

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

In the Matter of:) CSR 5331-E
Time Warner Cable) Atlanta, GA
Petition for Determination)
Effective Competition)

MEMORANDUM OPINION AND ORDER

Adopted: June 16, 2000

Released: June 20, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Time Warner Cable ("Time Warner"), filed a petition with the Commission asserting that it is subject to local exchange carrier ("LEC") effective competition from BellSouth Entertainment ("BellSouth"), a competing cable operator and multichannel multipoint distribution service ("MMDS" or "wireless cable") operator serving several communities in the greater metropolitan Atlanta region (the "Affected Communities"). While Time Warner's request is unopposed, it later filed a supplement to its petition to update the record.

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. 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. Certification becomes effective 30 days from the

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).

2The following franchise areas are subject to the petition: (1) Cherokee County (GA0240); (2) Woodstock (GA0239); (3) Cobb County (GA0144); (4) Marietta (GA0973); (5) Fulton County (GA0559); and (6) Roswell (GA0928).

3Communications Act § 623(a)(4), 47 U.S.C. § 543(a)(4).

447 C.F.R. §§ 76.906, 76.910(b)(4).

date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.⁵ In *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996* ("Cable Act Reform Order"),⁶ the Commission instructed cable operators believing themselves subject to local exchange carrier ("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.⁷ 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.⁸

II. THE PLEADINGS

3. Time Warner states that it provides cable service to the Affected Communities pursuant to several cable franchises. Time Warner argues that it is subject to LEC effective competition in the Affected Communities from BellSouth, a competing cable and MMDS operator serving those same areas.⁹

4. With regard to the LEC affiliation requirement,¹⁰ Time Warner contends that BellSouth is a competing MMDS operator and wired cable operator, that is a wholly owned affiliate of BellSouth Corp., a local exchange carrier serving telephone customers in Georgia and other parts of the southern United States.¹¹ BellSouth makes available on its various systems more than 80 channels of broadcast and satellite delivered cable programming.¹²

⁵47 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).

⁶11 FCC Rcd 5937, 5944 (1996).

⁷47 C.F.R. § 76.7.

⁸Communications Act § 623(l)(1)(D), 47 U.S.C. § 543(l)(1)(D); *See* 47 C.F.R. §76.905(b)(4).

⁹Time Warner Petition at 1.

¹⁰The 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)).

¹¹Time Warner Petition at 4.

¹²*Id.* at 13 and Exhibit L.

5. With regard to the requirement that the LEC competitor offer¹³ video programming service in the unaffiliated cable operator's franchise area, Time Warner asserts that BellSouth is physically able to deliver service to potential subscribers in Atlanta and the other Affected Communities.¹⁴ Time Warner explains that BellSouth provides wireless cable service in central Georgia through the use of four MMDS transmitters located atop: (1) the Nationsbank building (downtown Atlanta); (2) Peachtree City Tower; (3) Stone Mountain; and (4) Sweet Mountain.¹⁵ According to Time Warner, BellSouth's MMDS transmitter's 35-mile presumptive service boundary covers each of the Affected Communities.¹⁶ Time Warner adds that while BellSouth is physically able to provide digital wireless cable service to each of the Affected Communities, the Cities of Roswell and Woodstock, as well as Cherokee County, are also served by BellSouth's wired cable systems.¹⁷ Time Warner asserts that potential subscribers in the franchise areas can technically receive service from BellSouth. To buttress its assertion, Time Warner states that BellSouth had nearly 1,900 subscribers¹⁸ and of those taking service, 374 (302 MMDS subscribers and 72 cable subscribers) are former Time Warner customers.¹⁹ Finally, Time Warner contends that no regulatory, technical or other impediments exist to the receipt of BellSouth's service in the Affected Communities.²⁰

6. Time Warner asserts that potential subscribers in its franchise areas are reasonably aware that they may purchase MMDS service as a result of BellSouth's marketing efforts.²¹ Time Warner provides marketing materials (i.e., door hangers, direct mail, etc.) from BellSouth which have been distributed in the Affected Communities, several newspaper pieces publicizing the availability of BellSouth's competing video

¹³In 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 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).

¹⁴Time Warner Petition at 6.

¹⁵*Id.*

¹⁶*Id* at 7.

¹⁷*Id.*

¹⁸*Id.* at 8 and Exhibit I.

¹⁹*Id.* Time Warner notes that it continues to lose approximately 20 subscriber per week to BellSouth in the Affected Communities.

²⁰Time Warner Petition at 10-11.

²¹*Id.* at 10.

services, and BellSouth advertisements from the local Yellow Pages.²² Time Warner asserts that individuals must have been made aware of BellSouth's service because the company has almost 2,000 subscribers.²³

7. Time Warner asserts that BellSouth offers programming comparable to that offered by Time Warner in the Affected Communities.²⁴ Time Warner provides BellSouth's channel line-ups showing that BellSouth's video service consists of more than 80 channels of video programming, including 10 local television broadcast signals.²⁵ Time Warner provides approximately 80 channels of programming, 12 of which are local broadcast stations, on its cable systems serving the Affected Communities.²⁶

8. Time Warner states that in response to competition from BellSouth, it has undertaken a system-wide upgrade in order to expand the systems' channel capacity, improve signal quality, and introduce advanced services to subscribers.²⁷ In addition, Time Warner states that it is offering its customers "The Time Warner Difference Plan," which includes a combination of discounts and free expanded basic service.

9. In its supplement, Time Warner informs the Commission that BellSouth has a fifth MMDS transmitter site in operation in Douglasville, Georgia. Time Warner explains that it has included a new line-of-sight shadow map as an exhibit to demonstrate that all of the Affected Communities are able to receive BellSouth's MMDS service because of the five transmitters now in place.²⁸ Time Warner notes that while certain small portions of its Cherokee County franchise area may not be able to receive MMDS service because there is no clear line-of-sight, it should not make a difference in the analysis as BellSouth provides wired cable service in that area.²⁹

III. ANALYSIS

10. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition as defined in the Communications Act.³⁰ The cable operator bears the burden of rebutting the presumption that effective competition does not exist and must provide evidence sufficient to

²²*Id.* at 11-12 and Exhibits B, J, and K.

²³*Id.* at 12.

²⁴The 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. 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)).

²⁵Time Warner Petition at 13 and Exhibit L.

²⁶*Id.* and Exhibit M.

²⁷*Id.*

²⁸Time Warner Supplement at 3.

²⁹*Id.* at 4.

³⁰47 C.F.R. §76.906.

demonstrate that effective competition, as defined by Section 76.905 of the Commission's rules, is present in the franchise area.³¹ Time Warner has met this burden.

11. 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"))³² using the facilities of such LEC or its affiliate, we find that Time Warner has provided sufficient evidence demonstrating that BellSouth Entertainment is a wholly-owned subsidiary of BellSouth Corp., which is unquestionably a LEC. We find that Time Warner satisfies the affiliation prong of the LEC effective competition test. We also find that Time Warner is unaffiliated with BellSouth Corp. or BellSouth Entertainment.

12. Time Warner has submitted sufficient evidence demonstrating that BellSouth provides comparable programming. In a LEC effective competition setting, a competing MVPD is said to offer comparable programming when at least 12 channels of programming, some of which are television broadcasting signals, are present. The channel line-up for BellSouth submitted by Time Warner establishes that BellSouth offers over 80 channels of programming, including 10 over-the-air broadcast signals. This is sufficient to satisfy the Commission's programming comparability criterion.

13. The LEC effective competition test requires that competitive service be offered directly to subscribers in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area. In enacting the LEC effective competition test, Congress indicated that the Commission should apply its preexisting definition of the term "offer" to the LEC effective competition test. This definition provides that service is 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.³³

14. Based on the information before us, we find that BellSouth is offering service in all of the Affected Communities. Time Warner has submitted evidence that BellSouth's MMDS transmitters, as well as its wired cable systems, are in place and physically able to offer service. In order to provide service, BSE need only install an MMDS antenna on, or near, a subscriber's home or hook up a cable coaxial wire to the subscribers' television set. A Time Warner generated line-of-sight/shadow plot map, which is the proper evidentiary tool to determine MMDS availability in LEC effective competition cases, indicates that the relevant franchise areas lie

³¹47 C.F.R. §76.911(b)(1).

³²The 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, or 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).

³³47 C.F.R. §76.905(e); *see Cable Act Reform Order*, 11 FCC Rcd at 5941 (citing Telecommunications Act 1996 Conference Report, S. Rep. 104-230 at 170 (Feb. 1, 1996) ("Conference Report")).

within the MMDS transmitter's line-of-sight, with no geological barriers inhibiting reception. Certain franchise areas are also served by BellSouth's wired cable systems without any difficulty.

15. With regard to the Affected Communities, we conclude that no regulatory, technical or other impediments prevent potential subscribers from receiving either of BellSouth's video services. We find that potential subscribers in the Affected Communities are reasonably aware that they may receive competing video service because of BellSouth's marketing and promotional campaign. The fact that BellSouth has a substantial number of subscribers in the franchise areas supports this finding. We also find relevant that Time Warner is meeting competition by providing its customers with discounts on program packages and other services.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED** that the Petition for Determination of Effective Competition filed by Time Warner challenging the certification of the local franchising authorities in Cherokee County, Woodstock, Cobb County, Marietta, Fulton County, and Roswell, Georgia **IS GRANTED**.

17. **IT IS FURTHER ORDERED** that the above noted franchising authorities' certifications to regulate rates are revoked.

18. 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).

19. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended.³⁴

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

³⁴47 C.F.R § 0.321.