

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

In the Matter of:)
)
Time Warner Entertainment-)
Advance/Newhouse Partnership)
)
d/b/a Time Warner Communications)
)
For Change in Regulatory Status and)
Petition for Revocation of the Certification)
of the City of Cocoa, Florida)
(FL 0004, FL 0164, FL 0012, FL 0018))

MEMORANDUM OPINION AND ORDER

Adopted: February 8, 2001

Released: February 9, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Time Warner Entertainment-Advance/Newhouse d/b/a Time Warner Communications ("Time Warner"), pursuant to Section 76.915(f) of the Commission's rules,¹ has filed a petition with the Commission seeking a change in its regulatory status based upon the presence of effective competition in the City of Cocoa and communities of Cocoa Beach, Melbourne Beach, and Patrick Air Force Base ("Patrick AFB"), Florida (collectively, the "Communities"). Time Warner also seeks a waiver of certain provisions of its Social Contract.² Specifically, Time Warner argues that it is subject to competing provider effective competition due to the competing service offered by Wireless Broadcasting Systems of Melbourne ("WBS"), an unaffiliated wireless cable operator/multichannel multipoint distribution service ("MMDS") provider, as well as other competing multichannel video programming distributors ("MVPDs").³ In addition, Time Warner seeks revocation of the certification of the City of Cocoa, Florida ("Cocoa") to regulate basic cable service rates. No oppositions were filed.

¹Section 76.915(f) is no longer part of the Commission's rules. We will, however, treat Time Warner's petition as a request for a determination of effective competition pursuant to Section 76.7 of our rules. See 47 C.F.R. § 76.7. Three of the communities at issue, Cocoa Beach, Melbourne Beach, and Patrick AFB, are not certified to regulate basic cable rates. The City of Cocoa is certified to regulate rates. Consequently, we will resolve this aspect of Time Warner's petition pursuant to Section 76.914 of the Commission's rules which permits a cable operator to petition the Commission to revoke the certification of a local franchising authority. 47 C.F.R. § 76.914.

²Social Contract for Time Warner, 11 FCC Rcd 2788 (1996).

³Time Warner filed a similar petition to change the regulatory status for various cities and towns in Florida, including Cape Canaveral, Melbourne, Satellite Beach, Indiatlantic, Malabar, and Palm Shores. That petition was granted. See Time Warner Entertainment-Advance/Newhouse Partnership, *Memorandum Opinion and Order*, 13 FCC Rcd 12517 (1998).

2. Section 623(a)(4) of the Communications Act permits local franchising authorities to become certified to regulate the basic cable service and associated equipment rates of cable operators within their jurisdictions who are not subject to effective competition.⁴ For purposes of the initial request for certification, franchising authorities may rely on the presumption that cable operators are not subject to effective competition, unless the franchising authority has actual knowledge to the contrary.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:

- (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and
- (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.⁶

II. DISCUSSION

3. Time Warner alleges that its cable systems serving the Communities are subject to competing provider effective competition and, therefore, are exempt from rate regulation pursuant to the Commission's rules. Time Warner asserts that it is subject to effective competition due to the presence and availability of WBS' wireless cable service in the Communities, as well as other competing multichannel video programming distributors ("MVPDs").⁷ The first prong of the competing provider test requires that at least two unaffiliated multichannel video programming distributors ("MVPDs") each offer comparable programming to at least 50 percent of the households in the communities at issue. Time Warner argues that it and WBS each offers comparable programming to at least 50 percent of the households in the Communities.⁸ With regard to WBS, Time Warner provides the geographic coordinates of WBS' transmitter and states that the transmitter is in place and operational.⁹ Time Warner states that the Communities are all located within 35 miles of WBS' transmitter site and line-of-sight area.¹⁰ Time Warner further states that there are no regulatory impediments to receipt of WBS' service in the franchise area and that WBS currently has over 10,000 subscribers in the Communities.¹¹ Time Warner further

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

⁵47 C.F.R. § 76.910(b).

⁶Communications Act of 1934, as amended, § 623(l)(1)(B), 47 U.S.C. § 543 (l)(B); *see also*, C.F.R. § 76.905(b)(2).

⁷Petition at 2.

⁸Section 76.905(e) of the Commission's rules state that, for purposes of effective competition, service by an MVPD is deemed offered "when the [MVPD] is physically able to deliver 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) [w]hen 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 [MVPD]." 47 C.F.R. § 76.905(e).

⁹Petition at 3.

¹⁰*Id.* Time Warner provides a shadow map of the franchise area at Exhibits B and C.

¹¹Petition at 4.

states that subscribers are reasonably aware of WBS' services because of the presence of WBS subscribers, WBS marketing materials appear in Florida Today and a local newspaper, and that pamphlets regarding the service are distributed throughout the franchise area.¹² As a result, Time Warner argues that WBS clearly offers service to more than 50 percent of the households in the Communities.

4. Time Warner also maintains that DBS providers also offer comparable programming to at least 50 percent of the households in the Communities.¹³ Time Warner states that the Commission has recognized that DBS is available nationwide¹⁴ and has presumed that DBS providers satisfy the 50 percent threshold.¹⁵ Thus Time Warner maintains that it satisfies the requirements of this part of the first prong of the competing provider test.

5. The first prong of the competing provider test also requires that at least two competing providers offer comparable programming. Time Warner states that WBS' programming is comparable to its own because WBS currently offers 34 channels of programming, including numerous non-broadcast programming services¹⁶ and local television broadcast stations.¹⁷ Time Warner further states that DBS offers comparable programming in accordance with Commission rules. Time Warner maintains that, because of the similar channel line-ups offered by itself and WBS, the communities are being served by at least two unaffiliated MVPDs each of which offer comparable programming.

6. The second prong of the competing provider test requires that at least 15 percent of the households in the Communities be subscribers to MVPDs other than the largest MVPD.¹⁸ Time Warner maintains that WBS, the smallest of the MVPDs, meets that requirement and states that there are sufficient subscribers of WBS, and in one case WBS and unaffiliated DBS subscribers, such that the 15% competing MVPD penetration requirement is met in the Communities.¹⁹ Time Warner submitted data comparing its current subscribers with 1990 Census data to show that the following percentages of households subscribe to WBS: 20.36% in Cocoa Beach; 17.32% in Melbourne Beach; and 23.1% in Patrick AFB. The following percentage of households subscribe to WBS and DBS: 16.49% in Cocoa. Time Warner argues that, because it has shown that the requirements of the competing provider effective competition test have been satisfied, its Petition should be granted.

¹²*Id.* at Exhibit E.

¹³*Id.* at 7.

¹⁴*Id.* citing Reexamination of the Effective Competition Standard for the Regulation of Cable Television Basic Service Rates, MM Docket No. 90-4, 6 FCC Rcd 4545 (1991) at ¶ 42 and n. 52 (DBS service presumed to be available nationwide when any one DBS licensee begins operations).

¹⁵*Id.* citing Paragon Communications and Time Warner Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Communications v. City of Lakeland, FL, *Memorandum Opinion and Order*, 13 FCC Rcd 5913 (1997).

¹⁶Petition at 5. Time Warner states that these channels include ESPN, Home Box Office, and CNN.

¹⁷Petition at 6.

¹⁸47 C.F.R. § 76.905(b)(2).

¹⁹Petition at 7.

7. Time Warner further argues that the Commission should modify application of certain provisions of the Social Contract to its cable service in the Communities. The effect of Time Warner's request would be that Time Warner cable service in the Communities would:

(1) no longer be subject to a price cap on either its basic service tier ("BST")²⁰ or its cable programming service tier ("CPST"),²¹

(2) be permitted to add additional channels to its BST at any time;²²

(3) be permitted to establish its equipment rates without regard to regional equipment costs or blended rates;²³

(4) no longer be subject to price caps or a limit on the number of channels migrated to its Migrated Product Tiers ("MPT");²⁴ and,

(5) not be subject to any regulations established by the Commission governing annual adjustments to BST or CPST rates.²⁵

Time Warner states that, regardless of its request for modification, it will remain bound by all other applicable provisions of the Social Contract, including the infrastructure upgrade requirement.²⁶

A. Effective Competition

8. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,²⁷ as that term is defined by Section 76.905 of the Commission's rules.²⁸ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area. In the instant case, Time Warner seeks to demonstrate that it is subject to competing provider effective competition as a result of WBS' wireless cable service and the service offered by DBS providers in the cable communities at issue.

²⁰Social Contract at Section III.A.2.

²¹*Id.* at Section III.F.4.

²²*Id.* at Section III.A.3.

²³*Id.* at Section III.B.

²⁴*Id.* at Section III.D. The Social Contract defines an MPT to mean "(a) a tier consisting of up to four services moved from a system's existing BST or CPST(s)... or (b) any Superstation Tier or any tier consisting of those services remaining on a Preferred Tier ... after any excess channels have been shifted to CPST." Social Contract at 3. A Superstation Tier is defined as "low-priced collective offering, containing primarily superstations, at an average price of less than \$0.29 per channel, excluding copyright fees." *Id.* at 9. A Preferred Tier is defined as "a low-penetrated collective offerings predominately containing channels which had been affirmatively marketed as a separate tier before offered on an a la carte basis." *Id.*

²⁵*Id.* at Section III.G.

²⁶Petition at 9.

²⁷47 C.F.R. § 76.906.

²⁸47 C.F.R. § 76.905.

9. With regard to the first prong of the competing provider test, Time Warner introduced evidence from the 1990 Census to show that WBS as well as DBS providers offer service to at least 50 percent of the households in the Communities. We find that Time Warner has demonstrated that at least two MVPDs offer service to at least 50 percent of the households in the franchise area. Time Warner relied on the Commission's presumption that the nationwide availability of DBS satisfies the 50 percent threshold. The Commission has stated that, in the absence of evidence to the contrary, DBS service providers are presumed to satisfy the requirement of offering service to 50 percent of households in the franchise area.²⁹ We also find that Time Warner, WBS, and the DBS service providers each meets the Commission's definition of "comparable programming" contained in Section 76.905(g) because each offers "at least twelve channels of programming, including at least one channel of non-broadcast programming."³⁰ Time Warner's and WBS' channel line-ups indicate that each is offering more than the minimum number of channels of both broadcast and non-broadcast channels in the Communities.³¹ We therefore conclude that at least two MVPDs are offering comparable programming to at least 50 % of the households in each franchise area, and that the first prong of the competing provider test is satisfied.

10. The second prong of the competing provider test requires that the number of households subscribing to WBS, an MVPD other than the largest MVPD, exceeds 15 percent of the households in each of the Communities. Time Warner submitted sufficient evidence demonstrating that WBS provides service to 20.36% of the households in Cocoa Beach, 17.32% of the households in Melbourne Beach, 23.1% of the households in Patrick AFB, and that WBS and the DBS providers provide service to 16.49% in Cocoa, Florida.³² We find that Time Warner has demonstrated that WBS' penetration rate in the Communities satisfies the requirement of the second prong of the competing provider test. We conclude that Time Warner has established that both prongs of the competing provider effective competition test have been met and, accordingly, we grant Time Warner's petition for a determination of effective competition and revoke the certification of the City of Cocoa.

B. Social Contract

11. The Commission and Time Warner negotiated the Social Contract in order "to provide upgrade incentives for Time Warner and to provide rate stability and increased quality of service for its consumers."³³ The Social Contract provides that Time Warner may, in the event of any relevant change in applicable laws, regulations or circumstances, petition the Commission to modify or terminate the Social Contract.³⁴ Time Warner is required to serve any such petition to modify or terminate the Social Contract on the local franchising authorities for the affected systems.³⁵

²⁹See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

³⁰47 C.F.R. § 76.905(g).

³¹Petition at Exhibit F and G.

³²Petition at 8.

³³Social Contract, 11 FCC Rcd at 2790. The Social Contract also resolved numerous rate cases and provided refunds to subscribers.

³⁴*Id.* at 2824. Time Warner may elect not to be bound by the relevant portions of the Social Contract should there be (continued....)

12. Time Warner's petition is based upon a change in circumstance, *i.e.*, the presence of effective competition in the Communities. We have found that Time Warner has demonstrated that its cable systems serving the Communities face effective competition from WBS, a competing provider of wireless cable service and from the service offered by DBS providers. Under the Commission's rules governing rate regulation, the rates of cable systems that are found to be subject to effective competition are not regulated.³⁶ Time Warner has requested that the Commission waive certain rate provisions of the Social Contract, namely, Sections III.A.2 (price cap on the BST); III.A.3 (additions to the BST); III.B (equipment rates); III.D (price caps on the MPT); III.F.4 (price cap on the CPST); and III.G (annual rate adjustments to the BST and CPST). Each of those provisions of the Social Contract pertain to regulation of service and equipment rates on a regulated tier of cable service. In light of the expiration of the Social Contract in the year 2000, this request is now moot.

III. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the Petition for a determination of effective competition filed by Time Warner Entertainment-Advance/Newhouse Partnership d/b/a Time Warner Communications, pursuant to Section 76.905(b)(2) of the Commission's rules, 47 C.F.R. § 76.905(b)(2), **IS GRANTED**.

14. **IT IS FURTHER ORDERED** that the certification of the City of Cocoa to regulate cable rates **IS REVOKED**.

15. This action is taken pursuant to delegated authority under Section 0.321, 47 C.F.R. § 0.321, of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

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any material change in the 1992 Cable Act or the Commission rules that would favorably impact Time Warner. However, even if the statutory or regulatory provisions concerning rate regulation change, Time Warner remains bound to the non-rate provisions of the Social Contract.

³⁵*Id.*

³⁶47 C.F.R. § 76.906.