

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

	)	CSR 7234-E
	)	CSR 7235-E
	)	CSR 7236-E
	)	CSR 7369-E
	)	CSR 7370-E
	)	CSR 7385-E
	)	CSR 7386-E
	)	CSR 7388-E
	)	CSR 7404-E
In the Matter of	)	CSR 7405-E
	)	CSR 7406-E
Time Warner Cable Inc., and Time Warner	)	CSR 7483-E
Entertainment-Advance/Newhouse Partnership	)	CSR 7491-E
	)	CSR 7492-E
25 Petitions for Determination of Effective	)	CSR 7494-E
Competition in 229 Communities in New Jersey	)	CSR 7497-E
and New York	)	CSR 7499-E
	)	CSR 7501-E
	)	CSR 7536-E
	)	CSR 7547-E
	)	CSR 7555-E
	)	CSR 7556-E
	)	CSR 7557-E
	)	CSR 7559-E
	)	CSR 7560-E

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION

Adopted: November 6, 2008

Released: November 7, 2008

By Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. This Memorandum Opinion and Order resolves two petitions¹ that the cable operator Time Warner Cable Inc., and Time Warner and Entertainment-Advance/Newhouse Partnership (collectively, “Time Warner” or the “Company”) filed about two decisions of this Commission. Those decisions concerned Time Warner’s requests to have the rates for its basic cable service deregulated in approximately 760 franchise areas (“Communities”) in New Jersey, New York, and Pennsylvania. The decisions granted Time Warner’s requests for the vast majority of the Communities, but denied deregulation in 229 of them (3 in New Jersey and 226 in New York).² The petitions seek reconsideration of the 229 denials. The only opposition to the petitions that was filed concerns the 3 New Jersey Communities and

¹ Petition for Reconsideration in CSR 7234-E *et al.* filed by Time Warner on Sept. 12, 2008; Petition for Reconsideration in CSR 7547-E filed by Time Warner on Sept. 15, 2008.

² *Time Warner Cable Inc., & Time Warner & Entertainment-Advance/Newhouse Partnership*, Memorandum Opinion & Order DA 08-1893 (“*New York/Pennsylvania MO&O*”), released Aug. 13, 2008, available at 2008 WL 3450890; *Time Warner Cable, Inc.*, Memorandum Opinion & Order DA 08-1917 (“*New Jersey MO&O*”), released Aug. 15, 2008, available at 2008 WL 3823069.

was filed by the Division of Rate Counsel (the “DRC”) of the Department of the Public Advocate for the State of New Jersey.³ Time Warner filed a reply to it.⁴ We are resolving both of Time Warner’s petitions in this one Memorandum Opinion and Order on Reconsideration for reasons of efficiency and economy.

2. The DRC, which opposes the parts of our *New Jersey MO&O* that favor Time Warner, also filed an Application for Review of those parts of the *New Jersey MO&O*. The DRC requests that that pleading and Time Warner’s Petition for Reconsideration in CSR 7547-E be consolidated and decided by the full Commission.⁵ We deny the DRC’s request. Section 1.104(c) of our rules specifically provides that “If in any matter one party files a petition for reconsideration and a second party files an application for review, the Commission will withhold action on the application for review until final action has been taken on the petition for reconsideration.”⁶ This allows all issues to be thoroughly considered by the staff and conserves the Commissioners’ resources until then.

II. ANALYSIS

A. The Original Petitions and Memorandum Opinions and Orders

3. In the original petitions that led to the decisions of which Time Warner seeks reconsideration, Time Warner alleged that it was subject to so much competition in the 229 Communities that its rates for basic cable service there should be deregulated. In particular, Time Warner alleged that it was subject to “competing provider effective competition” pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended,⁷ in each of the 229 Communities. This form of effective competition required Time Warner to make two showings about each Community. The first, which Time Warner successfully made, was that in each Community it faced certain kinds of competitors (multichannel video programming distributors or “MVPDs”).⁸ The second showing that Time Warner was required to make, and the one that it failed to make credible, concerned the success in winning subscribers that Time Warner’s competitor MVPDs had achieved in each Community. Specifically, Time Warner had to prove that, in each Community, in excess of 15 percent of the households subscribed to MVPD services other than Time Warner’s.⁹

4. Time Warner’s petitions included statistical evidence that stated, for each Community, Time Warner’s own market share and the combined market shares of its competitors, who were the Direct Broadcast Satellite (“DBS”) providers DIRECTV and Dish Network. The decisions of which Time Warner seeks reconsideration found fatal flaws in Time Warner’s statistical evidence. First, Time Warner’s evidence showed that, in the 229 Communities, its own market share and that of the two DBS providers combined was in excess of 100 percent.¹⁰ Second, Time Warner stated that in 33 of those

³ Opposition to Time Warner’s Petition for Reconsideration on Behalf of the New Jersey Division of Rate Counsel (“DRC Opposition”), filed in CSR 7547-E on Oct. 10, 2008.

⁴ Reply in CSR 7547-E, filed Oct. 16, 2008.

⁵ DRC Opposition at 2, 7-8.

⁶ 47 C.F.R. § 1.104(c).

⁷ 47 U.S.C. § 543(l)(1)(B).

⁸ Specifically, 47 U.S.C. § 543(l)(1)(B)(i) requires that each Community be “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.”

⁹ Specifically, 47 U.S.C. § 543(l)(1)(B)(ii) requires that “the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor,” which was Time Warner, “exceeds 15 percent of the households in the franchise area.”

¹⁰ The Petition for Reconsideration in CSR 7234-E *et al.* states at 6 that the *New York/Pennsylvania MO&O* erred in including the Village of Bridgewater (NY0296) among the Communities where the combined market shares of Time Warner and the DBS providers exceeded 100%. The statistics stated in the *MO&O* about subscribership for that

(continued....)

Communities its own market share was over 100 percent; in three of those Communities, it was over 200 percent; and, in one Community, Time Warner stated that its own market share was 771 percent.¹¹ It strains credulity for a company to claim that it has significant competition in a market where it claims a market share in excess of 100 percent.

5. A final evident flaw in Time Warner's statistical evidence appeared in pairs of Communities that bordered each other and had the same name. In 15 such pairs of Communities, Time Warner stated that it and/or the DBS providers had subscriberships that were so different as to strain credulity. For example, Time Warner stated that its own subscribership in the Town of St. Johnsville was nine percent and, in the neighboring Village of St. Johnsville, was 69 percent;¹² and that the DBS providers' market share was 19 percent in the Town of Groton and, in the neighboring Village of Groton, was nearly twice as high, 37 percent.¹³

6. Time Warner's petitions offered no explanation for the obviously inaccurate and unreliable data that they contained. Indeed, the petitions showed no awareness of these patent flaws. Attached to the petitions were sworn declarations personally signed by an officer of the Company and its outside counsel attesting, to the best of their knowledge, information and belief, to the accuracy of the factual statements in the petitions.¹⁴

(...continued from previous page)

Community add up to 99.62% and round to 100%. *New York/Pennsylvania MO&O* at Att. C. And, on closer evaluation, we determined that the *New York/Pennsylvania MO&O* mis-copied Time Warner's data, mistakenly using the DBS subscribership for the Town of Bridgewater instead of the Village. Time Warner's actual data state Time Warner's subscribership in the Village of Bridgewater as 65.20% and the DBS providers' as 44.98%, for a total of 110.18%. Petition for Special Relief in CSR 7501-E at Exhs. A & F. Thus, the Village of Bridgewater is a Community in which Time Warner's evidence states that its own market share and that of the two DBS providers combined was in excess of 100%.

¹¹ *New York/Pennsylvania R&O* at Att. C; *New Jersey R&O, R&O* at Att. C.

¹² Petition for Special Relief in CSR 7235-E, Exh. A.

¹³ Petition for Special Relief in CSR 7492-E, Exh. E.

Other occurrences of evident flaw in Time Warner's evidence are, in CSR 7235-E, the Town and Village of Canajoharie (Time Warner subscribership of 6% and 69% (respectively and rounded off to the nearest whole number); in CSR 7236-E, the Town and Village of Argyle (DBS subscribership of 32% and 57%); in CSR 7385-E, the Town and Village of Richmondville (Time Warner subscribership of 19% and 88% and DBS subscribership of 28% and 44%) and the Town and Village of Schaghticoke (DBS subscription of 16% and 28%); in CSR 7406-E, the Town and Village of Gainesville (DBS subscribership of 28% and 45%); in CSR 7492-E, the Town and Village of Groton (Time Warner subscribership of 11% and 75% and DBS subscribership of 19% and 37%); in CSR 7499-E, the Town and Village of Newport (Time Warner subscribership of 7% and 98% and DBS subscribership of 14% and 34%); in CSDR 7556-E, the Town and Village of Franklin (DBS subscribership of 23% and 44%), the Town and Village of Otego (DBS subscribership of 15% and 36%), and the Town and Village of Oxford (DBS subscribership of 25% and 38%); in CSR 7557-E, in the Town and Village of Fabius (Time Warner subscribership of 20% and 57% and DBS subscribership of 32% and 45%); in CSR 7559-E, the Town and Village of Sherburne (DBS subscribership of 49% and 30%); and in CSR 7560-E, the Town and Village of Burke (DBS subscribership of 30% and 49%) and Town and Village of Waddington (DBS subscribership of 39% and 23%). Of the foregoing pairs of Communities, one of each pair was among the 229 Communities for which the Commission denied deregulation. There may be more such pairs among the Communities for which the Commission granted deregulation.

¹⁴ *See, e.g.*, Petition for Special Relief in CSR 7406-E, in which Time Warner stated that its own subscribership in the Village of LeRoy, New York, was 771.43%, at 10 (signed statement by outside counsel that, to the best of his knowledge, information and belief formed after reasonable inquiry, the petition "was well grounded in fact"); *id.* at 11 (declaration under penalty of perjury by President of the Rochester Division of Time Warner Cable Inc., that statements made in the petition and facts contained therein "are true and correct" to the best of his knowledge, information and belief).

7. The Commission found that these conspicuous flaws in Time Warner's own evidence made its showings in the 229 Communities "obviously inaccurate and unreliable."¹⁵ Accordingly, the Company failed to sustain its burden of proof in those Communities and the Commission denied the petitions for deregulation in them. The Commission hypothesized in its *MO&Os* that a possible source of Time Warner's flawed data likely reflected a Community with a very small population included in a five-digit zip code with a very large population, and stated that Time Warner could re-file using nine-digit zip code data that would provide more precise data.¹⁶

B. The Petitions for Reconsideration

8. Time Warner petitions for reconsideration, asking that the Commission reverse itself and find that the Company's evidence showed that competing provider effective competition does exist in the 229 Communities. Pointing to its evidence showing DBS subscribership in excess of 15 percent, Time Warner asks that we disregard the rest of the evidence it submitted, especially the evidence of its own subscribership and the combined subscribership of itself and the DBS providers.¹⁷ We decline to do so. Cable systems are presumed not to be subject to effective competition.¹⁸ We require a cable operator to sustain a burden of proof that its cable system is subject to effective competition by producing evidence that effective competition is present in its franchise area.¹⁹ When a cable operator presents evidence that is patently unreliable as described in the foregoing paragraphs, it fails to sustain its burden of proof.

9. Time Warner attempts to explain the estimates of its own market share by alleging generally that in some small rural communities, a significant number of households may subscribe to both cable service and DBS service, producing subscribership estimates slightly over 100%.²⁰ Or, Time Warner theorizes, perhaps some households in one Community receive their mail in another Community and therefore appear on Time Warner's records as residing in the latter.²¹ We cannot find merit in these explanations, for several reasons. First, Time Warner offers no evidence that these conditions actually exist in any of the 229 Communities, much less explain those instances where the subscribership for all MVPDs exceeded 200 percent. Second, the Company has not attempted to comply with our rules by showing that evidence of such conditions, if it exists, consists of recent events, changed circumstances, facts that Time Warner did not know of earlier and could not have known through the exercise of ordinary diligence, or facts the consideration of which is "required in the public interest."²² Third, even if Time Warner were able to provide data in support of this explanation for Communities in which it has subscribership in excess of 100%, it still fails to take into consideration those households that may (a) subscribe to a competitive cable provider or local exchange carrier or (b) not subscribe to any form of pay television service.

10. Finally, Time Warner criticizes the Commission's suggestion that it re-file its DBS

¹⁵ *New York/Pennsylvania R&O* at ¶ 10; *New Jersey R&O, R&O* at ¶ 8. The evidently flawed evidence submitted by Time Warner, described in paragraph 4 above, was not necessary for denial of the petitions and was therefore not mentioned in the Commission's Memorandum Opinions and Orders.

¹⁶ *New York/Pennsylvania R&O* at ¶ 10; *New Jersey R&O, R&O* at ¶ 8.

¹⁷ Petition for Reconsideration in CSR 7234-E *et al.* at 3-6; Petition for Reconsideration in CSR 7547-E at 3-6.

¹⁸ 47 C.F.R. § 76.906; *see also* 47 U.S.C. § 543(a)(2), (1).

¹⁹ 47 C.F.R. § 76.907(b).

²⁰ Petition for Reconsideration in CSR 7234-E *et al.* at 6 (theorizing that perhaps "where one or more DBS Providers may not provide local-into-local broadcast service or a full complement of all local broadcast HD and multicast SD streams, . . . some subscribers [may] receive a combination of 'basic' service from the cable operator and 'expanded' video services from a DBS Provider"; Petition for Reconsideration in CSR 7547-E at 6.

²¹ Petition for Reconsideration in CSR 7234-E *et al.* at 7.

²² 47 C.F.R. § 1.106(b)(2), (c)(1, 2); DRC Opposition at 4-5.

subscribership estimates based on nine-digit “Zip+Four” codes.²³ Time Warner characterizes the use of nine-digit zip code data as “prohibitively expensive in the context of 226 small communities,”²⁴ but fails to provide any support for this assertion. We doubt that such data would be prohibitively expensive for Time Warner, because the major cable operators Charter²⁵ and Mediacom²⁶ commonly provide such data in proceedings for rate deregulation. The Commission was merely suggesting a new approach to Time Warner, which the Company is free to follow or not as it chooses. We urge the Company, if it does not accept the Commission’s suggestion, to intensify the efforts that it describes in its Petitions for Reconsideration to produce credible data in support of its petitions for cable rate deregulation.²⁷

III. ORDERING CLAUSE

11. Accordingly, **IT IS ORDERED** that the Petitions for Reconsideration filed in the captioned proceedings by Time Warner Cable Inc., and Time Warner and Entertainment-Advance/Newhouse Partnership **ARE DENIED**.

12. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.²⁸

FEDERAL COMMUNICATIONS COMMISSION

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

²³ Petition for Reconsideration in CSR 7234-E *et al.* at 7; Petition for Reconsideration in CSR 7547-E at 3-4.

²⁴ Petition for Reconsideration in CSR 7234-E *et al.* at 4 n.10.

²⁵ *See, e.g.*, Petition for Special Relief in CSR 7830-E at Exh. 3 (filed April 3, 2008, by Charter for St. James Parish, Louisiana); Petition for Special Relief in CSR 7546-E at Exh. 3 (filed Aug. 31, 2007, by Charter for Hoover, Alabama); in CSR 6916-E (Petition for Special Relief by Charter in St. Louis, Missouri), Letter from Steven J. Horvitz, Esq., Davis Wright Tremaine LLP, counsel for Petitioner, to Steven Broecker, Deputy Chief, Policy Division, Media Bureau, dated March 30, 2007, at 2.

²⁶ *See, e.g.*, Petition for Special Relief in CSR 7689-E at Exh. E (dated Nov. 2, 2007, by Mediacom for Hudson, Iowa); Petition for Special Relief in CSR 7688-E at Exh. E (dated Nov. 1, 2007, by Mediacom for Britt, Iowa).

²⁷ Petition for Reconsideration in CSR 7234-E *et al.* at 6-7; Petition for Reconsideration in CSR 7547-E at 6.

²⁸ 47 C.F.R. § 0.283.