

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

In the Matter of:)	CSR 5217-E
)	
Rifkin & Associates, Inc.)	Duluth, GA
)	CUID No. GA0272
For Determination of)	
Effective Competition)	

MEMORANDUM OPINION AND ORDER

Adopted: February 1, 2001

Released: February 5, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Rifkin & Associates, Inc./Cable Equities of Colorado, Ltd. ("Rifkin") has filed a Petition for Special Relief seeking a determination of effective competition. Rifkin asserts that it is subject to local exchange carrier ("LEC")¹ effective competition in Duluth, Georgia because of the presence of BellSouth Interactive Media Services, Inc.'s ("BIMS") cable service in that city. This petition is unopposed. For the reasons discussed below, the Petition is granted.

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.² 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.³ Certification becomes effective 30 days from the date of filing unless the Commission finds that the authority does not meet the statutory certification requirements.⁴ In *Implementation of Cable Act Reform*

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).

²Communications Act § 623(a)(4), 47 U.S.C. § 543(a)(4).

³47 C.F.R. §§ 76.906, 76.910(b)(4).

⁴47 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).

Provisions of the Telecommunications Act of 1996 ("Cable Act Reform Order"),⁵ 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.⁶ 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.⁷

II. THE PLEADINGS

3. Rifkin asserts that it is subject to LEC effective competition in its Duluth, Georgia franchise area, where it currently serves over 5000 subscribers.⁸ With regard to the LEC affiliation requirement,⁹ Rifkin asserts that BIMS is a competing franchised cable operator affiliated with BellSouth, Inc., which is an incumbent local exchange carrier serving several states in the southern United States.¹⁰

4. With regard to the requirement that the LEC competitor offer¹¹ video programming service

⁵11 FCC Rcd 5937, 5944 (1996).

⁶47 C.F.R. § 76.7.

⁷Communications Act § 623(l)(1)(D), 47 U.S.C. § 543(l)(1)(D); see 47 C.F.R. § 76.905(b)(4).

⁸Rifkin Petition at 2.

⁹The 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).

¹⁰Rifkin Petition at 5.

¹¹In 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. 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

in the unaffiliated cable operator's franchise area, Rifkin asserts that BIMS is now providing such service to subscribers in Duluth.¹² To substantiate its claim, Rifkin states that BIMS has a total subscriber base of 759 out of a total of 951 homes passed.¹³ Rifkin states that BIMS has marketed and publicized the availability of its cable service through direct mail solicitations and door-to-door sales team visits. The introduction of BIMS service has also been made known through several articles in the *Atlanta Constitution*.¹⁴ Given that BIMS has over 700 subscribers so far, Rifkin asserts there are no regulatory, technical, or other impediments to households taking service from BIMS.¹⁵

5. Rifkin also asserts that BIMS offers comparable programming¹⁶ to Duluth subscribers. Specifically, Rifkin provides BIMS's channel line-up which demonstrates that BIMS offers 79 channels, 11 of which are local television broadcasting signals.¹⁷ Rifkin offers 86 channels of programming, 13 of which are local broadcast signals, in Duluth.¹⁸

6. Finally, Rifkin states that it has made pricing and marketing changes in response to increased competition from BIMS. Rifkin notes, for example, that it recently advanced the schedule of its "substantial" \$15.5 system upgrade, which adds nine new cable programming services, a low-priced, three channel new product tier, and seven new channels of pay-per-view, to the existing line-up.¹⁹

III. ANALYSIS

7. 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.²⁰ 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.²¹ Rifkin has met this burden.

8. With regard to the first part of the LEC effective competition test, which requires that the

they may purchase the services of the multichannel video programming distributor.

⁴⁷ C.F.R. ?76.905(e).

¹²Rifkin Petition at 2.

¹³*Id.*

¹⁴*Id.* at 7 and Exhibits D and E.

¹⁵*Id.* at 8.

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*, 11 FCC Rcd at 5940 (quoting 1996 Act Conference Report, S. Rep. 104-230 at 170 (Feb. 1, 1996)).

¹⁷Rifkin Petition at 8 and Exhibit F.

¹⁸*Id.* at 9 and Exhibit G.

¹⁹*Id.* at 10.

²⁰47 C.F.R. ?76.906.

²¹47 C.F.R. ?76.911(b)(1).

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 Rifkin has provided sufficient evidence demonstrating that BIMS is an MVPD affiliated with a LEC. BellSouth is a LEC as defined by the Communications Act,²² and BIMS meets the Commission's definition of MVPD.²³ Therefore, we find that Rifkin satisfies the affiliation prong of the LEC effective competition test. Rifkin is unaffiliated with both BellSouth and BIMS.

9. We also find that Rifkin has submitted sufficient evidence to show that the programming of BIMS is comparable to the programming which it provides. The channel information for BIMS submitted by Rifkin establishes that BIMS offers 79 channels of programming, including 11 local broadcast channels, as compared to the 86 channels of programming, 13 of which are local broadcast signals, offered by Rifkin. This satisfies the programming comparability criterion.

10. In addition, we find that based on the information before us, BIMS is franchised to serve Duluth and is offering service in Rifkin's franchise area sufficient to demonstrate the presence of effective competition. BIMS is continuing to overbuild Rifkin's system in the City of Duluth and is now competing for customers with Rifkin in the area at issue. We find that BIMS's undisputed recruitment of 759 subscribers to be a clear indicator that BIMS is physically able to offer service in the franchise area.

11. We note that BIMS's marketing efforts and the press coverage of BIMS's construction activity in the local media ensure that potential subscribers are reasonably aware of the availability of BIMS's service. Generally, subscribers in Duluth are able to receive BIMS's cable service for only a minimal additional investment and without encountering regulatory or technical obstacles. We also note that, to aggressively compete with BIMS's service, Rifkin has added new channels and upgraded its cable plant, which benefits subscribers in Duluth. Consistent with Congressional intent in adopting Section 623(1)(1)(d) of the Communications Act, under the circumstances, 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 Rifkin & Associates, Inc., challenging the certification of the City of Duluth, in Duluth, Georgia **IS GRANTED**.

²²The 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).

²³See 47 C.F.R. §76.905(d).

13. **IT IS FURTHER ORDERED** that the certification of the City of Duluth, Georgia to regulate the basic cable rates of Rifkin in Duluth, Georgia **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*.

15. This action is taken pursuant to delegated authority under Section 0.321 of the Commission's rules, as amended.²⁴

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

²⁴47 C.F.R. §0.321.