

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

In the Matter of)	
)	
Time Warner Cable Inc.)	MB Docket No. 12-172, CSR-8663-E
)	
Petition for Determination of Effective Competition)	
in Eight Communities in Wisconsin)	

MEMORANDUM OPINION AND ORDER

Adopted: April 19, 2016

Released: April 19, 2016

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

I. INTRODUCTION AND BACKGROUND

1. Time Warner Cable Inc. (“Time Warner” or the “Company”) has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission’s rules for a determination that the Company is subject to effective competition in the communities listed on Attachment A (the “Communities”) because of competing service provided by a local exchange carrier (“LEC”). Time Warner alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(l)(1)(A) of the Communications Act of 1934, as amended (“Communications Act”),¹ and the Commission’s implementing rules,² and that it is therefore exempt from cable rate regulation in the Communities because of the competing service provided by AT&T Wisconsin (“AT&T”). The Cities of Racine and Kenosha filed oppositions, to which Time Warner filed a reply. The City of Racine also filed an answer to Time Warner’s reply. Time Warner filed additional responses.³

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.⁴ 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.⁵ For the reasons set forth below, we grant Time Warner’s petition.

¹ See 47 U.S.C. § 543(l)(1)(D).

² 47 C.F.R. § 76.905(b)(4).

³ One response included AT&T’s television lineup for the City of Racine’s five zip codes. See Letter from Craig A. Gilley, Edwards Wildman Palmer LLP, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (“Time Warner Initial Response”) (filed Aug. 31, 2012). The other response, which included a confidential version and a version for public inspection, addressed AT&T subscribership data. See Letter from Craig A. Gilley, Edwards Wildman Palmer LLP, Counsel for Time Warner Cable Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission (“Time Warner Supplemental Response”) (filed Mar. 20, 2014).

⁴ 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*”).

⁵ See 47 U.S.C. § 543(l)(1); 47 C.F.R. §§ 76.905(b), 76.906.

II. THE LOCAL EXCHANGE CARRIER TEST

3. Time Warner's petition seeks a finding of LEC effective competition for the Communities. The statutory test for a finding of LEC effective competition requires that the LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁶ The Commission has stated that an incumbent cable operator could satisfy the LEC effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator's service in the franchise area.⁷ It is undisputed that the Communities are served by both Time Warner and AT&T, a local exchange carrier, that these two MVPDs are unaffiliated, and that AT&T provides comparable programming to Time Warner.⁸ Time Warner has demonstrated that AT&T otherwise satisfies the LEC effective competition evidentiary requirements set forth in the *Cable Reform Order*.⁹

4. The Cities of Racine and Kenosha argue that Time Warner has failed to demonstrate that effective competition exists in the franchise areas under any of the four types of effective competition.¹⁰ However, as Time Warner correctly indicates in its reply, the petition only seeks an effective competition determination under the LEC test.¹¹ Thus, Time Warner only has to establish that it has met the requirements of the LEC test. Racine contends that Time Warner has not established that AT&T's buildout is sufficient based upon the Commission's prior orders involving the LEC test.¹² This argument is not persuasive because the LEC effective competition test does not require any particular penetration level.¹³ Moreover, Time Warner has demonstrated that AT&T's video subscriber penetration among the Cities of Racine and Kenosha Census occupied households is significant indicating that AT&T's service area substantially overlaps Time Warner's service in the franchise areas.¹⁴ The Cities of Racine and Kenosha also argue that Time Warner has not satisfied the LEC test because the marketing and comparable programming materials included in the petition were not specifically for their cities and did not reflect the proper zip codes for the franchise areas.¹⁵ To address these concerns, Time Warner submitted additional channel lineups, marketing material, and zip codes that specifically included the

⁶ 47 U.S.C. § 543(1)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4).

⁷ *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("*Cable Reform Order*"). The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so, that no regulatory, technical or other impediments to household service exist, that the LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased, that the LEC has actually begun to provide services, the extent of such services, the ease with which service may be expanded, and the expected date for completion of construction in the franchise area. *Id.* at 5305.

⁸ Petition at 7.

⁹ *See Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-15. *See also* Petition at 3-6.

¹⁰ Kenosha Opposition at 2-3; Racine Opposition at 2-4.

¹¹ Time Warner Reply at 2.

¹² Racine Opposition at 3-4.

¹³ *Cable Reform Order*, 14 FCC Rcd at 5303.

¹⁴ *See* Time Warner Supplemental Response at 1 (Confidential Response – Not for Public Inspection). The Cities of Racine and Kenosha did not request access to Time Warner's Confidential Supplemental Response.

¹⁵ Kenosha Opposition at 5; Racine Opposition 8-9.

Cities of Racine and Kenosha.¹⁶ The Time Warner and AT&T channel lineups submitted by Time Warner satisfy the effective competition test's comparable programming requirement.¹⁷ The Cities of Racine and Kenosha do not provide any evidence to counter that submitted by Time Warner. Accordingly, we find that Time Warner has submitted sufficient evidence demonstrating that its cable system serving the Communities has met the LEC test and is subject to effective competition.

III. THE COMPETING PROVIDER TEST

5. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to 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.¹⁸ This test is referred to as the "competing provider" test. Pursuant to the *Effective Competition Order*, absent evidence to the contrary, the Commission presumes that the competing provider test is met. Accordingly, even if we determined that Time Warner failed to satisfy its burden of demonstrating LEC effective competition in the Communities, we would presume that Time Warner was subject to competing provider effective competition in the Communities. The Cities of Racine and Kenosha argue that the competing provider test is not satisfied because the petition omits data necessary to determine whether the percentage of households served in the franchise area exceeds 15 percent.¹⁹ However, as Kenosha acknowledges, Time Warner did not include competing provider penetration percentages because the petition did not seek a finding of effective competition under the competing provider test.²⁰ Finally, it appears that Racine's opposition mistakenly combines the requirements for competing provider effective competition with the requirements for LEC effective competition, which causes it to question the lack of data under the competing provider test.²¹ As we have previously indicated, the petition was filed under the LEC effective competition test and thus, Time Warner did not provide evidence to satisfy the competing provider test.

IV. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Time Warner Cable, Inc. **IS GRANTED** as to the Communities listed on Attachment A hereto.

7. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to or on behalf of any of the Communities set forth on Attachment A **ARE REVOKED**.

¹⁶ Time Warner Initial Response at 1.

¹⁷ Time Warner Reply at 4. The "comparable programming" element of the LEC test is met if a competing provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming. See 47 C.F.R. § 76.905(g); see also Petition at 5.

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

¹⁹ Racine Opposition at 5; Kenosha Opposition at 4.

²⁰ *Id.*

²¹ Racine Opposition at 3-10.

8. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²²

FEDERAL COMMUNICATIONS COMMISSION

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

²² 47 C.F.R. § 0.283.

ATTACHMENT A

MB Docket No. 12-172, CSR 8663-E

COMMUNITIES SERVED BY TIME WARNER CABLE INC.

Communities	CUIDs
Elmwood Park, Village of	WI0049
Kenosha, City of	WI0498
Mt. Pleasant, Village of	WI0050
North Bay, Village of	WI0894
Pleasant Prairie, Village of	WI0500
Racine, City of	WI0006
Somers, Town of	WI0499
Wind Point, Village of	WI0048