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PROJECT NO. 40227

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APPLICATION OF TIME WARNER §
ENTERTAINMENT- §
ADVANCE/NEWHOUSE §
PARTNERSHIP DBA TIME WARNER §
CABLE TO AMEND IT STATE-ISSUED §
CERTIFICATE OF FRANCHISE §
AUTHORITY; TO ADD THE CITY OF §
CORPUS CHRISTI, TEXAS §

COMMISSION STAFF’S RESPONSE TO TIME WARNER’S APPEAL FROM ORDER DISMISSING PROCEEDING

COMES NOW the Staff of the Public Utility Commission of Texas (Staff), representing the public interest and files this response to Time Warner Entertainment-Advance/Newhouse Partnership d/b/a/ Time Warner Cable (“Time Warner”) Appeal from Order Dismissing this Proceeding. Time Warner filed its appeal of the April 6, 2012 Order No. 2 Dismissing this Proceeding on April 16, 2012.¹ Accordingly, Staff’s response is timely filed.

I. BACKGROUND

On March 15, 2012, Time Warner filed an application to amend State Certificate of Franchise Authority (SICFA) No. 90008. In particular, Time Warner sought to expand its service footprint to include the City of Corpus Christi. On March 16, 2012, the presiding officer issued Order No. 1, requiring Commission Staff (Staff) to file its recommendation regarding the sufficiency and completeness of Time Warner’s application by April 2, 2012. On March 27, 2012, the City of Corpus Christi filed a motion to intervene in the proceeding. Staff then timely filed its recommendation that Time Warner’s application be denied on April 2, 2012. On April 6, 2012, the presiding officer issued an Order dismissing Time Warner’s application without prejudice.²

II. THE PRESIDING OFFICER PROPERLY DISMISSED TIME WARNER’S APPLICATION

In the cover letter to its application, Time Warner acknowledged that it is ineligible for the requested SICFA amendment in Corpus Christi under the plain language of Public Utility

¹ Appeal from Order Dismissing Proceeding (April 16, 2012).

² Order No. 2: Dismissing Proceeding (April 6, 2012).

Regulatory Act³ §§ 66.004(a) & (b-2). As an initial matter, PURA § 66.004(a) provides that a cable service provider “that currently has or had previously received a franchise to provide cable service . . . is not eligible to seek a [SICFA] under this chapter as to those municipalities until the expiration date of the existing franchise agreement.”⁴ Moreover, while PURA § 66.004(b), (b-1), and (b-2) permit cable service providers to terminate certain existing municipal franchises, they do not give an incumbent cable service provider the right to terminate an existing municipal franchise in a city with a population of 215,000 or more.⁵ Time Warner concedes that it is an incumbent cable service provider in Corpus Christi, a city with a population greater than 215,000. Time Warner further acknowledges that it has an existing municipal franchise in Corpus Christi.⁶ Accordingly, granting Time Warner’s application would result in Time Warner possessing a municipal franchise in Corpus Christi, as well as a SICFA for the same service territory in violation of PURA § 66.004(a).

Time Warner argued, however, that the prohibition in PURA § 66.004(b-2) should no longer apply to its application because the United States Court of Appeals for the Fifth Circuit has recently concluded that this provision is unconstitutional.⁷ However, in reaching this decision, the Fifth Circuit expressly chose not to enjoin the operation of PURA § 66.004(b-2). Instead, it ordered the Time Warner proceeding remanded to the United States District Court for the Western District of Texas for actions consistent with its ruling. After the remand from the Fifth Circuit, Time Warner requested an injunction concerning the operation of Chapter 66 from the district court. As the presiding officer noted, however, the district court has not ruled on Time Warner’s motion, nor has it issued any injunction regarding the operation of PURA §

³ Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-66.016 (West 2007 & Supp. 2011) (PURA).

⁴ PURA § 66.004(a).

⁵ PURA § 66.004(b-2) provides: “A cable service provider or video service provider in a municipality with a population of at least 215,000 may terminate a municipal franchise in that municipality in the manner described by Subsection (b-1) if:

- (1) The cable service provider or video service provider is not the incumbent cable service provider in that municipality; and
- (2) The incumbent cable service provider received a state-issued certificate of franchise authority from the commission before September 1, 2011.

PURA § 66.004(b-2).

⁶ Time Warner’s municipal franchise in Corpus Christi will not expire until August 24, 2017.

⁷ *Time Warner Cable, Inc. v. Hudson*, 667 F.3d 630 (5th Cir. 2012).

66.004(b-2). Therefore, the presiding officer properly concluded that the regulatory regime established by the legislature in PURA §§ 66.004(a) & (b-2) currently remains in effect.⁸

Time Warner now requests in this appeal that the Commission improperly enter an order effectively enjoining the application of these provisions before the district court has had an opportunity to act. While Time Warner may wish to avoid any further delays in the federal courts by seeking relief from the Commission, such an action is simply premature. Rather, the Commission should conclude, like the presiding officer has done, that absent any contrary action by the district court, the Time Warner's application should be evaluated and rejected on the basis of the law as it is presently stands. That is to say, PURA §§ 66.004(a) & (b-2) remain in effect as enacted by the Texas legislature. Consistent with these provisions, the presiding officer dismissed Time Warner's application. For the same reasons, the Commission should reject Time Warner's appeal.

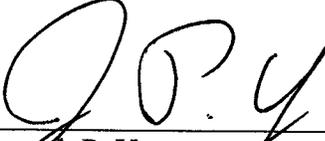
III. CONCLUSION AND PRAYER FOR RELIEF

Time Warner's Appeal from Order Dismissing this Proceeding should be **denied**.

Respectfully Submitted,

Margaret Uhlig Pemberton
Division Director-Legal Division

Keith Rogas
Deputy Division Director-Legal Division

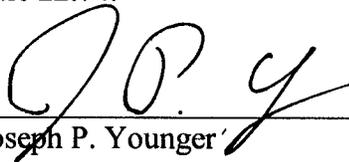


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⁸ Order No. 2: Dismissing this Proceeding at 2.

CERTIFICATE OF SERVICE

I certify that a copy of this document will be served on all parties of record on April 20, 2012, in accordance with P.U.C. Procedural Rule 22.74.



Joseph P. Younger