

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

In the Matter of:	)	
	)	
Time Warner Entertainment Co., L.P.	)	Columbus, OH
d/b/a Warner Cable	)	CUID Nos. OH0178
	)	OH0239
	)	OH0480
Petition for Determination of	)	
Effective Competition	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: December 6, 1996**

**Released: December 9, 1996**

By the Chief, Cable Services Bureau:

**I. INTRODUCTION**

1. In the captioned proceeding, Time Warner Entertainment Company, L.P. ("Time Warner") seeks a determination that Time Warner is subject to effective competition in Columbus, Ohio ("Columbus") on or after June 10, 1996, the date(s) on which Ameritech New Media's cable service would be considered "offered" to the public.<sup>1</sup> The City of Columbus filed comments in opposition to Time Warner's petition to which Time Warner filed a reply.

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 that 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 Telecommunications Act of 1996*,

<sup>1</sup>On June 25, 1996, Time Warner filed a supplement to its Petition for Special Relief stating that, as of June 10, 1996, there were no further regulatory impediments to households taking Ameritech New Media's service.

<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).

("Cable Act Reform Order")<sup>5</sup>, 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.<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>

Successful LEC effective competition petitions will exempt a cable operator from rate regulation as of February 8, 1996, the enactment date of the Telecommunications Act of 1996 (the "1996 Act").<sup>8</sup>

## II. THE PLEADINGS

3. Time Warner asserts that it is subject to LEC effective competition in its Columbus, Ohio franchise areas. With regard to the LEC affiliation requirement, Time Warner asserts that Ameritech New Media ("Ameritech") is a competing franchised cable operator wholly owned by Ameritech Corporation, a local exchange carrier serving customers in Ohio, Illinois, Indiana, Michigan, and Wisconsin.<sup>9</sup> Ameritech makes available at least 80 channels of video programming on its Columbus cable system.

4. With regard to the requirement that the LEC competitor offer<sup>10</sup> video programming

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<sup>5</sup>Order and Notice of Proposed Rulemaking, FCC 96-154, at ¶17 (rel. April 9, 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>*Cable Act Reform Order* at ¶17.

<sup>9</sup>The Columbus City Council awarded a franchise to Ameritech on April 29, 1996. Petition at 4.

<sup>10</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. *Cable Act Reform Order* at ¶8. The Commission previously determined that service of a multichannel video programming distributor will be deemed offered:

service in the unaffiliated cable operator's franchise area, Time Warner first asserts Ameritech is physically able to offer service to subscribers in Columbus.<sup>11</sup> Time Warner attaches a map provided to the City of Columbus by Ameritech that outlines the LEC's construction schedule.<sup>12</sup> Time Warner states that this map shows that Ameritech has already completed construction in a significant portion of the City with the majority of Columbus to be wired by the end of 1997. Time Warner also asserts that, as of June 10, 1996, there are no regulatory, technical, or other impediments to households taking service.<sup>13</sup> The operator states that Ameritech became eligible to begin service to Columbus residents on that date, 60 days after the LEC complied with the City's requirement to file its proposed rates and services. Time Warner also asserts that potential subscribers in the franchise area are "reasonably aware" that they may purchase Ameritech's service.<sup>14</sup> Time Warner states that Ameritech has generated extensive publicity about its new Columbus cable service through news releases, newspaper articles, and other marketing materials.<sup>15</sup>

5. Time Warner asserts that Ameritech offers comparable programming<sup>16</sup> to Columbus subscribers. Specifically, Time Warner provides Ameritech's channel line-up which demonstrates that Ameritech offers at least 80 channels, 6 of which are local television broadcasting signals.<sup>17</sup> Time Warner points out that its system offers 73 channels in Columbus.<sup>18</sup>

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- (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>11</sup>Petition at 5.

<sup>12</sup>*Id.* at Exhibit E.

<sup>13</sup>*Id.* at 7.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 8.

<sup>16</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>17</sup>Petition at 8 and Exhibit H.

<sup>18</sup>*Id.* at Exhibit I.

6. The City of Columbus opposes Time Warner's petition, arguing that the petition is premature. The City asserts that while a small number of Columbus residents may take Ameritech's cable service as of June of 1996, most city residents will not have a choice of cable operators for some time to come during Ameritech's construction period.<sup>19</sup> The City adds that because Ameritech's system is not yet fully built out, the LEC's presence has not had the effect of restraining Time Warner's rates.<sup>20</sup> The City states that it intends to monitor the progress of Ameritech, and may withdraw its objection to the petition at a later date upon its determination that Time Warner is subject to effective competition. In the meantime, the City requests that the petition be denied, or in the alternative, that the Commission seek additional information concerning the competitive circumstances in Columbus and grant the application only when effective competition exists.<sup>21</sup>

7. In its reply, Time Warner argues that the LEC effective competition test does not contain a percentage pass or penetration provision, as the City seems to believe.<sup>22</sup> Time Warner argues that Congress purposely did not include such provisions in Section 301(b)(3) of the 1996 Act and pass or penetration figures cannot be read into it. Time Warner then reiterates that Ameritech has completed construction in a significant portion of Columbus, adding that over 30% of the area where Time Warner currently serves customers is now wired by the LEC.<sup>23</sup> Time Warner argues that the rate at which Ameritech chooses to activate its completed plant does not impact the determination that, under the 1996 Act's definition of "offer," Ameritech is physically able to deliver service to potential subscribers in the City.<sup>24</sup> Time Warner contends that it cannot be "bound in a regulatory straight-jacket" through Ameritech's voluntary business strategy of selectively offering its services in discrete portions of Columbus.<sup>25</sup> In response to the City's labeling of the petition as "premature," Time Warner asserts that the City itself allowed Ameritech to commence construction of its competing cable system prematurely, prior to the effective grant of a franchise.

### III. ANALYSIS

8. In the absence of a demonstration to the contrary, cable systems are presumed not

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<sup>19</sup>Opposition at 3.

<sup>20</sup>*Id.* at 4.

<sup>21</sup>*Id.*

<sup>22</sup>Reply at 2.

<sup>23</sup>*Id.* at 3.

<sup>24</sup>Time Warner includes a new map, attached as Exhibit A, which purportedly shows that Ameritech is providing service to a portion of Columbus.

<sup>25</sup>Reply at 4.

to be subject to effective competition as defined in the Communications Act.<sup>26</sup> The cable operator bears the burden of rebutting the presumption that such effective competition does not exist and so 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>27</sup> Time Warner has met this burden.

9. 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"] using the facilities of such LEC or its affiliate), we find that Time Warner has provided sufficient evidence demonstrating that Ameritech New Media is an MVPD wholly owned by a LEC. Ameritech is unquestionably a LEC as defined by the Communications Act,<sup>28</sup> and Ameritech New Media meets the Commission's definition of MVPD. Therefore, we find that Time Warner satisfies the affiliation prong of the LEC effective competition test. Time Warner is unaffiliated with both Ameritech New Media and Ameritech.

10. We also find that Time Warner has submitted sufficient evidence that the programming of Ameritech is comparable to that which it provides. The channel line-up for Ameritech submitted by Time Warner establishes that Ameritech offers at least 80 channels, including 6 local broadcast channels; this satisfies the Commission's programming comparability criterion.<sup>29</sup>

11. To meet the LEC effective competition test, the alleged competitive service must also be offered directly to subscribers in the franchise area. In enacting the LEC test, Congress indicated that the Commission should apply its preexisting definition of the term "offer" to the new LEC effective competition test. Under that definition 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,

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<sup>26</sup>47 C.F.R. §76.906.

<sup>27</sup>47 C.F.R. §76.911(b)(1).

<sup>28</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>29</sup>See *supra* note 16.

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.<sup>30</sup>

12. Based on the information before us, we find that Ameritech is offering service in Columbus sufficient to demonstrate the presence of effective competition. Ameritech's initial service area lies in the core of the City of Columbus, with current construction expanding from that point in both a northern and southern direction during the next 15 months. According to the documents attached to Time Warner's petition, in those areas wired by Ameritech and released to Ameritech for marketing, potential subscribers need only contact Ameritech to activate service. Time Warner has provided Ameritech's construction schedule, maps of wired areas, and other demonstrations of the actual and planned offering of service by Ameritech.

13. Time Warner indicates that Ameritech has wired about a third of the area in the City where Time Warner currently serves subscribers. Within the area that Ameritech has wired, potential subscribers are able to receive service for only a minimal additional investment and without regulatory, technical or other impediments. Ameritech's aggressive marketing efforts, combined with the extensive press coverage of Ameritech in the local media, ensure that potential subscribers are well aware of the availability of Ameritech's service. While the entire franchise area is still in the process of being wired, Ameritech's franchise agreement appears to provide that Ameritech will construct its system throughout the City of Columbus.<sup>31</sup> Under its franchise, Ameritech is obligated to complete system construction on or before the third anniversary following its initial system activation.<sup>32</sup> Ameritech also has a legal obligation to provide the City with a bond of not less than three million dollars guaranteeing its full and faithful performance under the terms of the franchise agreement.<sup>33</sup> There is every indication that investment in the community will continue and that expansion of service is proceeding in accordance with an established schedule. We also note that Time Warner has upgraded its cable plant, expanded customer service to 24 hours a day, moved the Disney Channel to its expanded basic package,

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<sup>30</sup>47 C.F.R. §76.905(e); see *Cable Act Reform Order* at ¶9 (citing Telecommunications Act of 1996 Conference Report, S. Rep. 104-230 at 170 (Feb. 1, 1996)).

<sup>31</sup>See Ameritech's franchise agreement with the City of Columbus at Section 2-A (attached as Exhibit A to Time Warner's Petition for Special Relief) (Ameritech will "construct and operate a Cable Communications System **within** the City and in, under, or over the streets, highways, and other public property or public grounds of the City.") (emphasis added). See also Ameritech's public affairs informational, "The Choice for Columbus", dated April 25, 1996 (attached as Exhibit B to Time Warner's Petition for Special Relief) ("Ameritech New Media is proposing to construct **throughout** the City of Columbus, the most sophisticated broadband telecommunications system available today.") (emphasis added).

<sup>32</sup>*Id.* at Section 2-D-3.

<sup>33</sup>*Id.* at Section 2-E-6.

and added 4 new channels.<sup>34</sup> In the circumstances, consistent with Congressional intent in adopting Section 623(l)(1)(d) of the Communications Act, we find "effective competition" to be present.

14. With regard to the City's proposal that the Commission ask for additional information with regard to pass and penetration rates, we decline to follow such a course. As discussed above, Time Warner has provided evidence sufficient to satisfy all parts of the LEC effective competition test. The showing presented here supports a finding of service being offered, which is sufficient to meet Time Warner's burden of proof. As Time Warner has submitted sufficient evidence demonstrating that its cable system serving Columbus, Ohio is subject to LEC effective competition from Ameritech, its petition is granted, and the certification of the City of Columbus is revoked.

#### IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that the Petition for Determination of Effective Competition filed by Time Warner Entertainment Co. d/b/a Warner Cable challenging the certification of the City of Columbus, in Columbus, Ohio **IS GRANTED**.

16. **IT IS FURTHER ORDERED** that the certification of the City of Columbus, Ohio to regulate the basic cable rates of Time Warner Entertainment Co. d/b/a Warner Cable in Columbus, Ohio **IS REVOKED**.

17. This action is taken pursuant to the interim rules adopted in *Implementation of Cable Reform Provisions of the Telecommunications Act of 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>35</sup>

18. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended.<sup>36</sup>

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones  
Chief, Cable Services Bureau

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<sup>34</sup>See Warren's *Cable Regulation Monitor*, "This Week's News", September 23, 1996. In that same article, and in response to Ameritech's presence, a Time Warner spokeswoman also stated that the company has "done a number of things that will cost us money, but its worth it."

<sup>35</sup>*Cable Act Reform Order*, 11 FCC Rcd at 5938-5945, 5961-5964.

<sup>36</sup>47 C.F.R. §0.321.