

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

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| In re Petition of |) | CSR-8663-E | |
| |) | MB Docket No. 12-172 | |
| |) | | |
| |) | PSID #008466 | |
| TIME WARNER CABLE INC. |) | Elmwood Park, Village of | WI0049 |
| For Determination of |) | Kenosha, City of | WI0498 |
| Effective Competition |) | 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 |
| To: Chief, Media Bureau | | | |

REPLY

Time Warner Cable Inc. (“Time Warner Cable”), by its attorneys, and pursuant to Sections 76.7 of the Commission’s rules,¹ hereby responds to the Opposition filed by the City of Racine (the “City”) in response to the above-captioned Petition requesting a finding that Time Warner Cable’s cable television system serving the above-captioned communities (unless otherwise noted, individually “Franchise Area” and collectively “Franchise Areas”) is subject to effective competition under the LEC Test prong of Section 623(l)(1)(D) of the Communications Act of 1934.² For the following reasons, the arguments put forth in the City’s Opposition are without merit, and the Commission should deem the City of Racine, along with all the other Franchise Areas, subject to effective competition.

¹ 47 C.F.R. § 76.7.

² 47 U.S.C. § 543(l)(1)(D).

I. Most of the City’s Attacks On the Petition Can Be Disregarded As Time Warner Cable Is Solely Seeking A LEC Test Effective Competition Determination.

The Opposition, which focuses only on the Petition’s showing for Racine, is confused as to the scope of that showing. Instead of simply rebutting Time Warner Cable’s showing under the LEC Test prong, the Opposition goes to lengths to explain why Racine is not subject to effective competition under the three effective competition prongs not relied upon in the Petition. Specifically, the City unnecessarily provides extensive arguments why effective competition does not exist under the low penetration prong of Section 623(1)(1)(A), the 50/15 competing provider prong of Section 623(1)(1)(B), and the municipal system prong of Section 623(1)(1)(C).³ While Time Warner Cable reserves the right to demonstrate effective competition in Racine pursuant to any of these three prongs in the future, it is not doing so at this time. To clarify any confusion as to the scope of the Petition, Time Warner Cable is now solely requesting a determination that Racine is subject to effective competition pursuant the LEC Test prong. As such, all the City’s arguments regarding the other three prongs can be disregarded.

II. The City’s Remaining Attacks On Time Warner Cable’s LEC Test Showing Are Unavailing.

Under the LEC Test prong, a cable system is considered to be subject to effective competition where

a local exchange carrier [“LEC”] or its affiliate (or any multichannel video programming distributor using the facilities of such carrier 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, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁴

³ 47 U.S.C. § 543(1)(1)(A)-(C).

⁴ 47 U.S.C. § 543(1)(1)(D). The Commission has incorporated this test in Section 76.905(b)(4) of its rules. 47 C.F.R. § 76.905(b)(4).

As demonstrated in the Petition, the LEC Test is met in Racine due to the presence of AT&T Wisconsin (“AT&T”), the incumbent local exchange carrier which also provides a multichannel video service marketed as U-verse to Racine households. That claim is buttressed by AT&T itself, which has provided a supporting declaration confirming that its system “substantially overlaps” Time Warner Cable’s operations in Racine, that it faces no regulatory, technical or operational obstacles there, and that it is indeed actively marketing and providing U-verse service to residents throughout the City.⁵ As each of the elements of the LEC Test have been demonstrated and confirmed, there should be no doubt that effective competition exists in Racine.

Given the strength of the showing for Racine, each of the City’s rebuttal arguments are unconvincing. For example, there is no merit to the City’s assertion that the supporting declaration from AT&T is deficient in that it fails to provide exact numerical figures pertaining to AT&T’s operations in Racine. Unlike the other effective competition prongs, the LEC Test prong contains no pass or penetration thresholds whereby the submission of such figures is required.⁶ Further, the Commission has never required that any such figures be submitted to meet the LEC Test where, as in Racine, the LEC’s video system is fully built out and service is

⁵ See Petition at Exhibit C.

⁶ The Commission has repeatedly acknowledged that Congress very intentionally did not include any minimum homes passed or penetration standard in the LEC Test, and that a LEC’s presence (and especially the ILEC’s presence) can have a competitive impact upon a cable operator long before the LEC completes installing its plant or rolling out its services. *Implementation of Cable Act Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296, ¶¶ 9-15 (1999) (“*Cable Reform Order*”)(“We reject arguments that we should adopt penetration standards.”); *Implementation of the Cable Act Provisions of the Telecommunications Act of 1996*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5937, ¶ 72 (1996). See also *Armstrong Commun., Inc.*, 16 FCC Rcd 1039, ¶ 9 (2001) (LEC test does not specify any minimum amount of service to be offered by the LEC or include any penetration standards; it requires only that the offering be substantially more than *de minimis.*); *CoxCom, Inc.*, 14 FCC Rcd 7134, ¶ 24 (1999) (“Congress did not include a pass or penetration test in the LEC effective competition standard and the Commission has not indicated that it would impose such a test”), *reconsideration granted on other grounds*, 15 FCC Rcd 728 (2000).

offered throughout the community. For these reasons, there was no need for either the Petition or the declaration to provide such figures.

However, should the Bureau require additional details to confirm AT&T assertion that its operations “substantially overlap” Time Warner Cable’s in each of the Franchise Areas, the Bureau should request on its own motion, as provided in Section 76.907(c) of the Commission’s rules,⁷ that AT&T produce any required detailed information regarding such matters into the record. As explained in the Petition, AT&T has expressed a great deal of sensitivity about publicly divulging information about the extent of AT&T’s current operations in communities such as Racine, including current homes passed figures, current customer counts and maps detailing the exact geographic scope of its service. In order to respect AT&T’s desire to protect such information, Time Warner Cable would not object to such information being submitted under seal or subject to a protective order, and will agree to restrict access to any submitted information to only those persons directly participating in this proceeding. We assume the City would likewise respect AT&T’s request to protect the public dissemination of such information.

There is likewise no merit to the City’s complaint that the Petition’s supporting declarations lack specificity. For example, the City fails in its second attempted attack on the AT&T declaration that the declarant lacks sufficient familiarity to attest to the scope of AT&T’s marketing in Racine. The declaration was executed by Dan Alto, Director of Product Marketing Management at AT&T Service, Inc. (attached to the Petition as Exhibit C), and the AT&T executive responsible for AT&T’s U-verse sales and marketing efforts in southwest Wisconsin, where Racine is located. If there is somebody who knows where U-verse is available and where and how it is being marketed, it is Mr. Alto. He indicates, without qualification, that AT&T is both offering and actively marketing in each of the Franchise Areas, including Racine.

⁷ 47 C.F.R. § 76.907(c).

In response to the City's attack on the declaration by Ralph Newcomb, Time Warner Cable's Vice President of Technical Operations for southwest Wisconsin, and the Time Warner Cable employee who oversees Time Warner Cable's technical staff operating in Racine and surrounding areas, for failing to specifically mention Racine when describing to the scope of AT&T operations in the Franchise Areas, attached hereto at Exhibit 1 is a second declaration from Mr. Newcomb specifically attesting to his personal knowledge of the AT&T buildout in Racine and the other Franchise Areas, and the ubiquitous availability of AT&T's U-verse service in each of those areas.

The City likewise fails in its attempt to deny that AT&T's programming lineup is "comparable" to the programming offered by Time Warner Cable. Pursuant to Section 76.905(g), comparable programming exists when a competing multichannel video programming distributor offers at least twelve channels of video programming, including at least one channel of nonbroadcast service programming.⁸ As demonstrated by the AT&T channel lineup included in the Petition, AT&T offers over 300 channels of programming, including numerous nonbroadcast programming services such as ESPN, Home Box Office ("HBO") and CNN, as well as numerous local television broadcast stations such as WTMJ(NBC), WISN(ABC), WITI(Fox) and WDJT(CBS).⁹ As evidenced by Time Warner Cable's channel lineup provided in the Petition, AT&T lineup compares closely with the programming available on Time Warner Cable's cable system.¹⁰ Thus, as defined by the Commission, AT&T certainly offers comparable multichannel video programming to current and potential subscribers in all of the Franchise Areas including Racine.

⁸ 47 C.F.R. § 76.905(g).

⁹ See Exhibit A to the Petition, AT&T's local cable system channel directory.

¹⁰ See Exhibit F to the Petition, Time Warner Cable's local cable system channel directory.

The City, nonetheless, takes issue with the submitted lineups for two reasons. First, the City claims that the AT&T lineup submitted in the Petition lists only one (94301) of the eight zip codes overlapping Racine, and thus can not be taken as evidence that residents in the other seven zip codes are actually offered comparable programming. To rectify any question, and to confirm that AT&T's lineups in all eight Racine zip codes are identical, attached as Exhibits 2 through 8 are separate AT&T U-verse channel lineups for Racine zip codes 94302, 94303, 94304, 94305, 94306, 94307 and 94308. These seven additional channel lineups are indeed identical to each other and to the 94301 channel lineup submitted with the Petition. These lineups, just as the lineup for 94301, indicate that AT&T offers comparable multichannel video programming (including at least twelve channels of video programming and one channel of nonbroadcast service programming) to current and potential subscribers in all areas of Racine. Second, the City complains that the Time Warner Cable channel lineup submitted with the Petition, labeled Milwaukee Metro, does not list Racine specifically. To clarify any confusion, attached as Exhibit 9 is a Racine specific Time Warner Cable channel lineup card which contains all of the same programming as the Milwaukee Metro lineup card submitted with the Petition. There should now be absolutely no question that AT&T and Time Warner Cable offers comparable programming in Racine.

The City's final complaint, that the AT&T marketing materials submitted as Exhibit A to the Petition are not specific to Racine, is similarly easily rectified. Attached as Exhibit 10 are additional examples of AT&T U-verse marketing materials, including door hangers, brochures and direct mailings, which have been targeted and distributed to residents of Racine. These materials, combined with the materials earlier provided in the Petition, clearly indicate that Racine residents are well aware of the existence of AT&T U-verse service.

CONCLUSION

Because Time Warner Cable has demonstrated that it is subject to effective competition pursuant to the LEC Test in each of the Franchise Areas including Racine, and the City has failed to rebut those showings, Time Warner Cable respectfully requests that the Commission expeditiously find that Time Warner Cable's cable system serving those Franchise Areas is not subject to rate regulation as to basic cable service or other forms of rate regulation specified in 47 U.S.C. § 543 and revoke the LFAs' certification to regulate basic rates as appropriate.

Undersigned counsel have read the foregoing Reply, and to the best of such counsels' knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose.

Respectfully submitted,

Time Warner Cable Inc.

By: _____

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