(2) of the Commission’s rules. Although the State welcomes competition in the market for cable service, the State believes that effective competition is not present in the Franchise Areas.

Time Warner Cable mischaracterizes the area in which it seeks relief as a single franchise area when it is in fact two separate franchise areas: (1) East Hawaii (Hilo) and (2) West Hawaii (Kona). The Communications Act and Commission precedent require Time Warner Cable to demonstrate effective competition in *each* franchise area on the Island of Hawaii. Time Warner Cable has failed to meet its statutory burden because it does not provide separate DBS subscriber numbers for the East Hawaii (Hilo) franchise area and the West Hawaii (Kona) franchise area. Due to the absence of DBS subscriber data for each of the Franchise Areas, it is impossible to accurately calculate whether effective competition is present. The second prong of the competing provider test has not been satisfied.

Furthermore, the DBS providers’ participation in the Franchise Areas is not yet sufficient to constitute effective competition because they do not “offer” services to the extent required under the competing provider test. The State submits that Time Warner Cable has not proven that potential subscribers in the Franchise Areas are “reasonably aware” of the availability of

DBS service. DBS service is not readily available, nor is it regularly marketed, in the Franchise Areas.

There are apparent flaws in the calculations provided by Time Warner Cable that call into question the reliability of the 17.7 percent DBS penetration that it alleges on the Island of Hawaii. The Petition's numbers do not account for the large number of vacation homes in the Franchise Areas that receive cable or DBS service. There are also households in the Franchise Areas that Time Warner Cable does not pass and to which it does not make available its cable service, so DBS service is the only option for such households and there is no competition in those areas. As a result of these factors, Time Warner Cable has not met its burden to show that the 15 percent threshold has been reached.

For each of these reasons, the State therefore requests that the Media Bureau deny Time Warner Cable's Petitions.

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To: Chief, Media Bureau

**OPPOSITION OF THE STATE OF HAWAII
TO PETITIONS FOR SPECIAL RELIEF**

The State of Hawaii (the “State”),¹ by its attorneys and pursuant to Section 76.7 of the Federal Communications Commission’s (“Commission’s”) rules, hereby opposes Time Warner Cable Inc.’s (“Time Warner Cable’s”) Petitions for Special Relief (“Petitions”) requesting that the Commission determine that Time Warner Cable faces effective competition in the Island of Hawaii franchise areas (“the Franchise Areas”).² Time Warner Cable seeks a finding that the Franchise Areas are subject to effective competition pursuant to the “competing provider” test in Section 76.905(b)(2) of the Commission’s rules because two Direct Broadcast Satellite (“DBS”)

¹ These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs (“DCCA”). The DCCA is the cable franchise authority for the State of Hawaii.

² Time Warner Cable Inc., Petition for Special Relief (filed Dec. 13, 2011) (“Petitions”).

providers, DIRECTV and DISH Network, offer video programming services in the Franchise Areas.³

Congress established a presumption that cable systems are not subject to effective competition.⁴ This presumption exists because of the possible adverse impact on consumers, particularly senior citizens and other individuals living on fixed incomes, flowing from the potential elimination of rate regulation. It is the burden of the petitioning cable operator to rebut this presumption and affirmatively demonstrate with evidence that effective competition exists in the franchise area.⁵ Time Warner Cable has not met this burden for the reasons set forth below.

Time Warner Cable has failed to show that there is a sufficiently high level of DBS penetration within each of the Franchise Areas to overcome the strong presumption against effective competition. Time Warner Cable has failed to meet its statutory burden to demonstrate effective competition in *each* franchise area because it does not provide separate DBS subscriber numbers for the East Hawaii (Hilo) franchise area and the West Hawaii (Kona) franchise area. The Petitions fail to satisfy the requirements of the competing provider test for the reasons set forth below. There are also flaws in the calculations provided by Time Warner Cable that call into question the reliability of the 17.7 percent DBS penetration that it alleges. The State therefore requests that the Media Bureau deny the relief sought by Time Warner Cable.

³ 47 C.F.R. 76.905(b)(2).

⁴ *See* 47 C.F.R. 76.906.

⁵ *See* 47 C.F.R. 76.907(b).

I. TIME WARNER CABLE DID NOT MEET ITS BURDEN OF PROOF FOR EACH OF THE TWO FRANCHISE AREAS ON THE ISLAND OF HAWAII

Time Warner Cable mischaracterizes the area in which it seeks relief as a single franchise area when it is in fact two separate franchise areas. The Petitions state, “Pursuant to a county and island-wide franchise issued by the State of Hawaii, Time Warner Cable’s franchise area encompasses the entire Island of Hawaii, including all incorporated and unincorporated places therein.”⁶ There are actually two franchise areas: (1) East Hawaii (Hilo) and (2) West Hawaii (Kona).⁷ These franchise areas have different physical system identification (“PSID”) numbers: PSID No. 000320 for East Hawaii (Hilo) and PSID No. 000295 for West Hawaii (Kona). Although Time Warner Cable has requested that the State combine the two franchise areas into a single franchise area,⁸ the State has not granted this request.⁹

The Commission acknowledged that there are two franchise areas in its Public Notice that listed the Petitions and assigned docket and CSR numbers.¹⁰ The Commission assigned two separate docket numbers for the Petitions: (1) MB 12-8 for the Island of Hawaii (PSID No.

⁶ Petitions at n.2.

⁷ See, e.g., Time Warner Entertainment Company, L.P., Over-Collected Franchise Fees for the Period of January 1, 2007 through December 31, 2007, *Decision and Order No. 347*, at I.A. (dated Jan. 20, 2010), available at http://hawaii.gov/dccaihar/catv/decisions_orders/files/Decision_and_Order_347.pdf.

⁸ See Letter from Brian Kang, counsel to Time Warner Cable, to Clyde Sonobe, DCCA, dated May 22, 2009, available at http://hawaii.gov/dcca/catv/twefranchiserenewal/twe_request_consolidate_renewal_proceedings_and_is.pdf.

⁹ See Letter from Clyde Sonobe, DCCA, to Brian Kang, counsel to Time Warner Cable, dated Aug. 13, 2009, available at http://hawaii.gov/dcca/catv/twefranchiserenewal/twe_request_consolidate_renewal_proceedings_and_is.pdf.

¹⁰ See *Public Notice*, Report No. 0361, “Special Relief and Show Cause Petitions” (rel. Jan. 23, 2012).

000320), and (2) MB 12-16 for the Island of Hawaii (PSID No. 000295). Time Warner Cable was required to pay two separate fees for its Petitions.

Time Warner Cable is required to meet the burden of proof separately for *each* franchise area.¹¹ It has not met this burden because it did not demonstrate that the competing provider test is met for each of the two franchise areas as discussed below.

II. THE FRANCHISE AREAS ARE NOT SERVED BY THE DBS PROVIDERS TO THE EXTENT REQUIRED BY THE COMMISSION’S RULES

To satisfy the first prong of the competing provider test, the cable operator must show that the franchise area is 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.¹² Although the DBS providers may provide comparable video programming, the State contends that Time Warner cable has not met its burden of proof with regard to the other elements of this prong.

A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area.¹³ The Commission has stated that DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware

¹¹ See 47 U.S.C. § 543(l)(1)(B)(ii); see also *Service Electric Cable TV of New Jersey, Inc., Memorandum Opinion and Order*, 20 FCC Rcd 20532, 20534 ¶ 6 (2005) (“*Service Electric*”) (“The statute requires Service Electric to demonstrate effective competition in each franchise area.”).

¹² See 47 C.F.R. 76.905(b)(2).

¹³ See *Time Warner Cable Inc., Memorandum Opinion and Order*, DA 11-2088, at ¶ 4 (rel. Dec. 29, 2011).

that the service is available.¹⁴ As the Commission has repeatedly recognized, however, DBS has never been as available in Hawaii to the extent that it is available in the rest of the United States and therefore the Commission's normal presumptions regarding DBS availability should not be applied in this case.

A. There are Limitations on the Technical Availability of DBS Service in the Franchise Areas

Although DBS service is usually presumed to be technically available due to its nationwide satellite footprint, DBS service is not available in Hawaii to the extent that it is in the 48 contiguous states. The Commission has observed that DBS penetration in the State of Hawaii is 4.65 percent, which is lower than in the rest of the United States.¹⁵

There are technical limitations that prevent the DBS providers from serving all parts of the Franchise Areas. The relatively low elevation angle between the DBS providers' satellites and the Island of Hawaii results in a large portion of the island being unable to receive DBS signals.¹⁶ In addition, some households are unable to receive DBS service because their line of sight to the DBS providers' satellites is blocked by the volcanoes that form the Island of Hawaii. Consumers living on the west side of the Island of Hawaii (Kona) have a limited ability to

¹⁴ See MediaOne of Georgia, Inc., *Memorandum Opinion and Order*, 12 FCC Rcd 19406, 19409 n.16 (1997) ("*MediaOne*").

¹⁵ Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Thirteenth Annual Report*, 24 FCC Rcd 663 ¶ 257 (2009) ("*Thirteenth Report*").

¹⁶ Although the Hawaiian Islands are closer to the equator (about 20° North Latitude) than the continental United States, the State is significantly to the west of the mainland (at about 157° West Longitude), thus resulting in a relatively low look angle to DBS satellites operating in the range of 101° to 110° W.L., where many DBS satellites operate.

receive DBS service.¹⁷ As a result of these limitations, DBS service is not available throughout the Franchise Areas. In places where DBS service is not available, it is not providing effective competition to Time Warner Cable's service. Time Warner Cable has not proved that the DBS providers can serve at least 50 percent of the households in the Franchise Areas. Without such proof, the Bureau cannot make a determination that effective competition exists.

B. DBS Service is Not Actually Available in the Franchise Areas Because Subscribers are Not Reasonably Aware of its Availability

DBS service is presumed to be "actually available" if households in the franchise area are made "reasonably aware" of the service's availability.¹⁸ The State submits that Time Warner Cable has not proven that potential subscribers in the Franchise Areas are "reasonably aware" of the availability of DBS service. This is largely because the DBS services of DIRECTV and DISH Network have historically been either unavailable or significantly inferior to the services that they provide in the continental United States.

Time Warner Cable failed to provide any evidence of DBS advertising in local, regional, and national media that serve the Franchise Areas to support its assertion that potential customers in the Franchise Areas are reasonably aware that they may purchase the service of the DBS providers. Although effective competition petitions typically include local newspaper advertising by the competitor, Time Warner Cable's Petitions did not include any advertising by the DBS providers. Moreover, Time Warner Cable has not presented evidence that the DBS

¹⁷ This is evidenced by the fact that more than 60 percent of the 11,874 DBS subscribers identified in Time Warner Cable's Petitions reportedly live in zip codes that are on the east side of the Island of Hawaii.

¹⁸ See *MediaOne*, 12 FCC Rcd at 19409 n.16; see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, 5660-61 ¶ 32 (1993) ("*Rate Regulation Report and Order*").

providers have engaged in any type of mass media marketing or direct mail marketing of their service in the Franchise Areas.

Because Time Warner Cable did not provide evidence of a broad awareness of the existence and availability of DBS service in the Franchise Areas, the Commission should find, consistent with precedent, that Time Warner Cable has failed to prove that residents in the Franchise Areas are “reasonably aware” of the DBS providers’ service.¹⁹

In fact, when the State previously researched this issue, it discovered and reported to the Commission that DIRECTV’s DBS service is not readily available, nor is it regularly marketed, in the Franchise Areas. The State found that DIRECTV does not make its service readily accessible to potential customers in Hawaii through national retail chains.²⁰ At the time of the State’s prior investigation, only a handful of stores appeared to carry DIRECTV’s equipment in Hawaii. DIRECTV’s service cannot be purchased at the Hawaiian outlets of DIRECTV’s major retail distributors, such as Wal-Mart and Best Buy.²¹ The State previously explained to the Commission,

¹⁹ See Marcus Cable Associates, L.P., *Memorandum Opinion and Order*, 13 FCC Rcd 9326, 9331 ¶ 13 (1998) (“Because evidence of a broad awareness of the existence and availability of PBVS’s service is lacking, we find that Marcus has failed to prove that PBVS ‘offers’ service in Whittier.”).

²⁰ See State of Hawaii, *Petition for Administrative Sanctions*, MB Docket No. 03-82 (filed Feb. 6, 2003); see also Letter from Bruce A. Olcott, Counsel for the State of Hawaii, to Marlene Dortch, FCC, MB Docket No. 03-82, at 3 (filed May 18, 2006) (“Directv does not make its service readily accessible to consumers in the State through national retail chains – its primary mode of distribution on the mainland.”).

²¹ See *id.* at 2-3. The State found that the Best Buy stores had a small number of DIRECTV receivers available for purchase, but did not have satellite dishes available for purchase. Sales representatives in the Best Buy stores said the receivers were available for customers who already subscribed to DIRECTV’s service and needed to replace an existing receiver or wanted to upgrade to a better model. The sales representatives said new customers were advised that they should not purchase DIRECTV receivers from Best Buy, but instead should contact DIRECTV for information. See *id.* at 2-3.

Although Directv maintains a toll free telephone number for potential new subscribers, most consumers in Hawaii probably do not know about the telephone number because they have little or no reason to believe that Directv's service is available in the State. Directv and its national retailers do not regularly market Directv's service using local promotions or local advertising in Hawaii.²²

Granted, the State's most recent investigation into the issue was more than five years ago. The State has seen no indication, however, that the situation has improved and, most importantly, Time Warner Cable has made no effort to demonstrate otherwise.

Furthermore, potential customers in Hawaii remain unable to purchase DIRECTV's service from its website. Potential customers are instead instructed by the website to call DIRECTV to make special arrangements due to what DIRECTV describes as the "unique equipment and programming" required by DIRECTV for customers seeking to receive its service in Hawaii.²³

The Commission has previously noted in its Thirteenth Annual Report on the status of competition in the market for the delivery of video programming ("*Thirteenth Report*") the challenges faced by DIRECTV in marketing and providing service in Hawaii. The Commission stated,

The State of Hawaii attributes DIRECTV's difficulties in marketing its service in the state to the reception equipment that must be used. It states that subscribers in Hawaii must install a 1.2 meter antenna to receive basic DIRECTV packages that may include local channels and a second 1.2 meter antenna for HDTV or foreign language channels. State of Hawaii claims that installation of the equipment may be unattractive and burdensome for single family homeowners. It also notes that about half of the state's population lives in multi-family housing, where installation of a 1.2 meter antenna may be physically difficult or prohibited because the over-the-air reception device ("OTARD") regulations do not protect antennas greater than 1.0 meters in diameter. The State of Hawaii concludes that in order for its residents to enjoy true MVPD competition, both major DBS

²² *Id.* at 3.

²³ See http://www.directv.com/DTVAPP/new_customer/base_packages.jsp?footernavtype=-1 (last visited Feb. 6, 2012).

licensees must make an effort to provide comparable service to that offered on the mainland, in terms of the necessary equipment and the marketing of the service through major retail outlets.²⁴

Although the *Thirteenth Report* was released in 2009, the State is unaware of any changes that have made it easier to purchase DIRECTV's service in the Franchise Areas today.

Turning to the other major provider of DBS service, although DISH Network has a better track record of service in Hawaii, it is also not possible for potential customers to purchase DISH Network's service in Hawaii from its website. When potential customers attempt to purchase DISH Network's service online, they get the following error message: "Currently there are no dates available for installation. Please call 1-800-WatchTV (928-2488) for installation."²⁵ Although DISH Network has a toll free telephone number for potential new subscribers, many consumers in Hawaii are probably not aware of the telephone number.

The Commission has previously noted the challenges for potential customers of DISH Network in Hawaii. The Commission stated,

We note that EchoStar's reception equipment may be even larger than DIRECTV's, requiring a 1.5 meter dish in some locations, although independent retailers may provide equipment as small as 24 inches when appropriate. In large cities in Alaska and Hawaii, retailers provide a 30- or 36- inch antenna EchoStar also requires a second receiver for extended channels, and is unable to carry some public interest and international channels.²⁶

Here again, although the *Thirteenth Report* was released in 2009, the State remains unaware of any improvements that have made it easier to purchase DBS service from DIRECTV or DISH Network in the Franchise Areas today. Time Warner Cable has not shown that the situation has changed, and therefore it has not met its burden of proving the DBS services of either provider

²⁴ *Thirteenth Report* at ¶ 258.

²⁵ <https://customersupport.dishnetwork.com/cart/appointment.action> (last visited Feb. 6, 2012).

²⁶ *Thirteenth Report*, 24 FCC Rcd at 664 ¶ 259.

are actually available or that potential customers in the Franchise Areas are reasonably aware of them.

III. THE DBS PROVIDERS DO NOT OFFER SERVICE TO AT LEAST 50 PERCENT OF THE HOUSEHOLDS IN THE FRANCHISE AREAS

To satisfy another element of the first prong of the competing provider test, Time Warner Cable must demonstrate that the two DBS providers offer comparable programming to at least 50 percent of the households in the Franchise Areas.²⁷ The State would welcome competition in the market for cable service in Hawaii and the benefits that consumers would enjoy from having a choice in providers. The State believes, however, that Time Warner Cable's Petitions are premature because effective competition is not present in the Franchise Areas. The State submits that the DBS providers' participation in the Franchise Areas is not yet sufficient to constitute effective competition because they do not "offer" services to the extent required under the competing provider test.

A. The DBS Providers are Not Physically Able to Deliver Video Service to All Parts of the Franchise Areas

The first part of the definition of "offered" states that service is offered when the MVPD "is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service."²⁸

As discussed previously in Section III.A., there are technical limitations that prevent the DBS providers from serving all parts of the Franchise Areas. Time Warner Cable has not proved

²⁷ See 47 C.F.R. 76.905(b)(2)(i).

²⁸ 47 C.F.R. § 76.905(e)(1).

that DBS service is available to at least 50 percent of the households in the Franchise Areas and therefore has not satisfied the “physically able” prong of the test. This matter should be subject to further investigation prior to finding effective competition.

B. There are Technical and Other Impediments to Receipt of DBS Service in the Franchise Areas

The second part of the definition of “offered” states that service is offered “[w]hen no regulatory, technical or other impediments to households taking service exist and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the multichannel video programming distributor.”²⁹

As discussed previously in Section III.B., DBS service is not readily available, nor is it regularly marketed, in the Franchise Areas. Potential customers may not be able to purchase DIRECTV’s service or equipment at the Hawaiian outlets of DIRECTV’s major retail distributors. In addition, potential customers in Hawaii are unable to purchase DBS service from the DBS providers’ websites. Thus, there are significant impediments that prevent residents in the Franchise Areas from subscribing to the DBS providers.

C. Potential Subscribers are Not Reasonably Aware of DBS Service

Another requirement for service to be offered is that “potential subscribers in the franchise area are reasonably aware that they may purchase the services of the multichannel video programming distributor.”³⁰ As discussed previously in Section III.B., potential subscribers in the Franchise Areas are not reasonably aware that they may purchase the services

²⁹ 47 C.F.R. § 76.905(e)(2).

³⁰ *Id.*

of the DBS providers. Instead, most consumers in Hawaii likely have accepted the notion that, absent significant efforts on their part, DBS service is reasonably available only on the mainland.

IV. TIME WARNER CABLE HAS FAILED TO DEMONSTRATE THAT 15 PERCENT OF THE HOUSEHOLDS IN *EACH* FRANCHISE AREA SUBSCRIBE TO DBS SERVICE

To satisfy the second prong of the competing provider test, Time Warner Cable must show that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in *each* franchise area.³¹ The Petitions allege that “there is an aggregate total of 11,874 DBS Provider subscribers taking services at locations on the Island of Hawaii.”³² Time Warner Cable asserts that the DBS providers’ subscriber penetration level on the Island of Hawaii is 17.7 percent.³³

Time Warner Cable has failed to separately provide the DBS penetration rate for *each* of the two Franchise Areas. In addition, the State contends that the DBS penetration rate is lower because vacation homes are excluded from the total number of households in the denominator of the calculation and when they are included, it lowers the penetration rate. Some homes are not passed by Time Warner Cable, and the numbers should be further adjusted accordingly. The sum total of these adjustments results in a DBS penetration rate below 15 percent.

A. Time Warner Cable Failed to Separately Provide the DBS Penetration Rate for Each of the Two Franchise Areas

Time Warner Cable has failed to meet its statutory burden to demonstrate that *each* franchise area on the Island of Hawaii is subject to effective competition. The Petitions provide

³¹ See 47 C.F.R. 76.905(b)(2)(ii).

³² Petitions at 7-8.

³³ See *id.* at 8.

the aggregate number of DBS subscribers on the Island of Hawaii, but do not provide separate numbers for the East Hawaii (Hilo) franchise area and the West Hawaii (Kona) franchise area. The State submits that the evidence supporting the Petitions is fundamentally defective because it does not demonstrate the DBS penetration rate for *each* of the two franchise areas. As the Commission stated in the *Rate Regulation Report and Order*, the Communications Act “expresses the tests for determining effective competition in terms of the ‘franchise area.’”³⁴ The competing provider test in Section 623 of the Communications Act specifically looks at whether “the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households *in the franchise area.*”³⁵ It is impossible to determine the DBS penetration rate, and calculate whether the 15 percent threshold is exceeded, in each of the two franchise areas based on the data in the Petitions. Time Warner Cable’s decision not to include franchise-specific DBS subscriber data should be “fatal” to its Petitions, as it was in *Service Electric*.³⁶

To the extent that Time Warner Cable attempts to argue that it operates the two franchises as a single cable system, the Bureau should reject that argument as it has in prior Orders. In the *Rate Regulation Report and Order*, the Commission rejected a proposed rule to allow cable operators to demonstrate effective competition on a system-wide basis because the statute requires the Commission to determine whether *each* franchise area is subject to effective

³⁴ *Rate Regulation Report and Order*, 8 FCC Rcd at 5672 ¶ 47.

³⁵ 47 U.S.C. § 543(1)(1)(B)(ii) (emphasis added).

³⁶ *See Service Electric*, 20 FCC Rcd at 20535 ¶ 9 (finding that “Service Electric’s decision not to request franchise-specific data for either household or DBS subscriber totals is fatal to its petition.”).

competition.³⁷ The Commission concluded that “the effective competition determination will be made on a franchise-area basis.”³⁸ In *Service Electric*, the Bureau rejected the cable operator’s argument that it operated multiple franchises as a single cable system. In that case, the Bureau stated that “the fact that ‘Service Electric operates the 26 [franchises] as a single contiguous system’ is immaterial to our analysis. The statute requires Service Electric to demonstrate effective competition in each franchise area.”³⁹ The Bureau also stated that “the aggregation of franchise areas is impermissible under the Act and our implementing regulations.”⁴⁰

The statute and Commission precedent require Time Warner Cable to demonstrate effective competition in *each* franchise area. Due to the absence of DBS subscriber data for each of the Franchise Areas, it is impossible to accurately calculate whether effective competition is present. The second prong of the competing provider test has not been satisfied. Because Time Warner Cable has not met its burden of proof for each of the two Franchise Areas, the Bureau should deny the Petitions. If Time Warner Cable revises its Petitions to provide separate DBS subscriber numbers for each of the Franchise Areas, the State reserves the right to file a response.

B. The Numbers Used by Time Warner Cable for its DBS Penetration Calculation are Flawed

There are several issues with using the numbers provided by Time Warner Cable to calculate whether effective competition is present that call into question the reliability of the 17.7 percent DBS penetration alleged by Time Warner Cable. First, the Petitions stated that there are

³⁷ See *Rate Regulation Report and Order*, 8 FCC Rcd at 5672-73 ¶ 49.

³⁸ *Id.*

³⁹ See *Service Electric*, 20 FCC Rcd at 20533 ¶ 6.

⁴⁰ *Id.* at ¶ 7.

67,096 occupied households on the Island of Hawaii.⁴¹ Using the 67,096 occupied households number to calculate whether effective competition is present is problematic for several reasons. First, this number is flawed because it does not account for the large number of vacation homes in the Franchise Areas that receive cable or DBS service. Second, there are households in the Franchise Areas that Time Warner Cable does not pass and to which it does not make available its cable service, so DBS service is the only option for such households. Given that there is no competition in those areas unserved by Time Warner Cable, these households should also be considered separately in identifying the true extent of competition on the Island of Hawaii.

1. Given the Unique Importance of Tourism in Hawaii, Vacation Homes Should be Included in the Total Household Base in Hawaii

The 67,096 occupied households noted by Time Warner Cable does not include the 7,135 housing units on the Island of Hawaii that fall in the Census Bureau category of “Vacant: for seasonal/recreational/occasional use.”⁴² The State acknowledges that the Commission typically uses Census data for occupied households when evaluating effective competition petitions, the State believes the conditions in Hawaii are fundamentally different. The State contends that the number of households for calculating effective competition in Hawaii should be adjusted upward to include vacation homes because there are a large number of vacation homes in the Franchise Areas that receive either cable service or DBS service. Hawaii is a popular location for people to own vacation homes, and residents of those homes typically subscribe to cable service from

⁴¹ See Petitions at 8.

⁴² See U.S. Census Bureau, 2010 Demographic Profile for Hawaii County, available at <http://www.census.gov>.

Time Warner Cable or the DBS providers.⁴³ High end vacation homes certainly would subscribe to one of these television services. The State therefore submits that the number of households used in the denominator to calculate whether the 15 percent threshold is met should be adjusted upward to include the housing units for seasonal/recreational/occasional use. Adding 7,135 to 67,096 results in 74,231 housing units. If the combined DBS penetration rate for the Franchise Areas is calculated with 74,231 as the denominator, the DBS penetration rate drops by 1.7 percent, from 17.7 percent to 16.0 percent (11,874 DBS subscribers / 74,231 households = 16.0 percent).

2. Households that Cannot Receive Service from Time Warner Cable Should also be Considered When Assessing Total DBS Subscribers in Hawaii

There are a significant number of households in the Franchise Areas that Time Warner Cable does not pass and to which it does not make available its cable service. Time Warner Cable has stated that it passes 38,000 homes in East Hawaii and 39,000 homes in West Hawaii, which results in a total of 77,000 homes passed in the Franchise Areas.⁴⁴ Since there are 82,324

⁴³ DIRECTV offers customers with a second home in Hawaii that only need service for part of the year the ability to suspend their service when they are not in Hawaii. See http://support.directv.com/app/answers/detail/a_id/1907/p/470 (last visited Feb. 9, 2011). DISH Network has programs that allow customers to temporarily suspend their DISH service at any time, such as when they are not at their vacation home. See <http://www.dish.com/downloads/legal/flex24.pdf> (last visited Feb. 9, 2011). Time Warner Cable also offers a seasonal/vacation hold option. See <http://www.timewarnercable.com/Hawaii/site.faqs/Accountand/Policies/Does-Time-Warner-Cable-have-se> (last visited Feb. 9, 2011).

⁴⁴ See Time Warner Entertainment Company, L.P., Application for Renewal of Cable Franchise, at 6-7 (dated July 20, 2011), available at [http://hawaii.gov/dcca/catv/twefranchiserenewal/twewritten-application-for-renewal-of-its-east-west-hawaii-franchise-july-20-2011/PUBLIC_VERSION-Application for Renewal of Cable Franchise -July 20 2011.pdf](http://hawaii.gov/dcca/catv/twefranchiserenewal/twewritten-application-for-renewal-of-its-east-west-hawaii-franchise-july-20-2011/PUBLIC_VERSION-Application%20for%20Renewal%20of%20Cable%20Franchise%20-July%202011.pdf).

total housing units (occupied and unoccupied) on the Island of Hawaii,⁴⁵ that means 5,324 households are not passed by Time Warner Cable. Because these households are not able to get Time Warner Cable's service, it is more likely that they subscribe to a DBS provider. In those areas, there is no competition between Time Warner Cable and the DBS providers, as DBS service is the only available cable service. Those households do not have a choice of video programming providers.

The percentage of DBS subscribers is likely higher in areas not passed by Time Warner Cable because, as the Commission has recognized, DBS penetration is higher in areas unserved by cable.⁴⁶ As a result, the State submits that these households are not subject to competition and therefore should be subtracted from the numbers used to calculate the 15 percent under the competing provider test. Assuming that 17.7 percent of the 5,324 households not passed by Time Warner Cable receive DBS service (and the actual number is likely higher), there are 926 DBS subscribers in the areas unserved by cable. After subtracting 926 DBS subscribers from the 11,874 DBS subscribers identified in the Petitions, the numerator changes to 10,948 DBS subscribers. If the 67,096 households number is used, the adjusted DBS penetration rate is 16.3 percent ($10,948 / 67,096 = 16.3$ percent). If, however, the 74,231 households number is used, as the State believes is appropriate, the adjusted DBS penetration rate is 14.7 percent ($10,948 / 74,231 = 14.7$ percent), which is below 15 percent.

⁴⁵ See U.S. Census Bureau, 2010 Demographic Profile for Hawaii County, *available at* <http://www.census.gov>.

⁴⁶ See *e.g.*, Falcon Community Ventures I, L.P., *Memorandum Opinion and Order*, DA 98-2077 ¶ 11 (1998) (“The City maintains that the percentage of DBS subscribers is higher outside the City because that area contains homes not passed by a cable operator, and it has been recognized that DBS penetration is higher in areas unserved by cable.”).

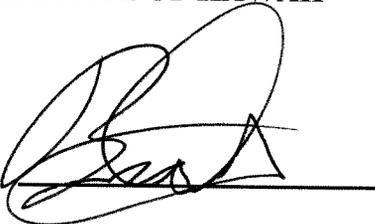
Granted, the State has employed certain assumptions in asserting that DBS penetration falls below 15 percent on the Island of Hawaii. The State, however, believes each of its assumptions is reasonable, if not conservative. In any event, it is the burden of Time Warner Cable to demonstrate that the numbers in its Petitions are accurate and sufficiently reliable to satisfy the evidentiary threshold for effective competition. Time Warner Cable clearly has not satisfied this requirement and its Petitions must therefore be denied.

V. CONCLUSION

Time Warner Cable has failed to meet its burden to prove that effective competition exists and has not satisfied the requirements of the competing provider test. The State respectfully requests that the Media Bureau deny Time Warner Cable's Petitions for Determination of Effective Competition.

Respectfully submitted,

THE STATE OF HAWAII

By: 

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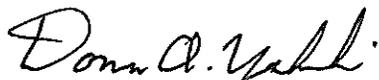
AFFIDAVIT

I, Donn A. Yabusaki, affirm the truth of the following representations based upon my personal knowledge:

1. I am the Cable Television Administrator of the Cable Television Division for the Department of Commerce and Consumer Affairs of the State of Hawaii.
2. I have read the foregoing Opposition to Time Warner Cable's Petitions. With respect to the Opposition, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact, is warranted by existing law, and is not interposed for any improper purpose.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 13th day of February 2012.


Donn A. Yabusaki
Donn A. Yabusaki

CERTIFICATE OF SERVICE

I, Judith Zlate-Goedecke, an Executive Legal Secretary at Squire Sanders (US) LLP, hereby certify that copies of the foregoing Opposition to Petitions for Special Relief were served this 13th day of February, 2012, via first-class mail, postage prepaid thereon to the following:

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