

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

In the Matter of:	)	CSR 5166-E
	)	
Time Warner Entertainment-	)	
Advance/Newhouse Partnership	)	
d/b/a Time Warner Cable	)	Somerville, MA
	)	CUID No. MA0057
Petition for Determination of	)	
Effective Competition	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 3, 1999**

**Released: February 5, 1999**

By the Chief, Cable Services Bureau:

**I. INTRODUCTION**

1. Time Warner Cable ("Time Warner") filed a petition asserting that it is subject to effective competition in the City of Somerville, Massachusetts ("Somerville" or the "City") from RCN-BecoCom, L.L.C. ("RCN"), an affiliate of a local exchange carrier ("LEC")<sup>1</sup> that is offering cable service in Somerville. In addition, Time Warner filed two supplements to its petition. No oppositions to Time Warner's submissions were filed.

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.<sup>2</sup> 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.<sup>3</sup> Certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.<sup>4</sup> In *Implementation of Cable Act Reform Provisions of the*

---

<sup>1</sup>The 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).

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

<sup>3</sup>47 C.F.R. §§ 76.906, 76.910(b)(4).

<sup>4</sup>47 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).

*Telecommunications Act of 1996 ("Cable Act Reform Order")*,<sup>5</sup> the Commission instructed cable operators believing themselves subject to LEC effective competition under Section 623(l)(1)(D) of the Communications Act to file a petition for determination of effective competition pursuant to Section 76.7 of the Commission's rules.<sup>6</sup> Section 623(l)(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.<sup>7</sup>

## II. THE PLEADINGS

3. Time Warner argues that it faces LEC effective competition in its Somerville, Massachusetts franchise area from RCN, a LEC-affiliated franchised cable operator. Time Warner explains that in the time between the filing of its petition and its supplement, RCN's status changed from open video system ("OVS") operator to cable operator.<sup>8</sup> With regard to the LEC affiliation requirement, Time Warner contends that RCN currently markets both telephone and cable television service to Somerville residents.<sup>9</sup> Time Warner explains that RCN is a joint venture between RCN Telecom Services, Inc. ("RCNTS") and Boston Edison Company. Time Warner states that RCNTS is a wholly-owned subsidiary of C-TEC,<sup>10</sup> a

---

<sup>5</sup>11 FCC Rcd 5937, 5944 (1996).

<sup>6</sup>47 C.F.R. § 76.7.

<sup>7</sup>Communications Act § 623(l)(1)(D), 47 U.S.C. § 543(l)(1)(D).

<sup>8</sup>At the time that Time Warner filed its Petition, RCN was authorized by the Commission to be an OVS operator in Somerville. *See In the Matter of RCN-BETG, LLC*, DA 97-454, 12 FCC Rcd 2480 (rel. February 27, 1997) (granting RCN's application for OVS certification covering 48 service areas in and around Boston, Massachusetts, including Somerville). RCN was also operating pursuant to an Interim OVS Agreement permitting RCN to provide OVS service to Somerville. *See* Petition, Exhibit I (Interim OVS Agreement). At the same time, however, as Time Warner explains in its Petition and Supplement (dated January 13 1998) RCN was pursuing a cable franchise from the City, which it eventually received on December 16, 1997. *See* Cable Television Provisional License ("Provisional License") included with Time Warner's Supplement dated January 13, 1998. Accordingly, on December 17, 1997, RCN filed a letter with the Commission withdrawing Somerville from its list of authorized OVS service areas. *See* Supplement (dated January 13, 1998), Exhibit B (Letter from Jean L. Kiddoo and Kathy L. Cooper, counsel for RCN, to Magalie R. Salas, Secretary, F.C.C., dated December 17, 1997); *see also* Supplement (dated January 13, 1998), Exhibit B (F.C.C.'s Public Notice regarding RCN's letter, DA 97-2672, dated December 22, 1997).

<sup>9</sup>In support of this contention, Time Warner provides a RCN marketing brochure entitled "Join the Solidarity Movement," which advertises RCN's telephone, cable and internet services. *See* Petition at Exhibit D.

<sup>10</sup>C-TEC is a holding company with wholly and majority-owned subsidiaries engaged in the provision of competitive local exchange services and cable television. C-TEC operates as a local exchange carrier in Pennsylvania, offering service to a 19-county, 5067 square mile service territory in the state. *See* Petition at Exhibit B (C-TEC Corporation SEC Form 10-K, filed with the Securities and Exchange Commission on March 31, 1997).

local exchange carrier, and that RCN, itself, is engaged in the provision of local exchange service.<sup>11</sup> Time Warner additionally asserts that RCN is affiliated with MFS Communications Company, Inc. ("MFS"), another local exchange carrier.<sup>12</sup> Time Warner explains that MFS, RCN, and C-TEC were, at one time, all owned by Peter Kiewit Sons, Inc., but that MFS was spun-off from Kiewit in September, 1995 and merged with WorldCom in 1996. Time Warner, states, however, that RCN is still affiliated with MFS, through Kiewit, for purposes of the LEC affiliation requirement.<sup>13</sup> In sum, Time Warner argues that RCN's own LEC operations, as well as its affiliations with C-TEC, MFS and WorldCom, clearly render RCN a LEC affiliate.

4. With regard to the requirement that the LEC competitor offer<sup>14</sup> video programming service in the unaffiliated cable operator's franchise area, Time Warner asserts that RCN is physically able to deliver service to potential subscribers in Somerville. Time Warner contends that RCN has already constructed its video programming distribution facility throughout most of the City and that construction to serve all parts of the City is proceeding rapidly.<sup>15</sup> Time Warner states that there are at least 1,200 RCN subscribers in Somerville<sup>16</sup> and references an article from the *Boston Globe* confirming that RCN began serving

---

<sup>11</sup>Time Warner notes that C-TEC's SEC Form 10-K states that RCN is a provider of "local and long distance telephone service, video programming and internet access to households located in New York City and Boston." See Petition at Exhibit B (C-TEC Corporation SEC Form 10-K, Item 1, Business - Operations, RCN Telecom Services Group). Time Warner further points out that the C-TEC 10-K states that in "Massachusetts, RCN is registered to offer local exchange carrier services." *Id.* See also Petition at Exhibit C (Peter Kiewit Sons', Inc. SEC Form 10-K, Item 1, Business - RCN Telecom Services, filed March 28, 1997).

<sup>12</sup>MFS is a holding company with subsidiaries providing "local and long distance switched service" and "local access" service. See Petition at Exhibit E (MFS Communications Company, Inc. SEC Form 10-K, Item 1, Business, filed May 16, 1997). MFS is now a wholly-owned subsidiary of WorldCom, Inc. ("Worldcom"). *Id.*

<sup>13</sup>Time Warner assumes that Kiewit shareholders retained their MFS stock after the spin-off and that the post-merger portion of WorldCom shares held by Kiewit stockholders would be approximately 315 million, or roughly 35% of all WorldCom shares. Time Warner also cites RCN's OVS Application which states that RCN "shares certain affiliations through a number of common officers, directors and individual shareholders with WorldCom, Inc. and/or certain of its subsidiaries." See Petition at Exhibit A (RCN's FCC Form 1275, filed Feb. 18, 1997, exhibit 1, p.2).

<sup>14</sup>In 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. 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 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).

<sup>15</sup> Petition at 8-9; Supplement (dated August 19, 1998) at 1. Time Warner submits maps showing the extent of RCN's construction in Somerville. See Petition at Exhibit K; Supplement (dated August 19, 1998) at Exhibit A.

<sup>16</sup>Supplement (dated August 19, 1998) at 2.

subscribers in the City in October of 1997.<sup>17</sup> According to Time Warner, Somerville residents need only contact RCN to activate service. Moreover, Time Warner points to the fact that RCN has a franchise with the City of Somerville to provide cable television service as evidence that there are no regulatory, technical or other impediments to households taking service from RCN. Time Warner also asserts that the Commission's grant of RCN's OVS application, covering 48 service areas in and around Boston, Massachusetts, including Somerville,<sup>18</sup> and RCN's Interim OVS Agreement with the City of Somerville, permitting RCN to provide OVS service to the City,<sup>19</sup> further demonstrate that there are no regulatory impediments to receipt of RCN's service by Somerville residents. Finally, Time Warner contends that RCN's intense advertising and marketing efforts as well as local newspaper reports ensure that Somerville residents are reasonably aware that they may purchase RCN's service. Time Warner states that RCN has aggressively marketed the availability of its cable service to Somerville residents through local media, door-to-door canvassing, direct mail, and telemarketing.<sup>20</sup>

5. Time Warner also asserts that RCN offers programming comparable<sup>21</sup> to that offered by Time Warner in Somerville. Time Warner provides RCN's channel line-up which demonstrates that RCN offers 95 channels of video programming, 12 of which are local television broadcast signals.<sup>22</sup> Time Warner also includes its own channel line-up which indicates that it offers 80 channels of video programming in Somerville.<sup>23</sup>

### III. ANALYSIS

6. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.<sup>24</sup> The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition, as defined by Section 76.905

---

<sup>17</sup>Petition at Exhibit M ("2d Cable Company Phasing in Service," *Boston Globe*, November 16, 1997).

<sup>18</sup>*In the Matter of RCN-BETG, LLC*, DA 97-454, 12 FCC Rcd 2480 (rel. Feb. 27, 1997).

<sup>19</sup>See Petition at Exhibit I (Interim Open Video Systems Agreement between the City of Somerville, Massachusetts and RCN-BecoCom, L.L.C., July 23, 1997).

<sup>20</sup>See Petition at Exhibit D attaching: (1) RCN's marketing brochures distributed to Somerville residents; (2) advertisements for RCN's cable service appearing in local newspapers serving Somerville and surrounding areas; and (3) newspaper articles regarding RCN's video service entry in Somerville. See also Supplement (dated August 19, 1998) at Exhibit B.

<sup>21</sup>The Commission observed that Congress specified a different definition of comparable programming for the LEC effective competition test from that adopted for the first three effective competition tests enacted as part of the 1992 Cable Act. Although soliciting comment as to the revised definition, the Commission on an interim basis determined that it will apply this new comparable programming standard which "includes access to at least 12 channels of programming, at least some of which are television broadcasting signals" to the LEC effective competition test. See *Cable Act Reform Order* at ¶12 (quoting 1996 Act Conference Report, S. Rep. 104-230 at 170 (Feb. 1, 1996)).

<sup>22</sup>See Petition at Exhibit S (attaching RCN's channel line-up in Somerville).

<sup>23</sup>See Petition at Exhibit T (attaching Time Warner's channel line-up in Somerville).

<sup>24</sup>47 C.F.R. § 76.906.

of the Commission's rules, is present within the franchise area.<sup>25</sup> Time Warner has met this burden.

7. 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 using the facilities of such LEC or its affiliate), we find that Time Warner has provided sufficient evidence, through SEC documents and other material, demonstrating that RCN is LEC-affiliated under the Commission's interim rules.<sup>26</sup> Therefore, we find that Time Warner satisfies the affiliation prong of the LEC effective competition test. In addition, we note that Time Warner is unaffiliated with RCN or any of RCN's partners.

8. We also find that Time Warner has submitted sufficient evidence showing that RCN's program service offering is comparable to Time Warner's channel line-up in Somerville. The channel information for RCN submitted by Time Warner establishes that RCN offers more than 95 channels of programming, including 12 local broadcast channels, in satisfaction of the programming comparability criterion.

9. In addition, we conclude that, based on the information before us, RCN is offering service in Time Warner's franchise area sufficient to demonstrate the presence of effective competition. RCN has already constructed its video distribution facility throughout most of Somerville and is actively signing up customers. Maps submitted by Time Warner show the substantial extent of RCN's construction<sup>27</sup> and Time Warner reports that there are at least 1,200 RCN subscribers in Somerville.<sup>28</sup> We further believe that RCN's Cable Television Provisional License, received from the City on December 16, 1997, demonstrates RCN's commitment to provide video programming service to Somerville residents now and in the future.<sup>29</sup> As noted by Time Warner in one of its supplements, the license requires RCN to complete construction of its cable system and make its cable service available to all residents of the City within 8 months of the Execution Date of the Final License.<sup>30</sup> Under the Provisional License, RCN is required to maintain a performance bond running to the City in the sum of \$300,000<sup>31</sup> and a letter of credit for \$60,000<sup>32</sup> to ensure that RCN performs its obligations under the Final License. Finally, the Provisional License contains a

---

<sup>25</sup>47 C.F.R. § 76.905 and § 76.911(b)(1).

<sup>26</sup>*Cable Act Reform Order*, 11 FCC Rcd at 5938-5945, 5961-5964. In fact, David McCourt, CEO of RCN, has stated that RCN is a "phone company that offers cable service." See Tony Munroe, "Firm Offering One-Stop Shopping for Cable, Phone," *Boston Herald*, August 14, 1996 at p. 24.

<sup>27</sup>See Petition at Exhibit K and Supplement (dated August 19, 1998) at Exhibit A.

<sup>28</sup>Supplement (dated August 19, 1998) at 2.

<sup>29</sup>Supplement (dated January 13, 1998) attaching Cable Television Provisional License. The term of the Provisional License runs from December 16, 1997 until December 16, 1998. Provisional License at Section 2.2. According to the terms of the Provisional License, at such time that the Licensee (RCN) complies with all applicable requirements, the Mayor of the City of Somerville shall grant the Licensee a 10 year Final License. *Id.*

<sup>30</sup>Supplement (dated January 13, 1998), Provisional License at Sections 4.1 and 4.2.

<sup>31</sup>*Id.* at Section 9.2

<sup>32</sup>*Id.* at Section 9.3.

liquidated damages section providing for the assessment of financial penalties against RCN should it default in the performance of obligations imposed by the Final License.<sup>33</sup> We find that the City's grant to RCN of a Provisional License to provide cable service and the requirements and obligations contained therein are clear evidence of RCN's commitment to providing such service to Somerville residents.

10. We note that RCN's extensive marketing efforts and the wide press coverage of RCN's construction activity in the local media ensure that potential subscribers are reasonably aware of the availability of RCN's service. Generally, subscribers in wired areas are able to receive RCN's cable service for only a minimal additional investment and without encountering regulatory or technical obstacles.

11. We find that Time Warner has submitted sufficient evidence demonstrating that its cable system serving Somerville, Massachusetts is subject to LEC effective competition from RCN. Time Warner's petition is hereby granted and the certification of the City of Somerville is revoked.

#### IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the Petition for Determination of Effective Competition filed by Time Warner Cable challenging the certification of the City of Somerville, Massachusetts **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that the certification of the City of Somerville, Massachusetts to regulate the basic cable rates of Time Warner Cable in Somerville, Massachusetts **IS REVOKED**.

14. This action is taken pursuant to the interim rules adopted in *Implementation of Cable Reform Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 5937 (1996), and is without prejudice to any further action taken by the Commission in adopting final rules pursuant to the Notice of Proposed Rulemaking contained therein.<sup>34</sup>

15. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended.<sup>35</sup>

FEDERAL COMMUNICATIONS COMMISSION

Deborah A. Lathen  
Chief, Cable Services Bureau

---

<sup>33</sup>*Id.* at Section 11.2.

<sup>34</sup>*Cable Act Reform Order*, 11 FCC Rcd at 5938-5945, 5961-5964.

<sup>35</sup>47 C.F.R § 0.321.

