

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

In the Matter of)	
)	
Time Warner Cable Inc.)	MB Docket No. 13-92, CSR 8778-E
)	
Petition for Determination of Effective Competition in Three Communities in Massachusetts)	
)	
Petition for Reconsideration of Certification of the Town of Adams, Massachusetts)	

MEMORANDUM OPINION AND ORDER

Adopted: June 2, 2016

Released: June 2, 2016

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

I. INTRODUCTION AND BACKGROUND

1. On March 6, 2015, Time Warner Cable Inc. (Time Warner) filed a Petition for Reconsideration, pursuant to Section 1.106 of the Commission’s rules,¹ of the Media Bureau’s *Memorandum Opinion and Order (Order)*, granting in part and denying in part Time Warner’s Petition for Special Relief in the above-referenced proceeding.² In its Petition for Reconsideration, Time Warner contends that the Media Bureau erroneously denied its initial Petition asserting that it is subject to effective competition in the Town of Adams, Massachusetts.³ On March 26, 2015, Time Warner and the Massachusetts Department of Telecommunications and Cable (MDTC)⁴ filed a letter notifying the Media Bureau that the parties reached a negotiated agreement in the above-referenced proceeding.⁵ Subsequently, on December 8, 2015, MDTC filed a Form 328 certification request for several communities, including the Town of Adams, Massachusetts (MA0001).⁶ In response, Time Warner filed

¹ 47 C.F.R. § 1.106.

² *Time Warner Cable Inc. Petition for Determination of Effective Competition in Three Communities in Massachusetts*, Memorandum Opinion and Order, 30 FCC Rcd 1067 (MB 2015) (*Order*). The *Order* found that the Town of Clarksburg and the City of North Adams, Massachusetts, were subject to effective competition while the Town of Adams, Massachusetts, was not subject to effective competition.

³ Time Warner Cable Inc. Petition for Reconsideration at 1, 6-7 (March 6, 2015) (TWC Petition for Reconsideration).

⁴ MDTC is the franchise authority for rate regulation of cable services throughout the Commonwealth of Massachusetts.

⁵ Letter from Sean M. Carroll, Counsel, Massachusetts Department of Telecommunications and Cable, and Craig A. Gilley, Counsel, Time Warner Cable Inc., to William T. Lake, Chief, Media Bureau, FCC, MB Docket No. 13-92, at 1 (March 26, 2015) (MDTC-Time Warner Agreement).

⁶ See Massachusetts Department of Telecommunications and Cable, FCC Form 328, Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition (Dec. 8, 2015).

a Petition for Reconsideration of Certification, arguing that effective competition exists in the Town of Adams.⁷ For the reasons set forth below, we accept the parties' negotiated agreement and grant Time Warner's Petition for Reconsideration. In addition, we deny MDTC's Form 328 certification request as it pertains to the Town of Adams.

II. BACKGROUND

2. In June 2015, a Commission order adopted a rebuttable presumption that cable operators are subject to one type of effective competition, commonly referred to as "competing provider effective competition."⁸ Accordingly, in the absence of a demonstration to the contrary, the Commission now presumes that cable systems are subject to competing provider effective competition, and it continues to presume that cable systems are not subject to any of the other three types of effective competition, as defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.⁹

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to competing provider effective competition if the franchise area is (a) served by at least two unaffiliated multichannel video programming distributors (MVPDs), each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the franchise area.¹⁰ Pursuant to the *Effective Competition Order*, absent evidence to the contrary, the Commission presumes that the competing provider test is met. Under the modified rules, franchising authorities remain free to rebut the presumption of competing provider effective competition.¹¹ All franchising authorities with existing certifications that wished to remain certified were required to file FCC Form 328 by December 8, 2015.¹² MDTC, as the franchise authority for rate regulation of cable services throughout the Commonwealth of Massachusetts, filed timely certifications for numerous Massachusetts communities, including the Town of Adams.¹³

4. In its initial Petition, Time Warner argued that it is subject to competing provider effective competition in the Town of Adams, the Town of Clarksburg, and the City of North Adams,

⁷ Time Warner Cable Inc. Petition for Reconsideration of Certification (Jan. 7, 2016) (TWC Petition for Reconsideration of Certification); *see also* 47 C.F.R. § 76.911 (a party may challenge a franchising authority's certification by filing a petition for reconsideration). The parties proceeded to file additional responsive pleadings. *See* Massachusetts Department of Telecommunications and Cable Opposition to Time Warner Cable Inc.'s Petition for Reconsideration (Jan. 19, 2016); Time Warner Cable Inc. Reply to Opposition to Petition for Reconsideration of Certification (Jan. 28, 2016) (TWC Certification Reply); Massachusetts Department of Telecommunications and Cable Surreply to Time Warner Cable Inc.'s Reply (Feb. 4, 2016); Time Warner Cable Response to Surreply (Feb. 18, 2016) (TWC Response to Surreply). MDTC and Time Warner Cable each filed motions asking for extensions of time in which to file a surreply and a response, respectively. *See* Massachusetts Department of Telecommunications and Cable Motion for Leave to File Surreply of the Massachusetts Department of Telecommunications and Cable to Time Warner Cable Inc.'s Reply (Feb. 4, 2016); Time Warner Cable Inc. Motion for Leave to File Response to Surreply (Feb. 18, 2016). Finding no prejudice to the parties, we will consider the pleadings for purposes of having a complete record before us.

⁸ *See Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574 (2015) (*Effective Competition Order*).

⁹ *See* 47 U.S.C. § 543(l)(1); 47 C.F.R. §§ 76.905(b), 76.906.

¹⁰ 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

¹¹ *Effective Competition Order*, 30 FCC Rcd at 6587-92, paras. 17-26.

¹² *See Notice of Effective Date of Revised Effective Competition Rules*, Public Notice, 30 FCC Rcd 10124, 10125 (2015).

¹³ *See supra* n.6.

Massachusetts.¹⁴ MDTC filed an opposition to Time Warner's initial Petition.¹⁵ The Town of Adams, the Town of Clarksburg, and the City of North Adams also filed an opposition to Time Warner's initial Petition.¹⁶ The *Order* found that the Town of Clarksburg and the City of North Adams were subject to effective competition and granted Time Warner's initial Petition for a determination of effective competition in those communities.¹⁷ However, the *Order* concluded that, in the Town of Adams, the number of households subscribing to programming services offered by MVPDs did not exceed 15 percent of the households in the franchise area and, therefore, the Town of Adams was not subject to effective competition. Accordingly, the *Order* denied Time Warner's initial Petition for a determination of effective competition in the Town of Adams.¹⁸

III. DISCUSSION

5. In its Petition for Reconsideration, Time Warner argues that its initial Petition for a determination of effective competition in the Town of Adams should not have been denied.¹⁹ Time Warner asserts that the Media Bureau incorrectly calculated the subscriber count in the Town of Adams by discounting a percentage of seasonal homes from the total subscriber count.²⁰ Time Warner believes that this subscriber count adjustment was based upon erroneous and improper calculations.²¹ Time Warner argues that updated subscriber counts for the Town of Adams confirm that the community is subject to effective competition.²² Additionally, in response to MDTC's Form 328 certification request, Time Warner argues that updated subscriber counts indicate that the Town of Adams continues to be subject to competing provider effective competition.²³

6. MDTC did not file an opposition to Time Warner's Petition for Reconsideration.²⁴ However, on March 26, 2015, MDTC and Time Warner notified the Media Bureau that the parties had reached a negotiated agreement.²⁵ MDTC agreed to not oppose Time Warner's argument that updated subscriber counts in the Town of Adams demonstrate the community is subject to effective competition in

¹⁴ Time Warner Cable Inc. Petition for Special Relief at 1 (March 27, 2013) (TWC Initial Petition).

¹⁵ Massachusetts Department of Telecommunications and Cable Opposition to Time Warner Cable Inc.'s Petition for Special Relief (April 29, 2013).

¹⁶ Opposition of the City of North Adams, MA, Town of Adams, MA, and Town of Clarksburg, MA, to Time Warner Cable Inc.'s Petition for Special Relief (June 7, 2013).

¹⁷ *Order*, 30 FCC Rcd at 1072-73, para. 14.

¹⁸ *Id.* at 1072, para. 13.

¹⁹ TWC Petition for Reconsideration at 1, 6-7.

²⁰ *Id.* at 1-6.

²¹ *Id.*

²² *Id.* at 6.

²³ TWC Petition for Reconsideration of Certification at 2-3, Exhs. A & B; TWC Certification Reply at 2-4, 6-7, Exhs. A & B; TWC Response to Surreply at 1-5 (arguing that updated subscriber counts identify additional residential DBS subscribers and with these additional subscribers the DBS penetration rate exceeds 15 percent in the community).

²⁴ Although MDTC requested an extension to file an opposition to Time Warner's Petition for Reconsideration, which the Media Bureau granted on March 16, 2015, MDTC did not file an opposition. *See* E-mail from Steven Broeckart, Senior Deputy Chief, Policy Division, Media Bureau, FCC, to Sean M. Carroll, Counsel, Massachusetts Department of Telecommunications and Cable, Craig A. Gilley, Counsel, Time Warner Cable Inc., et al., MB Docket No. 13-92 (March 16, 2015, 1:25 PM EDT) (granting motion for extension of time).

²⁵ *See* MDTC-Time Warner Agreement.

exchange for Time Warner committing to March 6, 2015, as the effective date of any order finding effective competition in the Town of Adams.²⁶

7. We accept the negotiated agreement between MDTC and Time Warner. On reconsideration, and given the parties' negotiated agreement, we find that Time Warner is subject to competing provider effective competition in the Town of Adams. Additionally, given MDTC's agreement to not oppose Time Warner's argument that the Town of Adams is subject to effective competition²⁷ as well as Time Warner's pleadings in response to MDTC's Form 328,²⁸ we also deny MDTC's Form 328 certification request insofar as it pertains to the Town of Adams.²⁹ Accordingly, we deny MDTC's Form 328 certification request as it pertains to the Town of Adams.

²⁶ *Id.* at 1. Given the negotiated agreement, the parties also deemed moot Time Warner's precedential arguments in Part A of the Petition for Reconsideration. *Id.* at 1, n.1.

²⁷ MDTC-Time Warner Agreement at 1.

²⁸ *See supra* n.7.

²⁹ We note that Time Warner's filings in response to MDTC's Form 328 certification request evidence the Town of Adams is subject to effective competition. *See* TWC Petition for Reconsideration of Certification at 2-3, Exhs. A & B; TWC Certification Reply at 2-4, 6-7, Exhs. A & B; TWC Response to Surreply at 1-5. Time Warner argues that additional DBS subscribers provided in a Satellite Broadcasting and Communications Association (SBCA) report for the Town of Adams are residential and should be included in the DBS penetration rate for the community. *See* TWC Response to Surreply at 3-4 (asserting that SBCA reports only provide DBS subscriber data for residential accounts and exclude commercial and test accounts). We agree and, with the updated subscriber count, we find that the DBS penetration rate exceeds 15 percent in the Town of Adams, even if the subscriber count is reduced to account for seasonal homes in the community. *See* TWC Certification Reply at 6-7, Exhs. A & B. Regardless, we note the parties have reached a negotiated agreement concerning the presence of effective competition in the Town of Adams and we accept this agreement. *See* MDTC-Time Warner Agreement at 1.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that pursuant to Section 1.106 of the Commission's Rules,³⁰ the Petition for Reconsideration filed in the captioned proceeding by Time Warner Cable Inc. **IS GRANTED** in accordance with the negotiated agreement between MDTC and Time Warner.

9. **IT IS FURTHER ORDERED** that the finding of effective competition in the Town of Adams is effective as of March 6, 2015.

10. **IT IS FURTHER ORDERED** that the Petition for Reconsideration of Certification filed by Time Warner with respect to the Town of Adams **IS GRANTED** and that the Form 328 certification request filed by the Massachusetts Department of Telecommunications and Cable with respect to the Town of Adams, Massachusetts **IS DENIED** and that the certification to regulate basic cable service rates granted to MDTC for the Town of Adams **IS REVOKED**.

11. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³¹

FEDERAL COMMUNICATIONS COMMISSION

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

³⁰ 47 C.F.R. § 1.106.

³¹ 47 C.F.R. § 0.283.