

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

In the Matter of:)	
)	
CC VIII Operating, LLC and)	
CC Michigan, LLC d/b/a)	
Charter Communications)	CSR 5925-E
)	
Petition for Determination of Effective)	
Competition in Twelve Michigan Communities)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: December 2, 2002

Released: December 6, 2002

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. CC VIII Operating, LLC and CC Michigan, LLC d/b/a Charter Communications (“Charter”) have filed with the Commission a petition alleging that Charter is subject to effective competition from competing service providers in the twelve franchise areas in Michigan listed in Attachment A (collectively, the “Communities”). Charter alleges that its’ cable systems serving the Communities are subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended (“Communications Act”),¹ and Sections 76.7 and 76.905(b)(2) of the Commission’s rules, and seeks revocation of the certifications of the local franchising authorities in the Communities to regulate basic cable service rates.² Charter bases its allegation of effective competition on the competing services provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and EchoStar Communications Corporation (“EchoStar”). Oppositions to the petition were filed by three of the Communities (the “Oppositions”).³

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission’s rules.⁵

¹47 U.S.C. § 543.

²47 C.F.R. §§ 76.7 and 76.905(b)(2).

³ The Oppositions were filed by Laurium Village, Calumet Village, and Calumet Township.

⁴47 C.F.R. § 76.906.

⁵47 C.F.R. § 76.905.

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. Based on the record in this proceeding, Charter has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD") each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁶

4. The Oppositions filed in this proceeding indicated that Charter used flawed data in its Petition and requested a copy of all data submitted by Charter in support of its petition.⁷ The Oppositions further asked that the Commission withhold any decision until reasonable time is allowed to review such documentation.⁸ Charter's Petition contained the required certificate of service indicating that the parties had been provided with a copy of the petition and its supporting exhibits.⁹ By correspondence dated August 15, 2002 and August 29, 2002, the Commission informed the three local franchising authorities of this fact and provided the local franchising authorities with two extensions of time to file more detailed comments. In addition, the August 15, 2002 correspondence instructed the local franchising authorities how to obtain an additional copy of Charter's Petition. In response, Calumet Township and Laurium Village indicated that "this information ha[d] not been received," despite earlier assertions in their Oppositions that the data contained within the Petition was faulty.¹⁰ An October 9, 2002 letter from the Commission to Calumet Township and Laurium Village sought clarification as to whether the two local franchising authorities had received an incomplete service copy of the Petition, or whether a complete service copy had been received and the two communities simply disputed its sufficiency.¹¹ The Commission did not receive a response to its clarification request. Further, neither the Oppositions nor the correspondence from Calumet Township and Laurium Village contain specific substantive arguments relating to the Petition. In the absence of demonstrable procedural defects or a substantive opposition, the Commission shall consider the merits of Charter's Petition.

5. Turning to the first prong of the competing provider effective competition test, DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in a franchise area are made reasonably aware that the service is

⁶ 47 U.S.C. § 543(l)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁷ *See* Oppositions at 1.

⁸ *Id.*

⁹ Letter from Steven A. Broecker, FCC, to Timothy L. Bies, President, Village of Calumet (Aug. 15, 2002); Letter from Steven A. Broecker, FCC, to Paul Lehto, Calumet Township Supervisor, and Edward M. Vertin, Laurium Village Administrator (Aug. 29, 2002); *see* 47 C.F.R. § 76.7(a)(3).

¹⁰ Letter from Paul Lehto, Calumet Township Supervisor to FCC (Aug. 19, 2002); Letter from Edward M. Vertin, Laurium Village Administration to FCC (Aug. 28, 2002); *see also* Oppositions at 1.

¹¹ Letter from Steven A. Broecker, FCC, to Paul Lehto, Calumet Township Supervisor, and Edward M. Vertin, Laurium Village Administrator (Oct. 9, 2002) (indicating that unless Calumet Township and Laurium clearly responded to the Commission's clarification request within 15 days, the Commission would proceed to issue an order in this proceeding).

available.¹² Charter has provided evidence of the advertising of DBS service in news media serving the franchise areas, indicating that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and EchoStar.¹³ We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.¹⁴ Charter has demonstrated that the twelve Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Charter has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers.¹⁵ Therefore, the first prong of the competing provider test is satisfied.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Charter sought to determine the competing provider penetration in its franchise areas by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers in the Communities on a five-digit zip code basis.¹⁶ However, rather than simply accepting SkyTrends' figures, Charter assumes that some of the DBS subscribers identified in the report may actually live in zip codes outside of the Communities.¹⁷ To account for such a possibility, Charter has devised a formula that compares U.S. Census household data for the Communities and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber count.¹⁸ Charter then reduces the estimated DBS subscriber count by 10 percent to reflect the possibility that some households have subscribed to both cable and DBS service and to take into account commercial or test accounts.¹⁹ The Commission believes that Charter's methodology is sound since it seeks to accurately quantify subscribers using the best available DBS subscriber data.

7. Charter asserts that it is the largest MVPD in the Communities because Charter's subscribership exceeds the aggregate DBS subscribership for those Communities.²⁰ Based upon the levels of DBS subscriber penetration as reflected in Appendix A, we find that Charter has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in each of these Communities. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Charter has

¹² See *MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

¹³ Petition at 4 and Exhibit 1.

¹⁴ See 47 C.F.R. § 76.905(g). See also Petition at 4-5 and Exhibits 2-3. Exhibit 2 contains the nationwide channel lineups of DirecTV and EchoStar and Exhibit 3 includes channel lineups for Charter's cable systems serving the Communities.

¹⁵ Petition at 3-4.

¹⁶ *Id.* at 5-6.

¹⁷ *Id.* at 6.

¹⁸ *Id.* at 6 and Exhibits 5-6.

¹⁹ *Id.* at 6-7. According to documentation previously provided to the Commission by Charter, SkyTRENDS' zip code subscriber numbers are inflated by roughly ten percent "due to dual receivers, and limited commercial and test accounts." See *Charter Communications*, DA 02-1919 at n.13 (MB rel. Aug. 6, 2002).

²⁰ *Id.* at 5 and Exhibit 4.

submitted sufficient evidence demonstrating that its cable systems serving the twelve Communities identified in Appendix A, are subject to effective competition.

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by CC VIII Operating, LLC and CC Michigan, LLC d/b/a Charter Communications **IS GRANTED**.

9. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service in the cities listed on Attachment A **ARE REVOKED**.

10. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
Deputy Chief, Policy Division, Media Bureau

²¹47 C.F.R. § 0.283.

ATTACHMENT A

CSR-5925-E

COMMUNITIES SERVED BY CC VIII OPERATING, LLC
AND CC MICHIGAN, LLC D/B/A CHARTER COMMUNICATIONS

Communities	CUIDS	CPR*	2000 Census Households⁺	Estimated DBS[‡] Subscribers⁺	Charter Subscribers⁺
Ironwood City	MI0028	16.6	2,841	472	2,562
Ontonagon Village	MI0061	26.1	768	201	713
Wakefield City	MI0030	25.2	883	222	757
Calumet Township	MI0136	16.9	2,892	487	1,095
Calumet Village	MI0131	16.9	387	65	256
Laurium Village	MI0129	16.3	897	146	736
Bessemer City	MI0022	15.9	976	155	970
Frenchtown Township	MI0531	16.0	7,733	1,237	4,847
Bronson City	MI0180	36.1	891	322	681
Quincy Village	MI0103	26.4	640	169	545
Carleton Village	MI0609	28.7	998	287	699
Erie Township	MI0528	21.1	1,789	378	1,044

*CPR = Percent of competitive DBS penetration rate.

⁺See Petition at Exhibits 4 & 5.

[‡]DBS subscriber estimate includes 10% reduction.