

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

In the Matter of:)	CSR-5711-E
)	
Kansas City Cable Partners)	Lenexa, Kansas
)	CUID No. KS0087
Petition For Determination of)	
Effective Competition)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: October 17, 2001

Released: October 19, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Kansas City Cable Partners ("KCCP") has filed a Petition for Special Relief seeking a determination of effective competition pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission's rules.¹ KCCP asserts that it is subject to local exchange carrier ("LEC")² effective competition in Lenexa, Kansas because of the presence of Everest Connections Corporation ("ECC") cable services in that community. Everest submitted a late-filed pleading opposing Time Warner's request. Time Warner filed a reply. For the reasons discussed below, the petition is granted.

II. BACKGROUND

2. Section 623(a)(4) of the Communications Act of 1934, as amended ("Communications Act") allows franchising authorities to become certified to regulate basic cable service rates of cable operators that are not subject to effective competition.³ In the absence of a demonstration to the contrary,

¹ 47 C.F.R. §§ 76.7, 76.905(b)(4) and 76.907.

² The Communications Act of 1934, as amended, defines the term "local exchange carrier" as:

any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under Section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

47 U.C.S. § 153(26).

³ 47 U.S.C. § 543(a)(4).

cable systems are presumed not to be subject to effective competition as defined in the Communications Act.⁴ The cable operator bears the burden of rebutting the presumption that such effective competition does not exist and so must provide evidence sufficient to demonstrate that effective competition, as defined by Section 76.905 of the Commission's rules, is present in the franchise area.⁵ Section 623(1)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a 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

3. 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 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 service so that potential customers are aware that the LEC's services may be purchased, that the LEC actually has 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.⁸

III. DISCUSSION

4. KCCP states that it operates a cable television system serving Lenexa, Kansas. KCCP also states that ECC operates a franchised cable system that serves the same community. With regard to the LEC affiliation requirement, KCCP provides exhibits demonstrating that ECC is a local exchange carrier serving customers in Kansas.⁹ Therefore, as to the first part of the LEC effective competition test, which requires that the alleged competitive service be provided by a LEC or its affiliate (or any multichannel video programming distributor ("MVPD") using the facilities of such LEC or its affiliate), KCCP has provided sufficient evidence demonstrating that ECC is an MVPD affiliated with a LEC. Accordingly, KCCP satisfies the affiliation prong of the LEC effective competition test. We also find that KCCP is unaffiliated with ECC.

5. With regard to the requirement that the LEC competitor offer video programming service in the unaffiliated cable operator's franchise area, KCCP asserts that ECC is now providing such service to Lenexa subscribers. To substantiate its claim, KCCP has submitted ECC promotional material and ECC's franchise agreement with the City to show that competitive service is, and will be, available to

⁴ 47 U.S.C. § 543(1); *see also* 47 C.F.R. § 76.906.

⁵ 47 C.F.R. § 76.905; *see also* 47 C.F.R. § 76.906 & 76.907.

⁶ Communications Act, § 623(1)(1)(D), 47 U.S.C. § 543(1)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 623(1) may be referred to as the "LEC" effective competition test.

⁷ *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

⁸ *Id.*

⁹ KCCP Petition at 2-3, and Exhibit A-B.

subscribers throughout the franchise area.¹⁰ KCCP notes that Everest's cable system already passes at least 50 percent of the more than 15,000 households in Lenexa, and that the company plans to pass 100 percent of the households no later than September 2005.¹¹ KCCP states that ECC's build-out requirements taken pursuant to its franchise, prove that there are no regulatory, technical or other impediments to the receipt of ECC's service by Lenexa residents.¹² In response to ECC's competitive presence, KCCP also notes that it is now offering special package rates to Lenexa residents who purchase both cable and internet services. While ECC has not wired the entire franchise area, we nevertheless find that competitive cable service is available to a substantial number of city residents, sufficient to satisfy this element of the LEC effective competition test.

6. KCCP also demonstrates that potential subscribers in Lenexa are reasonably aware that they may purchase the services offered by ECC. KCCP has submitted exhibits to illustrate that ECC has engaged in marketing and public relations efforts as evidence that Lenexa residents are reasonably aware that they may purchase ECC's video service.¹³ As noted by KCCP, because subscribers in the community already have signed up for of ECC's service, it must be assumed that other residents throughout the area are reasonably aware of ECC's cable service offerings.¹⁴ Based on all of the information before us, we find that ECC's promotional strategies in Lenexa are sufficient to satisfy this part of the LEC effective competition test.

7. We also find that KCCP has submitted sufficient evidence to demonstrate that the programming of ECC is comparable to that which it provides. The channel lineup for ECC submitted by KCCP establishes that ECC offers over 100 channels, including nonbroadcast programming services such as ESPN, Home Box Office ("HBO") and CNN, as well as several local broadcast channels.¹⁵ This channel lineup compares closely with the programming available on KCCP's system serving Lenexa.¹⁶ Accordingly, we find that KCCP has satisfied the Commission's programming comparability criterion.¹⁷

8. We note that Everest had submitted a late filed pleading. It asks the Commission to consider its response because it did not receive notice that Time Warner's Petition was filed until after the date timely oppositions were due.¹⁸ Time Warner notes that it is not required to serve Everest because it is not affected by the Petition as is the case with local franchising authorities.¹⁹ We find that Time Warner should have served Everest because it is an "interested person who is likely to be directly affected if the relief requested is granted" under Section 76.7 of the Commission's rules.²⁰ In this instance, Time Warner

¹⁰ *Id.* and 4-5, and Exhibit A and C.

¹¹ *Id.*

¹² *Id.* at 6-7.

¹³ *Id.*, and Exhibit A.

¹⁴ *Id.* at 7.

¹⁵ *Id.* at 8 and Exhibit A.

¹⁶ *Id.* at 9, and Exhibit E.

¹⁷ 47 C.F.R. § 76.905(g).

¹⁸ See Motion to File Out of Time Everest's Response to Petition for Special Relief Filed by Kansas City Cable Partners, filed with the Commission on July 26, 2001.

¹⁹ See Time Warner's Reply at n. 1.

²⁰ See 47 C.F.R. § 76.7(a)(3).

will be able to compete, in terms of services, prices, and promotions, with Everest without the restraints imposed under Section 623 of the Act. Untethered competition from Time Warner will directly affect Everest's business plans and marketing activities. Given this conclusion, we believe the public interest requires that Everest's substantive claims should be considered.

9. Everest argues that the LEC test is not the appropriate measure to evaluate Time Warner's petition because this test was intended for operators facing effective competition from regional bell operating companies, not small entities like itself.²¹ Instead, Everest argues that Time Warner should refile its Petition for a determination that it is subject to effective competition when it meets the competing provider test.²² Time Warner states that Everest attempts to reinterpret both the Communications Act and Commission precedent by arguing that the LEC test is inapplicable to competing local exchange carriers ("CLECs").²³ Time Warner argues that had Congress intended for the test to only apply to incumbent LECs, it would have made that distinction in Section 543(1)(1)(D) as it did elsewhere in the Act.²⁴ We agree with Time Warner. The Act does not limit the LEC test to regional bell operating companies. As such, we are obliged to apply the LEC test to all local exchange carriers that offer multichannel video programming, regardless of their size or class.

10. Everest also argues that Time Warner is contravening the law because it is offering disparate prices for certain types of services in the franchise area prior to a determination of effective competition.²⁵ Time Warner argues that its promotional campaign, which concerns cable modem services and premium channels, is legal because the uniform rate rule does not cover such services.²⁶ Time Warner also argues that its promotion is valid because it has not specifically targeted Everest customers.²⁷ We agree with Time Warner. The geographic uniformity requirement is not applicable to non-video services, such as cable modem service, or to pay-per-view and per channel video services.²⁸

²¹ See Everest's Response to Petition for Special Relief Filed by Kansas City Cable Partners and Expedited Request for Declaratory Ruling at 2-8 (Everest Response).

²² See 47 U.S.C. § 543(l)(1)(B).

²³ See Time Warner Reply at 2.

²⁴ *Id.* at 3; compare 47 U.S.C. § 251(h) (definition of incumbent local exchange carrier) with 47 U.S.C. § 541(l)(1)(D) (LEC test provision).

²⁵ See Everest Response at 10.

²⁶ See Time Warner Reply at 5.

²⁷ *Id.*

²⁸ See 47 C.F.R. § 76.984(a), (c)(2).

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that the Petition for Special Relief filed by KCCP Cable Partners seeking a determination that its cable television system serving Lenexa, Kansas is subject to effective competition **IS GRANTED**.

12. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended.²⁹

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief
Cable Services Bureau

²⁹ 47 C.F.R. § 0.321.