

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

In the matter of :	)	
	)	
Alert Cable T.V. of North Carolina, Inc. d/b/a	)	CSB-A-0689
Time Warner Cable	)	
	)	
Appeal of Local Rate Order of	)	
the Town of Cary, North Carolina	)	
	)	
	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 7, 2004**

**Released: January 8, 2004**

By the Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. Alert Cable T.V. of North Carolina, Inc. d/b/a Time Warner Cable (“TWC”) has filed an appeal of the local rate order adopted by the Town of Cary, North Carolina on February 27, 2003. The Town filed an opposition to the appeal and TWC filed a reply. Prior to TWC’s appeal of the local rate order, TWC had challenged the Town’s certification to regulate TWC’s basic service tier (“BST”) rate in a petition asserting that TWC is subject to effective competition.<sup>1</sup> The Commission recently made such a finding, and, consequently, TWC requests that the Commission vacate the Town’s rate order.<sup>2</sup>

**II. BACKGROUND**

2. The Communications Act provides that, where effective competition is absent, cable rates for the BST are subject to regulation by franchising authorities.<sup>3</sup> Rates for the BST should not exceed rates that would be charged by systems facing effective competition.<sup>4</sup> Under the Commission’s rules, rate orders issued by local franchising authorities may be appealed to the Commission. In ruling on an appeal of a local rate order, the Commission will sustain the franchising authority’s decision provided there is a reasonable basis for that decision, and will reverse a franchising authority’s decision only if the franchising authority unreasonably applied the Commission’s rules in its local rate order.<sup>5</sup> If the Commission reverses a franchising authority’s decision, it will not substitute its own decision but will remand the issue to the franchising authority with instructions to resolve the case consistent with the

<sup>1</sup> TWC’s effective competition petition was filed on July 1, 2002.

<sup>2</sup> See *Alert Cable TV of North Carolina, Inc., D/B/A Time Warner Cable*, 18 FCC Rcd 12848 (2003)(“*Alert*”).

<sup>3</sup> 47 U.S.C. § 543(a)(2).

<sup>4</sup> 47 U.S.C. § 543(b)(1); 47 C.F.R. § 76.922.

<sup>5</sup> See *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, 8 FCC Rcd 5631, 5731 (1993) (“*Rate Order*”); See also *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Third Order on Reconsideration*, 9 FCC Rcd 4316, 4346 (1994).

Commission decision on appeal.<sup>6</sup>

### III. DISCUSSION

3. On July 7, 2003 the Commission issued an order finding that TWC is subject to effective competition in Cary, North Carolina from the competing services provided by two unaffiliated direct broadcast satellite providers, DirecTV, Inc. and DISH Network.<sup>7</sup> Section 623(l) of the Communications Act provides that a cable operator is subject to effective competition, if any one of four tests for effective competition set forth therein is met.<sup>8</sup> TWC provided evidence of the advertising of DBS service in national and local media serving the franchise area, that the programming of the DBS providers satisfies the Commission's program comparability criterion, and that Cary is served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. With regard to the second prong of the competing provider test, TWC calculated the DBS subscriber penetration rate to be 17.25 percent and demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in Cary.<sup>9</sup> The Commission concluded that TWC satisfied both prongs of the competing provider test. A finding of effective competition exempts a cable operator from rate regulation.<sup>10</sup>

4. In its appeal of the rate order, TWC indicates that it filed its effective competition petition on July 1, 2002, that effective competition existed in the Cary community at the time of such filing, and argues that the Town's certification to regulate TWC's BST rates should be revoked. The Town adopted its rate order on February 27, 2003. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, however, TWC made the requisite showing.<sup>11</sup>

5. TWC first presented its evidence to the Commission demonstrating it is subject to effective competition in its petition seeking such a finding from the Commission on July 1, 2002. The Commission has recognized the filing date of the petition submitted in support of a finding of effective competition as the effective date that a cable operator is subject to competition.<sup>12</sup> We do so here as well. The Town cannot regulate TWC's rates in the Town of Cary, North Carolina after July 1, 2002. The revocation of certification removed the Town's jurisdiction to issue the rate order under appeal here. Accordingly, the Town's rate order with respect TWC for the community of Cary, North Carolina is without force or effect.

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<sup>6</sup> *Rate Order* at 5732.

<sup>7</sup> *See Alert Cable TV of North Carolina, Inc., D/B/A Time Warner Cable*, 18 FCC Rcd 12848 (2003) ("Alert").

<sup>8</sup> *See* 47 U.S.C. § 543(l)(1)(A)-(D).

<sup>9</sup> *See Alert*, 18 FCC Rcd at 12849.

<sup>10</sup> *See* 47 C.F.R. §76.905.

<sup>11</sup> 47 C.F.R. § 76.906.

<sup>12</sup> *See Falcon Cablevision (Thousand Oaks, California)*, 12 FCC Rcd 8229, 8234 (CSB 1997); *Rifkin and Associates, Inc., (Duluth, Georgia)*, 17 FCC Rcd 14233 (2002).

6. Accordingly, **IT IS ORDERED** that the Appeal of Alert Cable T.V. of North Carolina, Inc. d/b/a/ Time Warner Cable from the Rate Order by the Town of Cary, North Carolina **IS GRANTED** to the extent indicated herein and the local rate order **IS HEREBY VACATED AND SET ASIDE**.

7. This action is taken pursuant to authority delegated by § 0.283 of the Commission's rules.<sup>13</sup>

FEDERAL COMMUNICATIONS COMMISSION

John B. Norton  
Deputy Chief, Policy Division  
Media Bureau

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<sup>13</sup> 47 C.F.R. § 0.283.