

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

In re Petition of	)	CSR-____-E	
)		
	)	PSID No. 004342	
Time Warner Cable Inc.)		
For Determination of	)	Claiborne County (Uninc.)	TN0606
Effective Competition	)	Harlan County (Uninc.)	KY1319
	)	Knox County (Uninc.)	KY0551
	)	City of Pineville	KY0164

To: Chief, Media Bureau

PETITION FOR SPECIAL RELIEF

Time Warner Cable Inc. ("Time Warner Cable"), by its attorneys, and pursuant to Sections 76.7, 76.905(b) and 76.907 of the Commission's rules,¹ hereby petitions the Commission for a finding that Time Warner Cable's cable television system serving the above-captioned communities (unless otherwise noted, individually "Franchise Area" and collectively "Franchise Areas") is subject to effective competition² and therefore exempt from any rate regulation imposed pursuant to Section 623 of the Communications Act of 1934 (the "Act").³

¹ 47 C.F.R. §§ 76.7, 76.905(b), 76.907.

² Pursuant to Section 76.910 of the Commission's rules, rate regulatory authority may be exercised only by a local franchising authority ("LFA") that has been properly certified. 47 C.F.R. § 76.910. To the extent that any political subdivision covered by this petition is an LFA and has been certified to regulate rates in accordance with the Commission's rules, Time Warner Cable respectfully requests that the Commission revoke such certification pursuant to Section 76.914(c). 47 C.F.R. § 76.914(c). To the extent that franchising responsibilities of any political subdivision covered by this petition have been reassigned to another governmental body, e.g., pursuant to legislation providing for state-issued franchises, then that political subdivision is no longer an LFA and obviously would no longer have rate regulatory authority. In such event, Time Warner Cable is nevertheless seeking an effective competition determination to achieve the full competitive flexibility associated therewith.

³ 47 U.S.C. § 543. Time Warner Cable requests that, consistent with Commission precedent, any FCC grant of effective competition in the Franchise Areas be effective as of the date of filing of this petition. *See, e.g., Altrio Communications, Inc. v. Adelphia Communications Corporation*, 17 FCC Rcd 22955, ¶ 5 (Med. Bur. 2002) (Commission order released September 26, 2002 found that Adelphia was subject to effective competition in the Arcadia, California franchise area as of October 1, 2001).

I. TIME WARNER CABLE SATISFIES THE “50/15” OR “COMPETING PROVIDER TEST” IN THE CITY OF PINEVILLE.

Pursuant to Section 623(a)(2) of the Act,

[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section.⁴

The Act further provides that a cable system will be considered subject to effective competition (and therefore exempt from rate regulation) under the “50/15” test if, *inter alia*, the franchise area is:

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(ii) 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.⁵

As demonstrated below, effective competition exists in Pineville because competing multichannel video programming distributors (“MVPDs”), including direct-to-home (“DTH”) satellite providers such as DirecTV⁶ and DISH Network⁷ (collectively the “DBS Providers”), are available to more than 50 percent, and are subscribed to by more than 15 percent, of the households there.

A. Competing MVPD Services Are “Offered” in Pineville.

According to the Commission’s rules, an MVPD’s service is deemed to be “offered” for purposes of effective competition:

⁴ 47 U.S.C. § 543(a)(2).

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

⁶ DirecTV is a registered trademark of DirecTV, Inc.

⁷ DISH Network is a registered trademark of EchoStar Communications Corporation.

(1) When the multichannel video programming distributor 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; and (2) When 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.⁸

As demonstrated below, the DBS providers “offer” service in Pineville under this definition.

1. The DBS Providers are “Physically Able” to Offer Service to Subscribers in Pineville.

The Commission has repeatedly determined that DBS service is technically available throughout the continental United States due to its nationwide satellite footprint.⁹ Therefore, the DBS Providers are “physically able” to offer service to subscribers in Pineville.

2. No Regulatory, Technical or Other Impediments to Households Taking the DBS Providers’ Services Exist.

The DBS providers’ services are deemed to be technically available in a franchise area if the footprints of their satellites cover the franchise area and there are no local regulations prohibiting reception by home satellite dishes.¹⁰ As noted above, DBS services have been determined by the Commission to be available throughout the United States. Time Warner Cable is aware of no zoning restrictions in Pineville that would prevent potential subscribers from placing a small dish on their houses or on their properties in order to receive DBS service. Indeed, it would appear that any such restriction would violate Section 207 of the Telecommunications Act of 1996 and Section 25.104 of the FCC’s rules promulgated thereunder.¹¹ Further, the DBS providers do not need franchises to offer service to residents in

⁸47 C.F.R. § 76.905(e).

⁹ See, e.g., *Bright House Networks, LLC, Petition for Determination of Effective Competition*, Memorandum Opinion and Order, 22 FCC Rcd 4390, ¶ 6 (Med. Bur. 2007) (“*Bright House Networks*”).

¹⁰*Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, ¶ 32 (1993) (“*Rate Order*”).

¹¹Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996); see 47 C.F.R. § 25.104.

Pineville. As such, there are no regulatory, technical or other impediments to households taking the DBS providers' service.

3. Potential Subscribers in Pineville are “Reasonably Aware” That They May Purchase the DBS Providers’ Services.

In light of the Commission’s prior findings regarding the ubiquitous availability of DBS service, and in recognition of the DBS Providers’ extensive national, regional and local advertising and marketing efforts through television and radio, Internet, print media and direct marketing, potential subscribers throughout Pineville are undoubtedly “reasonably aware” of the availability of the DBS Providers’ services.¹² In addition, the Commission has held that the DBS Providers’ extensive nationwide subscribership and growth in recent years, combined with a local DTH penetration of more than 15 percent in any given franchise area, is an accurate sign that potential subscribers within that franchise area are “reasonably aware” of the availability of the DBS Providers’ services.¹³

Here, the presence of numerous subscribers of the DBS Providers’ services in Pineville, as shown below, demonstrates that such individuals are all obviously aware of their ability to obtain service from a DBS Provider. Moreover, it is reasonable to assume the awareness of the availability of the DBS Providers’ services only continues to increase as additional DBS dishes are prominently installed throughout Pineville.

¹² The DBS Providers maintain comprehensive websites, www.dishnetwork.com and www.directv.com, where consumers can learn more about local retail outlets and how to buy the necessary equipment online or through a toll-free number. *See Rate Order* at n. 104 (“[W]e believe that regional or local marketing, such as by a national or regional 800 telephone number, would suffice.”). *See also id.* at ¶ 29; *Adelphia Cable Communications*, 20 FCC Rcd 20487, ¶ 6 (Med. Bur. 2005) (“*Adelphia Effective Competition Order*”) (There is “no reason to require needlessly fractionalized marketing in order to ensure that a national or regional programming service is available in a particular community... [P]otential subscribers may be made reasonably aware of the availability of a competing service... through advertising in regional or local media, direct mail, or any other marketing outlet” (citing *Rate Order* at ¶ 29) (emphasis in original)).

¹³ Indeed, the Commission has “found households in a franchise area to be reasonably aware that they may purchase DBS service solely based on evidence of DBS’s nationwide growth and local subscriptions, without reference to advertising or other promotion.” *Bright House Networks* at ¶ 6 (referencing *Adelphia Communications, et al., Nineteen Unopposed Petitions for Determination of Effective Competition in Forty-Seven Local Franchise Areas*, Memorandum Opinion and Order, 20 FCC Rcd 7503, ¶ 3 (Med. Bur. 2005)).

Because the three factors described above have been satisfied, the DBS Providers “offer” competing MVPD services in Pineville.

B. The DBS Providers Offer “Comparable Multichannel Video Programming.”

Effective competition exists where programming offered by an MVPD competitor is deemed “comparable” to the programming offered by the unaffiliated cable operator.¹⁴ The programming offered by a competing MVPD is deemed “comparable” if it includes “at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.”¹⁵ The Commission’s decisions have repeatedly concluded that the DBS Providers satisfy § 76.905(g)’s comparable programming criterion.¹⁶

The programming offered by DirecTV and Dish Network, listings of which are available at www.directv.com and www.dishnetwork.com,¹⁷ includes many of the same popular nonbroadcast and broadcast programming services available on Time Warner Cable’s system serving Pineville. The DBS Providers’ programming lineups amply demonstrate that at least twelve channels of video programming are offered, including at least one channel of nonbroadcast programming service.¹⁸ Thus, the DBS Providers offer “comparable” multichannel

¹⁴ 47 U.S.C. § 543(I)(1)(B)(i).

¹⁵ 47 C.F.R. § 76.905(g).

¹⁶ See *ACC Cable Communications, FLA-VA, LLC*, 18 FCC Rcd 7110, ¶ 6 (Med. Bur. 2003) (Town of Lake Waccamaw and Town of Tabor City, North Carolina) (“...the Commission has repeatedly concluded that the programming of DBS providers, such as DIRECTV and Dish, satisfy the Commission’s [comparable] programming criterion”); *Adelphia Effective Competition Order* at ¶ 7 (“Because different sets of rules govern which stations cable operators and DBS service providers can or must carry, we have never insisted on absolute parity in station offerings. Instead, an MVPD offers ‘comparable programming’ if it offers ‘at least 12 channels of video programming, including at least one channel of nonbroadcast service programming’”); *Time Warner Entertainment-Advance/Newhouse Partnership*, 20 FCC Rcd 15709, n. 15 (Med. Bur. 2005) (Nineteen California Franchise Areas) (“the DBS providers offer well over 100 channels, most of which are non-broadcast channels,” which satisfies the comparable programming criterion).

¹⁷ See *The Helicon Group, L.P.*, 17 FCC Rcd 16636, n. 8 (Med. Bur. 2002) (Barnet, Vermont) (“While Charter did not provide in its Petition a copy of EchoStar’s nationwide channel lineup, which is otherwise available at www.dishnetwork.com, we have consistently found that the programming of both DBS providers satisfies the programming compatibility component of the competing provider effective competition test.”).

¹⁸ The DBS Providers satisfy the program comparability standard regardless of whether they provide local-into-local service to the Franchise Area. See *Falcon Telecable*, 17 FCC Rcd 22842, ¶ 4 (Med. Bur. 2002) (Four Texas Communities) (“[T]he Commission’s effective competition program comparability standard does not include a local television programming component.”).

video programming, as defined by the Commission, to actual and potential subscribers in Pineville.

C. The DBS Providers Offer Comparable Multichannel Video Programming to More Than 50 Percent of the Households in Pineville.

As noted above, at least one MVPD unaffiliated with the incumbent cable operator must offer comparable video programming to at least 50 percent of the households in a franchise area for the first prong of the 50/15 effective competition test to be met.¹⁹ In numerous effective competition decisions, the Commission has concluded that the DBS Providers are deemed to satisfy this 50 percent threshold due to their nationwide satellite footprints.²⁰ Accordingly, since the DBS Providers offer comparable programming to greater than 50 percent of the households in Pineville, the first prong of the 50/15 effective competition test is satisfied.

D. The Number of Households Subscribing to the Programming Services of Competing MVPDs Exceeds 15 Percent of the Households in Pineville.

The subscriber base of any MVPD or MVPDs,²¹ other than the largest MVPD, must exceed 15 percent of the households in a franchise area to meet the second prong of the 50/15 test. As demonstrated below, Time Warner Cable's cable system meets this threshold with respect to Pineville.²² Time Warner Cable is the largest MVPD in these because it has the most video subscribers there.

Time Warner Cable has used the ZIP+4 methodology previously approved by the Commission in numerous decisions to calculate the DBS Providers' subscribership in Pineville.²³

¹⁹ See 47 C.F.R. § 76.905(b)(2)(i).

²⁰ See note 9.

²¹ See *Time Warner Entertainment Co., L.P., et al. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995) (holding that the subscribership of all MVPDs, other than the largest MVPD, may be aggregated to satisfy the 15 percent threshold). See also 47 C.F.R. § 76.905(f).

²² See attached Declaration of Ed Kozelek, Vice President of Governmental Relations – Midwest for Time Warner Cable.

²³ See, e.g., *Marcus Cable Associates, LLC d/b/a Charter Communications, Inc.*, DA 02-2174, 17 FCC Rcd 16652 (Media Bureau 2002) (Denton, Texas), *aff'd* 18 FCC Rcd 9762 (Media Bureau 2003); see also *Vicksburg Video, Inc. d/b/a Wehco Video, Inc.*, DA 02-2176, 17 FCC Rcd 16659 (Media Bureau 2002) (Vicksburg, Mississippi); *Kilgore*

Attached as Exhibit A is a report from Media Business Corp. (“MBC”) which has identified all of the ZIP+4 zip codes that are encompassed, in whole or in part, by Pineville by using mapping software based on data derived from the U.S. Census Bureau and the U.S. Postal Service.

Attached as Exhibit B is the Census 2010 occupied household figures for Pineville indicating there are 675 occupied households there. Attached as Exhibit C is a report from the Satellite Broadcasting Communications Association (“SBCA”), which has been charged with the task of providing the required DBS Provider combined subscriber data for effective competition purposes, indicating there are 283 DBS Provider subscribers in the identified ZIP+4 zip codes. These figures thus indicate that the DBS Providers have achieved a 41.93 percent penetration in Pineville, well in excess of the 15 percent threshold. Consequently, Time Warner Cable has demonstrated that the second prong of the 50/15 effective competition test has been met for Pineville.

II. TIME WARNER CABLE ALSO SATISFIES THE “LOW PENETRATION” EFFECTIVE COMPETITION TEST IN THE REMAINING THREE FRANCHISE AREAS.

In the unincorporated portions of Claiborne, Harlan and Knox Counties, Time Warner Cable requests that the Commission additionally deem Time Warner Cable subject to effective competition under the separate “low penetration” effective competition test. Pursuant to Section 623(l)(1)(A) of the Act, effective competition exists under the low penetration test where “fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system.”²⁴ As demonstrated below, Time Warner Cable serves fewer than 30 percent of the households in each of these communities.

Video, Inc. d/b/a Wehco Video, Inc., DA 02-2177, 17 FCC Rcd 16662 (Media Bureau 2002) (Kilgore, Texas); *Twelve Oregon Cities Order*.

²⁴ 47 U.S.C. § 543(l)(1)(A); *see also* 47 C.F.R. § 76.905(b)(1).

Community	Time Warner Cable Subscribership	2010 Census Occupied Households²⁵	Time Warner Cable Penetration
Claiborne County	96	8,910	1.08%
Harlan County	177	8,620	2.05%
Knox County	507	7,846	6.46%

As it serves less than 30 percent of the households in each of the listed communities, Time Warner Cable has demonstrated that it is subject to effective competition in these Franchise Areas under the low penetration test for effective competition.

CONCLUSION

Because Time Warner Cable has demonstrated that it is subject to effective competition pursuant to Section 623(1)(1) of the Act and Section 76.905(b) of the Commission's rules for the above captioned Franchise Areas, Time Warner Cable respectfully requests that the Commission expeditiously find that Time Warner Cable's cable system serving the Franchise Areas is not subject to rate regulation as to basic cable service or other forms of rate regulation specified in 47 U.S.C. § 543 and revoke the LFAs' certification to regulate basic rates as appropriate.

²⁵ See Exhibit A.

Undersigned counsel has read the foregoing Petition, and to the best of such counsel's knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose.

Respectfully submitted,

TIME WARNER CABLE INC.

By:  _____
Craig A. Gilley

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Its Attorneys

Dated: September 11, 2012

DECLARATION

I, Edward Kozelek, hereby declare under penalty of perjury that:

1. I am the Regional Vice President of Government Relations – Midwest for Time Warner Cable, the operator of the cable system that serves the specific Franchise Areas involved in the foregoing Petition for Special Relief (“Petition”).
2. I have read the foregoing Petition and am familiar with the contents thereof and the matters referred to therein.
3. I have reviewed Time Warner Cable’s respective cable subscriber numbers for each of the communities involved in the Petition, as well as the DBS subscriber numbers provided by SBCA and allocated to each as described in the Petition. Time Warner Cable is the largest multichannel video program provider serving each of the Franchise Areas.
4. The facts contained within the Petition are true and correct to the best of my knowledge, information and belief.

Ed Kozelek

Edward Kozelek

Date: 9/9/12

EXHIBIT A

Media Business Corp. Zip Code Identification Report

Franchise & ZIP+4 Identification

Data Documentation

Franchise: Cable operator's franchised service area

Franchise boundary file vintage : County Mar 2012(source : Dynamap), MCD Mar 2012 (source : Dynamap), Place Mar 2012 (source : Dynamap)
Vintage is the currency of the data as of a specific date and does not correspond exactly to the time of product release because of data-to-product production time.

FIPS: One of a series of codes, issued by the National Institute of Standards and Technology (NIST), assigned for the purpose of ensuring uniform identification of geographic entities throughout all Federal Government programs and agencies.

Each officially recognized Census place has its own unique 5-10 digit identifier. For more information, please see <http://www.census.gov/geo/www/fips/fips.html>.

County: Census county in which the franchise resides

State: State in which the franchise resides

ZIP: United States Postal Service 5-digit ZIP code that covers, either in whole or in part, the cable operator's franchise area.

ZIP Code boundary file vintage : Mar 2012 (source : Dynamap)

Vintage is the currency of the data as of a specific date and does not correspond exactly to the time of product release because of data-to-product production time.

PLUS4: USPS +4 extension to the 5-digit ZIP code. Using geocoding technology, and using only +4s that could be determined to be entirely within the cable operator's franchise area, MBC determined that each of the ZIP+4s on the tab(s) included in this repo

ZIP4: 5-Digit USPS ZIP code and 4-digit extension.

ZIP+4 boundary file vintage : Mar 2012 (source : Dynamap)

Vintage is the currency of the data as of a specific date and does not correspond exactly to the time of product release because of data-to-product production time.

USPS Record Type: H - high-rise; F - firm; S - street; R - rural route/highway contract; P - post office box; G - general delivery.

* Type H Records (High Rises, Buildings, Apartments) are assigned a ZIP+4 centroid based on the actual address. If a ZIP+4 centroid cannot be assigned, a ZIP+2 or 5-digit ZIP centroid is assigned.

* Type F Records (Firms) are assigned a ZIP+4 centroid based on the actual address. If a ZIP+4 centroid cannot be assigned, a ZIP+2 or 5-digit centroid is assigned.

* Type S Records (Streets) are assigned a ZIP+4 centroid that falls on an address range. If a ZIP+4 centroid cannot be assigned, a ZIP+2 or 5-digit centroid is assigned.

* Type R Records (Rural Routes) are assigned ZIP+2 centroids if possible. In cases where this is not possible, a 5-digit centroid is assigned.

* Type P (P.O. Box) and Type G (General Delivery Records) are assigned a 5-digit centroid.

Centroid Type: Each record includes a centroid type code that indicates whether the ZIP+4 has been assigned a ZIP+4, ZIP+2 or 5-digit ZIP centroid.

* ZIP+4 - 1

* ZIP+2 - 2

* 5-digit ZIP - 3

* None - 0

Census 2010 HHS: Count of Census 2010 households by community. For Counties and Minor Civil Divisions (MCDs), HHS reflect count of community minus any incorporated areas within the larger franchise.

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EXHIBIT B

2010 Census Household Population

GCT-PL2 - Kentucky: Population and
Housing Occupancy Status: 2010 - State --
Place
2010 Census Redistricting Data (Public
Law 94-171) Summary File

NOTE: For information on confidentiality
protection, nonsampling error, and
definitions, see
<http://www.census.gov/prod/cen2010/pl94-171.pdf>

NOTE: Change to the
California, Connecticut, Mississippi, New
Hampshire, Virginia, and Washington P. L.
94-171 Summary Files as delivered.

Geographic area	Total	Housing units		
		Total	Occupied	Vacant
Kentucky	4,339,367	1,927,164	1,719,965	207,199
Pineville city	1,732	767	675	92

H3: OCCUPANCY STATUS - Universe: Housing units
2010 Census Summary File 1

Note: This is a modified view of the original table.

NOTE: For information on confidentiality protection, nonsampling error, and definitions, see <http://www.census.gov/prod/cen2010/doc/sf1.pdf>

Geography	Total:
	Occupied Households
Uninc. Claiborne County, Tennessee	8910
Uninc. Harlan County, Kentucky	8620
Uninc. Knox County, Kentucky	7846

EXHIBIT C

SBCA Effective Competition Tracking Reports

ECTR – Effective Competition Tracking Report



Provided by
Satellite Broadcasting and Communications Association

Pursuant to Section 76.907(c) of the FCC Rules, and your effective competition tracking request dated August 30, 2012 please find the following Direct-to-Home (DTH) satellite subscriber numbers per zip code (and/or zip+4 where necessary). The provision and use of this Effective Competition Tracking Report is governed by and subject to the terms and conditions of the Agreement for Provision and Use of Confidential Data, between your company and SBCA.

Report Date: September 7, 2012

ZIP Codes

DTH Count

Requested total for Pineville, KY	283
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Data is current through 7/31/2012

Report Prepared by:
Martin Esteves
Manager, Membership and Data Management
202-349-3630
mesteves@sbca.org

Methodology: Direct-To-Home (DTH) subscriber data reflects aggregated DIRECTV and DISH Network residential subscriber totals. The following data collection procedures are applied by Members in the normal course of business: a) single accounts with multiple receivers are only counted once; b) commercial and test accounts are not included; c) each occupied unit served in a multiple dwelling unit building has been counted as a separate residential subscriber; d) zip codes are taken from service locations (not billing addresses, where different); e) inactive accounts are routinely removed; f) invalid (undeliverable) addresses have been corrected where known; g) courtesy or complimentary accounts are included; and h) zip code information for Members' subscribers is periodically updated to reflect changes to zip codes by the United States Postal Service.

CERTIFICATE OF SERVICE

I, Glenda Thompson, a secretary at the law firm of Edwards Wildman Palmer LLP, hereby certify that, on this 11th day of September, 2012, copies of the foregoing "Petition for Special Relief" were sent via first-class mail, postage prepaid, to the following:

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Chief, Media Bureau
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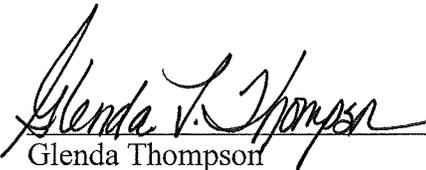
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*Via ECFS


Glenda Thompson