

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

In the Matter of:)	
)	
Time Warner Entertainment Co., L.P.)	Upper Arlington, OH
d/b/a Warner Cable)	CUID No. OH0240
)	
Petition for Determination of)	
Effective Competition)	

MEMORANDUM OPINION AND ORDER

Adopted: December 9, 1996

Released: December 12, 1996

By the Chief, Cable Services Bureau:

I. INTRODUCTION

1. On August 2, 1996, Time Warner Entertainment Company, L.P. ("Time Warner") filed a Petition for Determination of Effective Competition asserting that Time Warner is subject to effective competition in Upper Arlington, Ohio ("Upper Arlington") because Ameritech New Media is offering cable service to potential subscribers in that community. No oppositions were filed against Time Warner's request.

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.¹ 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.² Certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.³ In *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996* ("Cable Act Reform Order"),⁴ 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

¹Communications Act §623(a)(4), 47 U.S.C. §543(a)(4).

²47 C.F.R. §§76.906, 76.910(b)(4).

³47 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).

⁴ Order and Notice of Proposed Rulemaking, FCC 96-154, at ¶17 (rel. April 9, 1996).

competition pursuant to Section 76.7 of the Commission's rules.⁵ 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.⁶

A successful LEC effective competition petition will exempt a cable operator from rate regulation as of February 8, 1996, the enactment date of the Telecommunications Act of 1996.⁷

II. THE PLEADINGS

3. Time Warner asserts that it is subject to LEC effective competition in its Upper Arlington, Ohio franchise area. 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.⁸

4. With regard to the requirement that the LEC competitor offer⁹ video programming

⁵47 C.F.R. §76.7.

⁶Communications Act §623(l)(1)(D), 47 U.S.C. §543(l)(1)(D).

⁷*Cable Act Reform Order* at ¶17.

⁸The City of Upper Arlington awarded a franchise to Ameritech on March 25, 1996. *Petition* at 4.

⁹In 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. Communications Act, §623(l), 47 U.S.C. §543(l); *Cable Act Reform Order* at ¶8. 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.

service in the unaffiliated cable operator's franchise area, Time Warner first asserts that Ameritech is physically able to offer service to subscribers in Upper Arlington.¹⁰ Time Warner attaches a map provided to the City of Upper Arlington by Ameritech which outlines the LEC's construction schedule.¹¹ Time Warner states that this map shows that Ameritech is now physically able to provide cable service to nearly 50 percent of the City.¹² Time Warner states that Ameritech has begun a direct sales campaign, via telemarketing and door-to-door sales, aimed at prospective consumers, and has been connecting former Time Warner customers to its system.¹³ Time Warner asserts that there are no regulatory, technical, or other impediments to households taking service as Ameritech is currently providing service to Upper Arlington residents pursuant to the March 25 franchise grant.¹⁴ Time Warner also asserts that potential subscribers in the franchise area are "reasonably aware" that they may purchase Ameritech's service, as Ameritech has generated extensive publicity about its new Upper Arlington cable service through news releases, newspaper articles, and other marketing materials.¹⁵

5. Time Warner asserts that Ameritech offers comparable programming¹⁶ to Upper Arlington 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.¹⁷ Time Warner points out that its system offers 73 channels in Upper Arlington.¹⁸

47 C.F.R. §76.905(e).

¹⁰Petition at 5.

¹¹*Id.* at Exhibit E.

¹²*Id.* at 6.

¹³*Id.*

¹⁴*Id.* at 7.

¹⁵*Id.* at 8 and Exhibits F and G.

¹⁶The 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)).

¹⁷Petition at 8 and Exhibit H.

¹⁸*Id.* at Exhibit I.

III. ANALYSIS

6. 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.¹⁹ 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.²⁰ 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 ("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,²¹ 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.

8. 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.

9. 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

¹⁹47 C.F.R. §76.906.

²⁰47 C.F.R. §76.911(b)(1).

²¹The 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.

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.²²

10. Based on the information before us, we find that Ameritech is offering service in Upper Arlington sufficient to demonstrate the presence of effective competition. Time Warner has provided Ameritech's construction schedule, maps of wired areas, and other demonstrations of Ameritech's actual and planned offering of service. Ameritech's initial service area lies in the center of Upper Arlington, with current construction expanding from that point in both a northern and southern direction. Time Warner indicates that Ameritech has wired about half of the area in the City where Time Warner currently serves subscribers. While the entire franchise area is still in the process of being wired, construction maps provided by Ameritech indicate that the entire franchise area will be built out according to an established schedule.²³ Also under its franchise agreement, Ameritech has assented to a 14 year franchise providing for substantial investment in the City's information infrastructure on an annual basis;²⁴ Ameritech will spend \$2.5 million on its fiber-optic network to satisfy its franchise obligations.²⁵ Moreover, Ameritech has agreed to reimburse the City for all its costs and expenses incurred in connection with the grant of the franchise.²⁶ We find that expansion of service is on schedule and investment in the community will continue as it has since Ameritech was awarded its franchise.

11. 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. According to the documents attached to Time Warner's petition, in those areas wired and marketed by Ameritech, potential subscribers need only contact Ameritech to activate service. Moreover, subscribers are able to receive service for only a

²²47 C.F.R. §76.905(e); see *Cable Act Reform Order* at ¶9 (citing 1996 Act Conference Report, S. Rep. 104-230 at 170 (Feb. 1, 1996)).

²³See Exhibit D attached to Time Warner's Petition for Special Relief. Ameritech's franchise agreement provides that Ameritech will provide cable service in the Upper Arlington geographic area. See Ameritech's franchise agreement with the City of Upper Arlington (attached as Exhibit A to Time Warner's Petition for Special Relief)

²⁴See Ameritech's franchise agreement with the City of Upper Arlington, attached as Exhibit A to Time Warner's Petition for Special Relief. (In Year 1 of the franchise, for example, Ameritech promises to construct a public, educational, and government ("PEG") channel player system, player systems for community information kiosks, among other items. In each additional year until the end of the franchise, Ameritech promises to provide additional equipment and services for the City's use.)

²⁵See *Upper Arlington This Week*, April 1, 1996 at p. 1, attached in Exhibit G to Time Warner's Petition for Special Relief.

²⁶See Ameritech's franchise agreement with the City of Upper Arlington.

minimal additional investment and without regulatory, technical or other impediments. We 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, and added 4 new channels.²⁷ We also note that Time Warner has experienced subscriber loss since the introduction of Ameritech's service in Upper Arlington. 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.

IV. ORDERING CLAUSES

12. 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 Upper Arlington, in Upper Arlington, Ohio **IS GRANTED**.

13 **IT IS FURTHER ORDERED** that the certification of the City of Upper Arlington, Ohio to regulate the basic cable rates of Time Warner Entertainment Co. d/b/a Warner Cable in Upper Arlington, Ohio **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*, 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.²⁸

15. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended.²⁹

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones
Chief, Cable Services Bureau

²⁷See Warren's *Cable Regulation Monitor*, "This Week's News", September 23, 1996 (noting Time Warner's reaction to Ameritech's presence in Columbus.) According to FCC Form 325, Upper Arlington is served from Time Warner's principal headend in Columbus, O.

²⁸*Cable Act Reform Order*, 11 FCC Rcd at 5938-5945, 5961-5964.

²⁹47 C.F.R. §0.321.