

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

In the Matter of:)	
)	
)	CSR 5637-E
Time Warner Entertainment-Advance/Newhouse)	
Partnership, d/b/a Time Warner Cable)	
)	
Petitions for Determination of Effective)	
Competition in Waco, Texas (CUID No. TX0230))	

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 2001

Released: March 2, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Time Warner Entertainment-Advance/Newhouse Partnership, d/b/a Time Warner Cable (“Time Warner”) has filed with the Commission a petition¹ pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission's rules for revocation of the certification of the City of Waco, Texas to regulate basic cable service rates due to the presence of effective competition in Waco, Texas. Time Warner alleges that its cable system serving Waco is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended (“Communications Act”),² and the Commission's implementing rules,³ and is therefore exempt from cable rate regulation. Time Warner claims the presence of effective competition in Waco stems from the competing services provided by ClearSource, Inc. (“ClearSource”), a franchised cable operator that also provides local exchange carrier (“LEC”) service in Waco. No opposition to this petition was filed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with

¹See Public Notice, Cable Services Bureau Registrations; Special Relief and Show Cause Petitions, Report No. 1296, dated December 26, 2000.

²47 U.S.C. § 543(a)(2).

³47 C.F.R. § 76.905(b)(4).

⁴47 C.F.R. § 76.906.

⁵47 C.F.R. § 76.905.

evidence that effective competition is present within the relevant franchise area.⁶ Section 623(l)(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.⁷

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.⁸ 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.⁹

II. DISCUSSION

4. Time Warner operates a cable television system in Waco for which it seeks a determination of effective competition. Time Warner qualifies as the incumbent cable operator within Waco for purposes of the “LEC” effective competition test at issue in this proceeding.¹⁰ Time Warner provided information showing that ClearSource is a telephone company that provides telephone exchange and other telephone services within Waco.¹¹ Therefore, ClearSource qualifies as a “LEC” for purposes of the “LEC effective competition” test.¹²

5. In addition to qualifying as a LEC, ClearSource was awarded a 15-year local unrestricted franchise for the provision of cable service within the City of Waco on January 5, 1999. Time Warner submits evidence that ClearSource has substantially completed construction of its Waco cable system which passes approximately 35,000 of an estimated 52,200 homes in Waco.¹³ ClearSource has also distributed marketing materials within Waco pointing out that Waco’ residents need only call ClearSource for installation of its cable services.¹⁴

⁶See 47 C.F.R. §§ 76.906 & 907.

⁷Communications 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 632(l) may be referred to as the “LEC” effective competition test.

⁸See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) (“*Cable Reform Order*”).

⁹*Id.*

¹⁰Time Warner Petition at 4. Time Warner offers 70 channels of programming at a cost of \$29.95, an increase from 62 channels at a cost of \$32.29 before ClearSource began offering service, in Waco. *Id.* at 8, n. 30.

¹¹*Id.* at 2-3 & Exhibits A & B.

¹²See 47 U.S.C. § 543(1)(1)(D); 47 U.S.C § 153(a)(1).

¹³Time Warner Petition at 5 and Exhibit D.

¹⁴*Id.* at 6 and Exhibit A (consisting of direct marketing letters, customer bill inserts, web site materials (*see* (continued...))

6. ClearSource's marketing materials show that its cable service offers 70 channels of video programming that includes non-broadcast programming services such as ESPN, HBO CNN, as well as a complement of local television broadcast stations, such as KCEN-TV (NBC), KXXV-TV (ABC), and KWTX-TV (CBS).¹⁵ This complement of programming services compares closely with the programming available on Time Warner's systems.¹⁶ Therefore, ClearSource provides comparable programming as required by the "LEC" effective competition test. Time Warner's petition also provides substantial evidence that there are no regulatory, technical or other impediments to ClearSource's provision of cable service within Waco, and that ClearSource is able to provide cable service that overlaps Time Warner's service.¹⁷

7. Time Warner has also shown that ClearSource has commenced providing cable service within Waco, is marketing its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfies the "LEC" effective competition test consistent with evidentiary requirements set forth in the *Cable Reform Order*.¹⁸ Based on the foregoing, we conclude that Time Warner has submitted sufficient evidence demonstrating that its cable system serving Waco, Texas is subject to effective competition.

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the petition for revocation of the certification of the City of Waco, Texas to regulate basic cable service rates in Waco, Texas and for a determination of effective competition in Waco, Texas, filed by Time Warner **IS GRANTED**.

9. **IT IS FURTHER ORDERED** that the certification pursuant to Section 76.910 of the Commission's rules¹⁹ of the City of Waco, Texas, to regulate basic cable service rates in Waco, Texas, **IS HEREBY REVOKED**.

10. This action is taken pursuant to delegated authority pursuant to Section 0.321 of the Commission's rules.²⁰

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

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<http://www.clearsource.com/waco/residential/default.asp>), and channel line-ups from various periodicals.)

¹⁵*Id.* at 2-3, 8 and Exhibit A.

¹⁶*Id.* at 8 and Exhibit F.

¹⁷*Id.* at 4-6 and Exhibit A.

¹⁸14 FCC Rcd at 5305.

¹⁹47 C.F.R. § 76.910.

²⁰47 C.F.R. § 0.321.