

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

In the Matter of:)	
)	
Time Warner Entertainment- Advance/Newhouse Partnership)	CSR 5365-E
)	
d/b/a Time Warner Communications)	
)	
Petition for Determination of Effective Competition)	Largo, FL FL 0047, FL 0824
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2001

Released: February 9, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Time Warner Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Communications ("Time Warner") has filed a petition for special relief seeking a determination of effective competition. Time Warner asserts that it is subject to local exchange carrier ("LEC")¹ effective competition in Largo, Florida ("Largo" or the "City") because of the cable operations of GTE Media Ventures, Inc. ("GTE"). GTE is an unaffiliated franchised cable operator serving Largo. No oppositions to this petition have been filed. For the reasons discussed below, Time Warner's petition is granted.

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 which are not subject to effective competition.² For purposes of the initial request for certification, local franchising authorities may rely on a presumption that cable operators within their jurisdiction are not subject to effective competition unless they have actual knowledge to the contrary.³

¹The Communications Act 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.

Communications Act § 3(26), 47 U.S.C. § 153(26).

²Communications Act §623(a)(4), 47 U.S.C. §543(a)(4).

³47 C.F.R. §§76.906, 76.910(b)(4).

Certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.⁴ Section 623(1)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition where:

a local exchange carrier 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.⁵

To support a finding of effective competition under the LEC test, the LEC's cable service must substantially overlap the incumbent cable operator's service in the franchise area.⁶ The Commission considers a LEC's potential service area as well as where it actually offers service in determining effective competition under the LEC test.

II. DISCUSSION

3. Time Warner asserts that it is subject to LEC effective competition in its franchise area. With regard to the LEC affiliation requirement,⁷ Time Warner contends that GTE is a competing, franchised cable operator controlled by GTE Corporation, which is the incumbent local exchange carrier serving the City of Largo.⁸

4. With regard to the requirement that the LEC competitor offer⁹ video programming service in the unaffiliated cable operator's franchise area, Time Warner asserts that GTE is physically able to

⁴47 C.F.R. §76.910(e); 47 C.F.R. §76.910(b); *see also* Communications Act §623(a)(4), 47 U.S.C. §543(a)(4).

⁵Communications Act §623(1)(1)(D), 47 U.S.C. §543(1)(1)(D); *see* 47 C.F.R. §76.905(b)(4).

⁶*See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296 (1999).

⁷The Commission determined that the definition of affiliate provided in Section 3 of the 1996 Act will apply to the LEC effective competition test:

The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.

Cable Act Reform Order, 11 FCC Rcd at 5944 (quoting Communications Act § 3(1), 47 U.S.C. § 153(1)).

⁸Petition at 4.

⁹In implementing the LEC effective competition test on an interim basis, the Commission determined that its pre-existing definition of the term "offer" as used in the three effective competition definitions set forth in the 1992 Cable Act would apply to the LEC test. *Cable Act Reform Order*, 11 FCC Rcd at 5942. The Commission previously determined that service of a multichannel video programming distributor will be deemed offered:

(1) When the multichannel video programming distributor is physically able to deliver

(continued...)

deliver service to potential subscribers in Largo.¹⁰ Time Warner asserts that GTE has completed construction of its cable system in a substantial portion of the City and in fact, construction is complete in the entire western portion of Largo. It also states that affidavits from its customer service representatives indicate that calls have been processed requesting disconnection of Time Warner's service in order to switch to the cable service offered by GTE.¹¹ Approximately 224 households in Largo are subscribing to GTE's cable service in one portion of GTE's service area.¹² Time Warner contends that no regulatory, technical or other impediments exist to the receipt of GTE's service in Largo.¹³

5. Time Warner also asserts that potential subscribers in its franchise area are reasonably aware that they may purchase GTE's cable service in the City because GTE has aggressively marketed its product throughout the area.¹⁴ It explains that GTE has placed prominent advertisements in the St. Petersburg Times, a widely-circulated newspaper serving Pinellas County, including Largo, and that the newspaper has run several stories regarding the franchising process and the availability of GTE's cable service in the City.¹⁵ Time Warner asserts that GTE's marketing efforts have included an intense door-to-door marketing campaign.¹⁶ Time Warner provides marketing materials and newspaper articles about GTE¹⁷ and asserts that residents of the City are undoubtedly aware of GTE's presence as a cable operator in Largo.

6. Time Warner also asserts that GTE offers comparable programming to Largo subscribers. Specifically, Time Warner provides GTE's channel line-up which indicates that GTE offers 130 channels, many of which are local television broadcasting stations.¹⁸ Time Warner offers a comparable number channels of programming, including several local television broadcasting signals.¹⁹

7. In the absence of a demonstration to the contrary, cable systems are presumed not to be

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service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service; and (2) When no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the multichannel video programming distributor.

47 C.F.R. §76.905(e).

¹⁰Petition at 5-6.

¹¹See Exhibit C.

¹²See Exhibit D.

¹³Petition at 7.

¹⁴Petition at 7-8.

¹⁵Petition at 7.

¹⁶Petition at 8.

¹⁷See Exhibits F and G.

¹⁸Petition at 9 and Exhibit H.

¹⁹*Id.* at 9 and Exhibit I.

subject to effective competition as defined in the Communications Act.²⁰ The cable operator bears the burden of rebutting the presumption that such effective competition does not exist and 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.²¹ Time Warner has met this burden.

8. With regard 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 multi-channel video programming distributor ("MVPD"))²² using the facilities of such LEC or its affiliate), we find that Time Warner has provided sufficient evidence demonstrating that GTE Media Ventures is controlled by GTE Corporation, which is unquestionably a LEC as defined by the Communications Act.²³ We find that Time Warner satisfies the affiliation prong of the LEC effective competition test. We further find that Time Warner is not affiliated with GTE Media Ventures or GTE Corporation.

9. We also find that Time Warner has submitted sufficient evidence to show that the programming of GTE is comparable to the programming which it provides. The channel information for GTE submitted by Time Warner establishes that GTE offers more than 130 channels of programming, including numerous non-broadcast stations. This offering satisfies the programming comparability criterion.²⁴

10. We find that, based on the information before us, GTE is offering service in Time Warner's franchise area sufficient to demonstrate the presence of effective competition. GTE has completed construction of its cable plant system in a substantial portion of the City and it is able to physically deliver service to potential subscribers. Numerous households in the City are currently subscribing to GTE's cable service. Thus, residents in Largo are being served, and more undoubtedly will be served once GTE's cable construction is completed. We also conclude that no regulatory, technical or other impediments prevent potential subscribers from receiving GTE's service.

11. GTE's marketing efforts and the wide press coverage of GTE's construction and cable service offerings in the local media ensure that potential subscribers are reasonably aware of the availability of GTE's cable service. According to an advertisement in the St. Petersburg Times submitted by Time Warner, in those areas wired and marketed by GTE, potential subscribers have been offered a promotional package involving free installation and two months of free GTE cable service. In addition, several articles in that same publication have discussed GTE efforts to construct its system and thereby continue to inform potential subscribers about the availability of GTE. Consistent with the Congressional intent in adopting Section 623(l)(1)(D) of the Communications Act, under the circumstances presented herein, we find that effective competition is present.

²⁰47 C.F.R. §76.906.

²¹47 C.F.R. §76.911(b)(1).

²²The Commission's rules define a MVPD as "an entity such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, a television receive-only satellite program distributor, a video dialtone service provider, a satellite master antenna television service provider that makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 C.F.R. § 76.905(d).

²³Communications Act § 3(26), 47 U.S.C. § 153(26).

²⁴47 C.F.R. § 76.905(g).

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the Petition for Special Relief seeking a determination of effective competition filed by Time Warner Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Communications **IS GRANTED**.

13. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended.²⁵

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

²⁵47 C.F.R §0.321.