

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

In the Matter of:	)	CSR 5124-E
	)	
TCI Cablevision of Alabama, Inc.	)	Vestavia Hills, AL
	)	CUID No. AL0061
	)	
Petition for Special Relief	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 20, 1998**

**Released: March 25, 1998**

By the Deputy Chief, Cable Services Bureau:

**I. INTRODUCTION**

1. TCI Cablevision of Alabama, Inc. ("TCI") has filed a Petition for Special Relief seeking a determination of effective competition. TCI asserts that it is subject to competing provider effective competition in Vestavia Hills, Alabama because of the presence of BellSouth Interactive Media Services's cable service in that City. This petition is unopposed. For the reasons discussed below, the Petition is granted.

2. The Communications Act of 1934, as amended ("Communications Act") provides that only the rates of cable systems that are not subject to effective competition may be regulated.<sup>1</sup> The Act permits local franchising authorities to become certified to regulate the basic cable service rates of cable operators that do not face effective competition.<sup>2</sup> The Commission's rules presume that effective competition does not exist<sup>3</sup> and place the burden on the cable operator to show that it does face effective competition in a given franchise area.<sup>4</sup> Cable operators must prove that they are subject to effective competition under one of the four tests set forth in Section 76.905(b) of the Commission rules.<sup>5</sup>

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<sup>1</sup>Pub. L. No. 102-385, 106 Stat. 1460 (1992); Communications Act § 623(a)(2), *as amended*, 47 U.S.C. § 543(a)(2) (1992). *See also* 47 C.F.R. §76.905(a).

<sup>2</sup>Communications Act §623(a)(3) and (a)(4), 47 U.S.C. §543(a)(3) and (4). *See also* 47 C.F.R. §76.910. The City of Vestavia Hills has been certified to regulate the rates of the cable systems serving its franchise areas.

<sup>3</sup>47 C.F.R. §76.906.

<sup>4</sup>*See Report and Order* in MM Docket No. 92-266, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 5631, 5669 (1993). *See also* 47 C.F.R. §76.911(b)(1).

<sup>5</sup>47 C.F.R. §76.905(b).

3. One basis upon which a cable system may be deemed subject to effective competition is the competing provider test.<sup>6</sup> Under the competing provider test, a cable system is subject to effective competition if the franchise area is (1) served by at least two unaffiliated multichannel video programming distributors ("MVPD") each of which offers comparable programming<sup>7</sup> to at least 50 percent of the households in the franchise area; and (2) the number of households subscribing to multichannel video programming other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>8</sup>

4. Alternatively, a cable system may be deemed subject to local exchange carrier ("LEC") effective competition, as defined in Section 623(I)(1)(D) of the Communications Act.<sup>9</sup> Section 623(I)(1)(D) provides that a cable system is subject to LEC 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<sup>10</sup> to the video programming services provided by the unaffiliated cable operator in that area.

47 U.S.C. §543(I)(1)(D).

## II. THE PLEADINGS

5. TCI states that it is subject to effective competition under the competing provider test set forth in Section 623(I)(1)(B) of the Communications Act due to the presence of BellSouth Interactive Media Services ("BIMS"), a competing franchised cable operator in its Vestavia Hills, Alabama franchise area.<sup>11</sup> To demonstrate that the first prong of the competing provider test is satisfied, TCI asserts that it and BIMS

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<sup>6</sup>47 U.S.C. §543(I)(1)(B); 47 C.F.R. §76.905(b)(2).

<sup>7</sup>For this test, programming is considered "comparable" if it consists of "at least 12 channels of video programming, including at least one channel on nonbroadcast service programming." 47 C.F.R. §76.905(g).

<sup>8</sup>47 U.S.C. §543(I)(1)(B); 47 C.F.R. §76.905(b)(2).

<sup>9</sup>47 U.S.C.(1)(1)(D). The LEC effective competition test was adopted by Congress as part of the Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996).

<sup>10</sup>The Commission observed that Congress specified a different definition of comparable programming for the LEC effective competition test from that adopted for the other three effective competition tests. 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 Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 5937, 5942 (1996) (quoting 1996 Act Conference Report, S. Rep. 104-230 at 170 (Feb. 1, 1996)).

<sup>11</sup>The City of Vestavia Hills awarded a cable franchise to BIMS on October 2, 1995. Petition for Special Relief ("Petition") filed by TCI on Oct. 1, 1997 at 6.

pass all of the 9,797 occupied, non-seasonal housing units in Vestavia Hills.<sup>12</sup> TCI adds that both BIMS and it meet the relevant programming comparability criterion because each are MVPDs offering at least 12 channels of video programming, at least one of which is nonbroadcast programming.<sup>13</sup> In regards to satisfaction of the second prong of the competing provider test, TCI represents that the number of households subscribing to multichannel video programming other than to the largest MVPD exceeds the 15 percent penetration requirement in all the franchise area. TCI contends that the combined penetration rate of BIMS and DirecTV, another MVPD, is 18 percent.<sup>14</sup>

6. TCI asserts that, in the alternative, it is subject to LEC effective competition. TCI asserts BIMS is an MVPD because it is a franchised cable operator that makes available for purchase, by subscribers or customers, multiple channels of video programming.<sup>15</sup> With regard to the LEC affiliation requirement, TCI asserts that because of its use of the facilities of BellSouth Telecommunications, Inc. ("BST") to provide cable service, BIMS is an MVPD using the facilities of a LEC. TCI maintains that BST is a LEC serving customers in Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. TCI contends it is not affiliated with either BIMS or BST.<sup>16</sup>

7. With regard to the requirement that the LEC competitor offer video programming service in the unaffiliated cable operator's franchise area, TCI asserts that BIMS passes all of the households in Vestavia Hills. TCI believes that BIMS is now providing service to 1,468 customers and can provide service to all potential subscribers in Vestavia Hills with only minimal additional investment.<sup>17</sup> TCI adds that BIMS has heavily marketed the availability of its cable service through local media and other means. TCI asserts there are no regulatory, technical, or other impediments to households taking service from BIMS.

8. TCI also asserts that BIMS offers comparable programming to Vestavia Hills subscribers. Specifically, TCI provides BIMS's channel line-up which demonstrates that BIMS offers over 70 channels, of which at least 7 are local television broadcasting signals. TCI offers over 70 channels of programming in Vestavia Hills, of which at least 7 are local television broadcast signals.<sup>18</sup>

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<sup>12</sup>TCI states that it obtained this household count from the Vestavia Hills Financing Department. Petition at 11.

<sup>13</sup>Petition at 11.

<sup>14</sup>1,468 BIMS subscribers + 295 DirecTV subscribers ÷ 9,797 households in franchise area = 18 percent penetration. Petition at 12.

<sup>15</sup>Petition at 4. See 47 C.F.R. §76.905(d).

<sup>16</sup>Petition at 5.

<sup>17</sup>Petition at 7. See also Letter from John Howell, General Manager, BellSouth Entertainment to Dirk Kirby, TCI (Sept. 15, 1997) at Petition, Exhibit D.

<sup>18</sup>Petition at 10.

### III. ANALYSIS

9. 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.<sup>19</sup> The cable operator bears the burden of rebutting the presumption that such effective competition does not exist and must provide evidence sufficient to demonstrate that effective competition, as defined by Section 76.905 of the Commission's rules, is present in the franchise area.<sup>20</sup> TCI has met this burden by satisfying the competing provider test for effective competition.

10. The first part of the competing provider test requires that the franchise area be served by at least two unaffiliated MVPDs, each of which offers comparable programming to at least 50 percent of the households in the franchise area. We find that TCI has provided sufficient evidence demonstrating that it is unaffiliated with BIMS, and that both are MVPDs offering service to the requisite percentage of households. TCI and BIMS each offer cable service to 100 percent of the households in the City of Vestavia Hills franchise area. With respect to the issue of programming comparability, we find that the programming of TCI and BIMS is comparable because they offer at least 12 channels of video programming, including at least one nonbroadcast channel.<sup>21</sup> We conclude, therefore, that TCI has satisfied the first part of the competing provider test.

11. The second part of the competing provider test requires that the number of households subscribing to an MVPD other than to the largest MVPD exceeds 15 percent of the households in the franchise area. In the franchise area, this rate exceeds 18 percent. We find that TCI has demonstrated that the smaller MVPD penetration rate in the franchise areas satisfies the requirement of the second prong of the competing provider test. We conclude that TCI has established that both prongs of the competing provider effective competition test have been met. In light of this finding, we will not address TCI's contention that it is also subject to effective competition under the LEC effective competition test.

### IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the Petition for Special Relief seeking a determination of effective competition filed by TCI Cablevision of Alabama, Inc. **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that the certification of the City of Vestavia Hills, Alabama to regulate the basic cable rates of TCI in Vestavia Hills, Alabama **IS REVOKED**.

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<sup>19</sup>47 C.F.R. §76.906.

<sup>20</sup>47 C.F.R. §76.911(b)(1).

<sup>21</sup>See 47 C.F.R. §76.905(g).

14. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended.<sup>22</sup>

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Cable Services Bureau

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<sup>22</sup>47 C.F.R. §0.321.