

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

In the Matter of:)	
)	
Time Warner Cable)	CSR-4824-E
)	Lima, OH et. al.
Petition for Determination of)	
Effective Competition)	

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 2001

Released: February 7, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. In the above-captioned proceeding, Time Warner Cable ("Time Warner") seeks a determination that it is subject to effective competition in Lima, Ohio and surrounding franchise areas¹ (hereinafter "Communities") because W.A.T.C.H. TV Company ("WTC")² provides competing multichannel video service in each of the Communities. WTC filed an opposition to Time Warner's request, as did the Ohio cities of Piqua, Sidney, and St. Marys. Time Warner replied to each of the opponents' arguments.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 76.905 of the Commission's rules.⁴ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁵ Section 623(l)(1)(D) of

¹The following 50 franchise areas, categorized by cable system headend, are part of Time Warner's request: **Lima**--Allen County (OH0548 and OH0585), Amanda (OH1140), Auglaize (OH1407), Bath (OH0582), Beaverdam (OH1408), Bluffton (OH1413), Buckland (OH0339), Cairo (OH1241), Criderville (OH0583), Elida (OH0373), Harrod (OH1410), Jackson (OH1411), Lafayette (OH1412) Lima (OH0069), Monroe (OH01238), Shawnee (OH0583), Sugar Creek (OH0741), Spencer (OH1147), and Spencerville (OH1148); **Delphos**--Allen County (OH1008), Marion (OH1144), Putnam County (OH1006), and Van Wert County (OH1007); **Greenville**--New Weston (OH2359); **Kenton**--Kenton (OH0049); **Ottawa**--Blanchard (OH1603), Columbus Grove (OH0179), Glandorf (OH0181); Ottawa (OH0180 and OH1604); and Pleasant (OH1602); **Piqua**--Brown (OH1750 and OH2360), Fletcher (OH1721), Piqua (OH0134), Spring Creek (OH0135), and Washington (OH0136); **St. Marys**--Burketville (OH2342) and St. Marys (OH0050); **Sidney**--Clinton (OH2369), Orange (OH2373), Perry (OH2374), Port Jefferson (OH1005), Salem (OH2375), Sidney (OH0051), Washington (OH2380), and West Liberty (OH0636); and **Wapakoneta**--Auglaize County (OH0334) and Wapakoneta (OH0053).

²WTC is a provider of multichannel multipoint distribution service ("MMDS") or wireless cable service.

³47 C.F.R. § 76.906.

⁴47 C.F.R. § 76.905.

⁵See 47 C.F.R. §§ 76.906 & 907.

the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC 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, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁶

3. The Commission has stated that an incumbent cable operator could satisfy the “LEC” effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator’s service in the franchise area.⁷ The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so, that no regulatory, technical or other impediments to household service exist, that the LEC is marketing its services so that potential customers are aware that the LEC’s services may be purchased, that the LEC has actually begun to provide services, the extent of such services, the ease with which service may be expanded and the expected date for completion of construction in the franchise area.⁸

II. DISCUSSION

4. Time Warner asserts that it faces effective competition from WTC, a wireless cable operator serving subscribers in Lima, Ohio and surrounding communities. Time Warner asserts that WTC is affiliated with Benton Ridge Telephone Company, a local exchange carrier serving residents in four central Ohio counties.⁹ Time Warner states that WTC offers service in all these communities, as all are within WTC’s 35-mile radius of protected service.¹⁰ Time Warner also states that WTC, whose headquarters are in Lima, serves nearly 10,000 subscribers in these communities and that some of these subscribers are located more than 35 miles away from WTC’s Cridersville transmitter site. Time Warner argues that there are no regulatory, technical or other impediments to households’ subscribing to WTC service. Time Warner asserts that WTC’s service offering has been made known to potential subscribers through the use of direct mail and has been widely publicized in the *Lima News*, a local newspaper circulated in Allen County (where nearly half of the communities are located) and surrounding areas. Time Warner asserts that WTC offers comparable multichannel video programming in Lima and surrounding areas. Time Warner includes WTC’s channel line-up in its list of exhibits to illustrate that the

⁶Communications Act, § 623(1)(1)(D), 47 U.S.C. § 543(1)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 632(l) may be referred to as the “LEC” effective competition test.

⁷*See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) (“*Cable Reform Order*”). No showing of meeting a penetration standard is required under the “LEC” effective competition test. *Id.* at 5303.

⁸*Id.* at 5305.

⁹Benton Ridge provides local telephone service in portions of four Northwestern Ohio counties: Hancock, Henry, Defiance, and Putnam. *See* Time Warner Petition, Exhibits B&C.

¹⁰WTC’s central transmitter is located in Cridersville, Ohio--less than 10 miles away from Lima.

wireless operator offers 32 channels of programming comparable to that which it provides; the line-up includes several local broadcast channels.

5. In opposition, WTC argues that a decision in this case should be deferred until after the Commission acts on WTC's pending petition for special relief for a permanent waiver of Section 21.912,¹¹ the Commission's cable-MMDS cross-ownership rules, or a declaration that no such waiver is necessary. WTC asserts that if its petition is denied by the Commission, Benton Ridge may be forced to divest WTC, thus mooting Time Warner's request.

6. The Ohio Cities of Sidney, St. Mary's, and Piqua ("Cities") each filed separate oppositions to Time Warner's request. The City of Sidney states that it was not aware of WTC's existence until Time Warner filed its petition. Sidney also states that Time Warner provides no proof that WTC has subscribers in Sidney or surrounding areas. Sidney adds that the marketing materials provided by Time Warner, illustrating WTC's coverage area, show that WTC's transmitter signal encompasses only the northern part of Shelby County, and not the southern part where Sidney is located. The City adds that the *Lima News* is not sold in Sidney. The City asserts that WTC does not offer comparable programming because it carries only two television stations that Time Warner carries in Sidney.

7. The Cities of St. Marys and Piqua argue that WTC's signal is not physically available in their respective franchise areas and also state that Time Warner failed to demonstrate actual WTC subscribership in their respective franchise areas. Piqua explains that WTC's transmissions cannot be received by its residents due to terrain obstacles even though the City is 33 miles from the Cridersville transmitter. Piqua adds that it is in Miami County and that this county is not even included in the service area map provided by WTC in its marketing materials. Piqua asserts, as did Sidney, that WTC only carries two television stations that Time Warner also carries; thus the programming comparability factor is not met in this instance. St. Marys asserts that the cable-MDS cross-ownership rules could be considered a regulatory impediment to WTC providing service to subscribers within its borders. The Cities also assert that the *Lima News*, the publication which purportedly publicizes the existence of WTC to potential subscribers, is not circulated to residents within their borders.

8. In reply, Time Warner states that it has been unable to confirm whether residents of Piqua and Sidney can currently receive WTC's signal and whether WTC's service is being actively marketed in these two communities. Time Warner requests that its petition be dismissed without prejudice with respect to Piqua and Sidney. As for all of the other communities in its petition, including St. Marys which is less than 11 miles away from the WTC transmitter, Time Warner reiterates that WTC's service is unquestionably offered and available, and that subscribers are aware that they may purchase WTC's service in the communities.¹² Time Warner adds that the weekly circulation of the *Lima News* in St. Marys is 1,100, out of an estimated 3,400 occupied households in that community. It states that an audit report for the *Lima News* demonstrates that the paper has significant circulation in St. Marys as well as Auglaize, Allen, Hancock, Hardin, Logan, Mercer, and other

¹¹WTC is currently operating under a temporary waiver of this rule.

¹²Time Warner asserts that one of WTC's customer service representatives confirmed that some St. Marys residents are WTC subscribers. Time Warner has also submitted a line-of-site map showing that there are no technical impediments to St. Mary's households receiving WTC's wireless service.

northwest-central Ohio counties.¹³ As for the programming comparability argument presented by the opposing Cities, Time Warner argues that because WTC offers access to at least twelve channels of programming, at least some of which are television broadcasting signals, WTC offers comparable programming. With regard to WTC's argument that it would be premature to act on the effective competition petition given that the Commission still has to act on the cable-MMDS waiver, Time Warner argues that so long as Benton Ridge continues to own WTC, it is entitled to relief.

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.¹⁴ The cable operator bears the burden of rebutting the presumption that 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.¹⁵ Time Warner has met this burden for all the relevant Communities, including St. Marys. As per Time Warner's request, we dismiss the petition with regard to the cities of Sidney and Piqua.

10. 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"))¹⁶ using the facilities of such LEC or its affiliate), we find that Time Warner has provided sufficient evidence demonstrating that WTC is a wholly-owned subsidiary of Benton Ridge Telephone Company, which is unquestionably a LEC. WTC did not dispute this fact in its Opposition. We find that Time Warner satisfies the affiliation prong of the LEC effective competition test. We also find that Time Warner is unaffiliated with WTC or Benton Ridge.

11. Time Warner has submitted sufficient evidence demonstrating that WTC provides comparable programming. A competing multichannel video programming distributor is said to offer comparable programming when at least 12 channels of programming, at least one of which is non-broadcast programming, are present. Neither the Communications Act nor the Commission's rules mandate station-specific comparability to the extent argued by the cities above. The channel line-up for WTC submitted by Time Warner establishes that WTC offers 32 channels of programming, including six over-the-air broadcast signals and numerous non-broadcast channels. This satisfies the Commission's programming comparability criterion.

12. 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

¹³See Time Warner Reply, Exhibit B (Audit Report for the Lima News).

¹⁴47 C.F.R. §76.906.

¹⁵47 C.F.R. §76.911(b)(1).

¹⁶The 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).

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.¹⁷

13. Based on the information before us, we find that WTC is offering service in the Communities at issue. Time Warner has submitted evidence that WTC's Cridersville, Ohio transmitter is in place and physically able to offer service, and in fact currently serves approximately 10,000 subscribers throughout the relevant Communities. In order to provide service, WTC need only install an MMDS antenna on, or near, a subscriber's home. Line-of-sight/shadow plot maps generated by Time Warner and the Commission indicate that the Communities lie within WTC's line-of-sight area. These facts convince us that WTC's service is physically available in the areas at issue with minimal, additional investment.¹⁸

14. We likewise conclude that no regulatory, technical or other impediments prevent potential subscribers from receiving WTC's service. We find that potential subscribers in the Communities are reasonably aware that they may receive competing video service because of WTC's direct mail campaign and the numerous advertisements placed by WTC in the *Lima News*. Time Warner has also demonstrated through the use of objective audit data, that the *Lima News* is circulated in the areas at issue. WTC has about 10,000 subscribers in its service area, indicating that the marketing materials are in fact educating potential subscribers about the availability of its service. There are no other indications of impediments to taking service or regulatory, technical or other obstacles impeding the grant of the petition.

15. We disagree with WTC's argument that the Commission should defer action on Time Warner's Petition pending resolution of WTC's request for a permanent waiver of the Commission's cross-ownership rules. WTC continues to provide wireless cable service to subscribers in the Communities pursuant to a temporary waiver issued by the Commission. Should WTC discontinue its wireless cable service for any reason, Section 76.916 of our rules permits local franchising authorities to file a petition for recertification to regulate rates.¹⁹

III. ORDERING CLAUSES

¹⁷47 C.F.R. §76.905(e).

¹⁸See *Rate Order*, 8 FCC Rcd at 5657-58 ("The installation by the MMDS operator of a special subscriber antenna capable of receiving microwave signals represents an 'individual' additional investment by the operator, the antenna being particular to that household's reception of the service.").

¹⁹ 47 C.F.R. §76.916.

15. Accordingly, **IT IS ORDERED** that the Petition for Determination of Effective Competition filed by Time Warner Cable **IS GRANTED** with respect to the Communities referenced in footnote 1 of this Order, except that Time Warner Cable's Petition with respect to the Cities of Piqua and Sidney, Ohio is **DISMISSED** without prejudice.

16. **IT IS FURTHER ORDERED** that the certifications of the applicable franchise authorities are **REVOKED**.

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

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau