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 DEPARTMENT OF THE PUBLIC ADVOCATE
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JON S. CORZINE
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Director

November 2, 2007

Via Overnight Delivery

Marlene H. Dortch, Secretary
 FCC
 Office of the Secretary
 9300 East Hampton Drive
 Capital Heights, MD 20743

Re:

In the Matter of:

**Petition of Time Warner Cable Inc.
 For a Determination of Effective Competition in**

**Englewood, NJ
 Fairview, NJ
 Guttenberg, NJ
 Little Ferry, NJ
 Moonachie, NJ
 Ridgefield Park, NJ
 Ridgefield, NJ
 Teterboro, NJ**

) **CSR-7547-E**
)
)
)
) **CUID No. NJ0251**
) **CUID No. NJ0253**
) **CUID No. NJ0338**
) **CUID No. NJ0339**
) **CUID No. NJ0427**
) **CUID No. NJ0254**
) **CUID No. NJ0203**
) **CUID No. NJ0484**

Dear Secretary:


Enclosed please find for filing an original and (3) copies of Comments on behalf of the New Jersey Division of Rate Counsel in Opposition to Time Warner's Petition for a Declaration of Effective Competition, referenced above.

Kindly return one copy marked "filed" in the enclosed self-addressed stamped envelope provided.

Very truly yours,

RONALD K. CHEN.
PUBLIC ADVOCATE

Stefanie A. Brand
Director, Division of Rate Counsel

By: 
Jose Rivera-Benitez
Assistant Deputy Public Advocate

CC: Service List

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

In the Matter of:)	CSR-7547-E
)	
Petition of Time Warner Cable Inc.)	
For a Determination of Effective Competition in)	
)	
Englewood, NJ)	CUID No. NJ0251
Fairview, NJ)	CUID No. NJ0253
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Little Ferry, NJ)	CUID No. NJ0339
Moonachie, NJ)	CUID No. NJ0427
Ridgefield Park, NJ)	CUID No. NJ0254
Ridgefield, NJ)	CUID No. NJ0203
Teterboro, NJ)	CUID No. NJ0484

To: Chief, Media Bureau

**Comments of the New Jersey Division of Rate Counsel in Opposition
to Time Warner's Petition for a Declaration of Effective Competition**

The New Jersey Division of Rate Counsel ("Rate Counsel") hereby submits its comments in opposition to the above referenced Petition.¹ On or about August 29, 2007, Time Warner Cable Inc. ("Time Warner") filed the subject Petition with the Federal Communications Commission ("FCC" or "Commission") Media Bureau ("Bureau") covering eight (8) municipal franchises in New Jersey, seeking from the Media Bureau a determination of effective competition in the above captioned franchise areas (individually, a "franchise area"). The FCC issued a Public Notice on September 14,

^{1/} Rate Counsel observes that the Petition make no mention of whether the appropriate applicable fees that pertain to each franchise area have been paid in this matter, in accordance with Public Notice DA-05-921 Released April 1, 2005. Section 1.104(8) (g) of the rules, cited therein, requires payment of a filing fee for each franchise area. Additionally, the Public Notice reminded carriers of form requirements such as identification of each franchise area associated with the petition and that violation of such requirements would make the petition subject to return without processing.

2007 in Report No. 0224, which notified the interested public of this filing.² For the reasons set forth below, Rate Counsel respectfully submits that the Bureau should dismiss or, in the alternative, deny the Petition at this time.

First, Time Warner failed to submit acceptable household data and satellite penetration data to support the claim of effective competition. Time Warner relied upon household data representing United States Postal Service counts ("USPS"). The FCC has not sanctioned USPS data as a substitute for Census data. Additionally, the satellite subscriber or direct to home ("DTH") counts submitted for several franchise areas are inconsistent with one another. Also, the Time Warner filing does not contain the requisite data in an FCC approved form. Finally, the household data and satellite penetration data is not shown to be contemporaneous to one another nor current as of the filing date. As a result of these deficiencies, Rate Counsel submits that Time Warner has failed to sustain its burden of proof to show that effective competition exists in the subject franchise areas.

^{2/} See Public Notice, Report No. 0224, Special Relief and Show Cause Petitions, released September 14, 2007. In accordance with Section 76.7(b)(1) the FCC's rules, comments/opposition are due twenty (20) days after the issuance of the Public Notice. See 47 C.F.R. § 76.7(b) (1). By letter dated October 1, 2007, Rate Counsel, with the consent of counsel for Time Warner, requested an extension of time to submit comments until November 5, 2007.

LEGAL ARGUMENT

TIME WARNER'S PETITION FAILS TO PROVIDE THE NECESSARY DATA TO PROPERLY SUPPORT THE CLAIM OF EFFECTIVE COMPETITION, LACKS MERIT, AND SHOULD THEREFORE BE DENIED

Section 543 of the Communications Act of 1934, as amended by Section 623 of the Telecommunications Act of 1996,³ provides that subscriber rates of cable television systems are subject to either local or federal regulation where effective competition is absent.⁴ The Time Warner franchise areas at issue here are currently subject to the regulatory jurisdiction of the Local Franchise Authority ("LFA") for the State of New Jersey, the New Jersey Board of Public Utilities. Under FCC rules, cable operators, who claim that effective competition exists and seek to rebut the statutory presumption against the existence of effective competition, must satisfy one of the four tests set forth in Section 76.905(b) of the Commission's rules in order to avoid rate regulation in the specified franchise area.⁵ Time Warner's Petition seeks relief under the "competing provider test" only. Regardless of which test is pursued, the burden of proof rests exclusively with the cable operator to obtain the exemption from rate regulation.⁶

A cable operator may rebut the presumption that effective competition does not exist by showing that it satisfies the "competing provider test." Under this test, a cable

^{3/} Pub. L. No. 104, 100 Stat. 56, approved February 8, 1996, codified at 47 U.S.C. § 151 *et seq.*

^{4/} 47 U.S.C. § 543(a)(2).

^{5/} 47 C.F.R. § 76.905(b).

^{6/} Regardless of whether an effective competition is contested or not, the cable operator's failure to sustain the burden of proof results in denial and dismissal of the Petition. *See Cox Southwest Holdings, LP, ten Unopposed Petitions for Determination of Effective Competition in 17 Local Franchise Areas*, CSR 6877-E, etc., DZ 07-933 (Released March 2, 2007); *I/M/O Time Warner Entertainment Co. LP*, CSR 5136-E, DA 99-234 (Released January 26, 1999).

operator must provide competent evidence to demonstrate that a specific franchise area within a cable system is subject to effective competition by showing that the franchise area is: (1) served by at least two unaffiliated multichannel video programming distributors ("MVPDs"), each of which offers comparable programming to at least 50 percent of the households in the franchise area; and (2) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.⁷ A finding of effective competition exempts a cable operator from rate regulation.⁸ Cable operators, such as Time Warner, seeking relief from rate regulation must meet the burden of proof and affirmatively show at the time of filing that they are subject to effective competition by satisfaction of the "competing provider test."⁹

Time Warner claims that it meets the "competing provider test" because direct broadcast satellite ("DBS") providers' (namely DirecTV and Echostar's DISH Network) penetration rates allegedly exceed fifteen percent of the households in each of the franchise areas referenced in the Petition. The claim that the 15% threshold is met is supported by USPS data by 5 digit zip code that is then compared to 2000 Census household counts to arrive at a factor that is then used to limit the satellite subscriber count, which is then used to arrive at the satellite penetration percentage for the

^{7/} 47 U.S.C. § 623(l)(1)(B); See also, 47 C.F.R. §76.905(b)(2).

^{8/} 47 C.F.R. § 76.905.

^{9/} See *In re C-Tec Cable Systems of Michigan, Inc.*, 10 F.C.C.R. 1735, 1736 (1995); See also, *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd. 5631, 5669-70 (1993) ("Report and Order").

respective franchise areas identified in this Petition.¹⁰ The FCC has not approved the use of this procedure as satisfying a petitioner's burden of proof.¹¹

In addition, Time Warner's Exhibit B attempts to show USPS households as of April 2007. However, the supporting analysis and work papers used in its derivation of households are not in the record. While the Media Bureau has found Census household counts reliable, subject to updated Census information,¹² the Commission has not approved or sanctioned the use of USPS household counts as reliable. In fact, a review of Time Warner's Petition shows that the data regarding USPS households used by Time Warner conflict with the 2000 Census household data, which undermines the reliability and verifiability of household count presented by Time Warner. Specifically, the household count for Teterboro is 22 according to the USPS data provided by Time Warner, but is only 7 under the 2000 Census. As compliance with the "competing provider test" requires accurate household data, the use of USPS data to support the Petition requires its denial.

Additional factual conflicts exist with regard to the satellite subscriber counts. For Teterboro, the satellite subscriber count is reported as 8. The Teterboro satellite subscriber count, however, is counted in the satellite subscriber count for Moonachie,¹³

^{10/} Petition, Exhibit E.

^{11/} See, 47 C.F.R. § 0.283 which provides, in part, for disposition by the Commission *en banc* on matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.

^{12/} See, *I/M/O Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities Certifications to Regulate Basic Cable Service Rates*, DA-94-828, 9 FCC Rcd 3656, ¶ 3 (July 29, 1994). (Census data is an appropriate measure of households.); *I/M/O Mountain Cable Company d/b/a Adelphia Cable Communications; etc.* DA 99-1749, 14 FCC Rcd 13994 (September 2, 1999) (Updated Census household information is reliable and acceptable if more reliable than Census data.)

^{13/} Petition, Exhibit D.

resulting in a duplicate count. When one compares the satellite subscriber count for Moonachie and that of Little Ferry, the two counts are identical except for the exclusion of the Teterboro count (8) from the count for Little Ferry.¹⁴ Likewise, while the satellite subscriber count for the Fairview franchise area is reported as 1086, that same amount, in addition to the count for the Ridgefield Park Village franchise area (776), is included in the satellite subscriber count for the Ridgefield Borough franchise area (1086+502+776). These obvious discrepancies raise questions whether the satellite subscriber counts submitted by Time Warner are accurate.

Accurate satellite subscriber counts are necessary to show compliance with the “competing provider test.” If the subscriber counts are inaccurate, so too are the calculations of penetration percentages. For example, Rate Counsel’s review of the satellite subscriber count for Ridgefield Borough shows 502 subscribers and not 2364 subscribers as shown in the Petition. Therefore, the satellite penetration percentage for Ridgefield should be 12.49% (DTH/2000 Census households or 502/4020).¹⁵ Unlike the numbers presented by Time Warner, this percentage does not show effective competition under the “competing provider test.” Accordingly, Time Warner has not met its burden of proof and the Petition should be denied.

Time Warner’s methodology is further flawed due to the fact that there is no indication that the accepted zip code +4 analyses that excludes commercial accounts, test accounts or non-residential locations has been applied. Use of 5 digit zip codes alone

^{14/} *Id.*

^{15/} This calculation is submitted for illustrative purposes as Rate Counsel has and continues to advocate for current household data which is not reflected by stale 2000 Census figures. Also, Time Warner’s error in relying on USPS household counts is magnified if the Zip Code household count of 13,563 is used, which would result in a satellite penetration of 3.7% (502/13563).

requires exclusion of commercial and test accounts for determining satellite penetration in franchise areas that cover more than one zip code. Use of Zip code+4 obviates the need to apply an allocation methodology to satisfy the FCC.¹⁶ An accepted methodology is to reduce the 5 digit based satellite penetration count by 10%.¹⁷ No such adjustments were made by Time Warner. Therefore, Time Warner's Petition should be dismissed, or alternatively, denied.

Furthermore, the Petition is deficient due to Time Warner's failure to submit the analysis and work papers that underlie and support the exhibits to the Petition. The absence of such underlying support data deprives Rate Counsel, the Media Bureau, and interested parties of the ability to examine, challenge, and verify that the numbers submitted are complete and accurate. Since the FCC relies upon a petitioner's data to show compliance with the "competing provider test," Time Warner must supply all underlying data and analyses used to derive its numbers.¹⁸ By failing to provide the underlying data and analyses, a sound determination on the accuracy of the Petition cannot be made.

^{16/} *I/M/O Alert Cable TV of South Carolina, Inc. and Time Warner Entertainment-Advance Newhouse Partnership, d/b/a Time Warner Cable, etc.*, CSR-6047-E, DA-06-78 (January 26, 2006) ¶ 9.

^{17/} See *I/M/O Charter Communications Properties, LLC, Petition for Determination of Effective Competition in San Luis Obispo County, California*, DA-02-605, 17 FCC Rcd 4617 (2002); *I/M/O Fibervision, Inc.*, 17 FCC Rcd 16313 (2002) ¶ 5.

^{18/} See, *Owner-Operator Independent Drivers Association, Inc., v. Federal Motor Carrier Safety Administration, et. als.*, 494 F.3d 188, 199 (D.C. Cir. 2007). (The APA requires that critical factual material used to support the agency decision must have been made public in the proceeding and exposed for refutation. The Petitioners must submit the factual underpinnings from which exhibits are crafted in support of the factual claims.) See also, *Solite Corp. v. US EPA*, 952 F. 2d 473, 485 (D.C. Cir. 1991) (Courts have ruled that under the APA an agency may not rely on any information on which interested parties are not given access or the opportunity to comment.) The underlying data from which the exhibits in the Petition were prepared have not been submitted for examination, verification or challenge. Instead, Time Warner has submitted only the results, not the underlying support and analysis.

Rate Counsel also submits that Time Warner's reliance upon DBS penetration data and household data that are not reasonably contemporaneous in time to the filing date is insufficient to show that effective competition is present at the time of filing.¹⁹ Rate Counsel submits that due process requires application of a "complete when filed" rule so that reasonably contemporaneous data is supplied at the time of filing.²⁰ If a "complete when filed" rule is not required, the resulting decision is arbitrary and capricious. Rate Counsel incorporates by reference the arguments made in the two Applications for Review currently pending before the Commission in support of Rate Counsel's position on the need for a reasonably contemporaneous standard.²¹

As discussed above, the deficiencies in the data submitted by Time Warner render the Petition inadequate to show compliance with the 15% threshold of the "competing provider test." Rate Counsel also submits that the household and the satellite penetration data must be reasonably contemporaneous with one another at the time of filing. Without current and contemporaneous data for both households and DBS penetration, any determination made on mismatched data is arbitrary and capricious agency action.

^{19/} See, *I/M/O Cable Operator's Petitions for Reconsideration and Revocation of Franchising Authorities' Certifications to Regulate Basic Cable Service Rates*, 9 FCC Rcd 3656 (1994) ¶ 3. (In opposing LFA certifications, cable operators must rely on subscriber data as of or approximately as of the time of the certification, but no earlier than two months before the request for certification was filed.) Similarly, the data submitted in support of a petition for a determination of effective competition should be supported by data that is contemporaneous to the date the petition is filed.

^{20/} *Id.* See also, Opposition of Rate Counsel, dated December 2, 2004, *I/M/O Petition Service Electric of New Jersey for a Determination of Effective Competition in Morris County, Sussex County, and Warren County*, CSR-6404-E.

^{21/} See *Application for Review in I/M/O Petition of Cablevision of Rockland/Ramapo, Inc. for a Determination of Effective Competition in Montvale, NJ*, CSR-6537-E; *Petition of CSC TKR, Inc. d/b/a Cablevision of Elizabeth for a Determination of Effective Competition in Elizabeth, NJ*, CSR-6670-E; *Petition of Cablevision of Warwick LLC for a Determination of Effective Competition in West Milford, NJ*, CSR-6671-E, filed July 25, 2007; and *Application for Review in I/M/O Cablevision of Raritan Valley, Inc.*, CSR 6108-E; *Cablevision of New Jersey*, CSR 6169-E; *Cablevision of Monmouth*, CSR 6176-E, filed May 14, 2004.

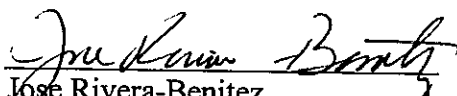
CONCLUSION

Rate Counsel respectfully submits that the Petition be dismissed or, in the alternative, denied.

Respectfully submitted,

RONALD K, CHEN
PUBLIC ADVOCATE

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By: 
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Dated: November 5, 2007

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