

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

In the Matter of:	)	
	)	
Marcus Cable Associates, LLC d/b/a	)	
Charter Communications	)	CSR-5927-E
	)	
Petition for Reconsideration of the	)	
Determination of Effective Competition in Denton,	)	
TX (TX0580)	)	
	)	

**ORDER ON RECONSIDERATION**

**Adopted: May 6, 2003**

**Released: May 13, 2003**

By the Deputy Chief, Media Bureau:

**I. INTRODUCTION**

1. The City of Denton, Texas (“Denton” or the “City”) has filed with the Commission a petition for reconsideration pursuant to Section 1.106 of the Commission's rules<sup>1</sup> of the Media Bureau's earlier determination<sup>2</sup> that Marcus Cable Associates, LLC d/b/a Charter Communications, Inc. (“Charter”) is subject to effective competition in Denton pursuant to Section 623(a) of the Communications Act of 1934, as amended (“Communications Act”), and Section 76.905(b)(2) of the Commission's rules (the “Order”).<sup>3</sup> Denton contends that Charter failed to demonstrate the presence of effective competition in Denton stemming from the competing services provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. and EchoStar Communications Corporation (collectively, the “DBS Providers”). Charter filed an opposition to the petition, to which Denton filed a reply. Charter also filed a motion for leave to respond to Denton's reply, to which Denton filed a second reply. Although Charter's Response and Denton's Second Reply were filed outside the normal pleading cycle for petitions for reconsideration, in the interest of a full and complete record in this proceeding, and since both parties have had an opportunity to fully express their positions before the Commission, we will consider the arguments set forth in these filings.

**II. BACKGROUND**

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

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<sup>1</sup> 47 C.F.R. § 1.106.

<sup>2</sup> *Marcus Cable Associates, LLC*, 17 FCC Rcd 16652 (2002) (“*Marcus*”).

<sup>3</sup> 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(2).

subject to effective competition,<sup>4</sup> as that term is defined by Section 76.905 of the Commission's rules.<sup>5</sup> 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. Section 623(l)(1)(B) of the Communications Act and Section 76.905(b)(2) of the Commission's rules provide that a cable operator is subject to effective competition if the 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.<sup>6</sup> The *Order* concluded that Charter had met its burden by demonstrating that the competitive presence of the DBS Providers in Denton, as evidenced by SkyTrends in a franchise-specific zip code plus four DBS subscriber report, satisfied the "competing provider" effective competition test.<sup>7</sup>

### III. DISCUSSION

3. In its petition for reconsideration, the City argues that the DBS Providers serve less than fifteen percent of the households in Denton and therefore do not meet the second prong of the competing provider test.<sup>8</sup> Denton disputes the number of DBS subscribers reported by SkyTrends on behalf of the DBS Providers and suggests that the 3,585 "records" mapped by SkyTrends as a part of SkyTrends' zip code plus four analysis for the City represent 3,585 individual subscribers that, when combined with the 121 SMATV subscribers reported by TVMAX, Inc., would result in a 12 percent competitive penetration rate based upon 2000 Census household numbers.<sup>9</sup> The zip code plus four methodology documentation provided by Charter indicates that the records mapped by SkyTrends actually represent zip code plus four extensions within the relevant franchise area that are typically associated with multiple DBS subscribers.<sup>10</sup> In the case of Denton, SkyTrends reports that the 3,585 zip code plus four records mapped within the City represent 5,919 DBS subscribers.<sup>11</sup> Our review of the record indicates that Charter has properly demonstrated the existence of 6,040 competitive DBS and SMATV subscribers within its Denton franchise area.

4. Denton further challenges the accuracy of the SkyTrends report for its alleged failure to include DBS subscriber data for the 76226 zip code in its zip code plus four analysis for the City. To the extent that DBS subscriber data associated with a particular five digit zip code may have been excluded from SkyTrends' analysis, we do not find it to be of decisional significance. If, as Charter contends, zip code 76226 falls outside Denton, then SkyTrends' zip code plus four mapping methodology would have

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<sup>4</sup> 47 C.F.R. § 76.906.

<sup>5</sup> 47 C.F.R. § 76.905.

<sup>6</sup> 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

<sup>7</sup> *Marcus*, 17 FCC Red at 16655.

<sup>8</sup> Petition for Reconsideration at 2. Denton additionally alleges that Charter is under investigation and involved in lawsuits relating to its accounting of subscribers and other financial issues. *Id.* at 2-3. However, Denton does not provide any rationale supporting a linkage between these events. As a result, these allegations are extrinsic to the issues involved in the instant proceeding and need not be addressed in this *Order on Reconsideration*.

<sup>9</sup> *Id.* at 2 (3,585 records + 121 SMATV subscribers ÷ 30,895 2000 Census households = 11.9%).

<sup>10</sup> Charter Opposition at Attachment A.

<sup>11</sup> Charter Opposition at 3; Petition for Special Relief at Exhibit 1.

automatically eliminated any DBS subscribers within that zip code from the total reported for Denton. In the alternative, if zip code 76226 does fall within the City, its inclusion in SkyTrends' analysis would only serve to increase the number of DBS subscribers allocated to Denton, thereby bolstering Charter's showing of effective competition.

5. Denton also criticizes Charter for not producing for verification the supporting data used by SkyTrends in its zip code plus four analysis for the City.<sup>12</sup> Denton asks that the Commission find that Charter is in violation of its franchise and assess a monetary forfeiture against the cable operator.<sup>13</sup> We have repeatedly accepted SkyTrends' subscriber reports on behalf of the DBS Providers in satisfaction Section 76.907(c) of the Commission's rules.<sup>14</sup> Pursuant to this provision, cable operators may request subscriber information from competitors for effective competition purposes, however, this information may be limited to numerical totals.<sup>15</sup> Charter provided Denton with the relevant portion of the SkyTrends report identifying the total number of DBS subscribers allocated to the City, as well as a copy of the methodology detailing how SkyTrends reached this result.<sup>16</sup> Charter has also submitted documentation reflecting that SkyTrends does not publicly release any zip code plus four data beyond its general methodology and the aggregate DBS subscriber total for the franchise area in question.<sup>17</sup> In this regard, Charter has satisfied its obligations under the Commission's rules regarding the provision of subscriber information for effective competition purposes and we decline to take any remedial action.

6. In addition to its concerns regarding the subscriber information provided by Charter, Denton argues that the use of 2000 Census household data to determine the aggregate DBS penetration within the City is inappropriate since Denton is a rapidly growing area and 2000 Census data is already out of date.<sup>18</sup> While Denton offers alternative data from the North Central Texas Council of Governments ("NCTCOG") which the City purports to be household estimates, the documentation provided in its opposition to Charter's original petition clearly indicates that the NCTCOG numbers are for housing units.<sup>19</sup> The difference between households and housing units is not simply one of nomenclature. For effective competition purposes, the Commission utilizes the U.S. Census Bureau's definition of "households" which is "occupied housing units."<sup>20</sup> Under this definition, "households" is a subset of "housing units," the latter being comprised of both occupied and unoccupied year round residences. We therefore find that use of the NCTCOG housing unit data is inappropriate for effective competition purposes.<sup>21</sup>

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<sup>12</sup> Denton First Reply at 2-3.

<sup>13</sup> *Id.* at 3.

<sup>14</sup> See 47 C.F.R. § 76.907(c); see, e.g., *Cablevision of Paterson*, 17 FCC Rcd 17239 (2002); *Mountain Cable Company d/b/a Adelpia Cable Communications*, 14 FCC Rcd 13994, 13997 n.26 (1999).

<sup>15</sup> 47 C.F.R. § 76.907(c).

<sup>16</sup> See *Marcus*, 17 FCC Rcd at 16654.

<sup>17</sup> Charter Opposition at Attachment A.

<sup>18</sup> Petition for Reconsideration at 2.

<sup>19</sup> Denton First Reply at 2; see also Opposition to Petition for Special Relief at 1.

<sup>20</sup> See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 9 FCC Rcd 4316, 4324 (1994); see also <[www.census.gov/dmd/www/glossary.html](http://www.census.gov/dmd/www/glossary.html)> ("Census Glossary").

<sup>21</sup> We recognize that even if the NCTCOG data did represent a household count for the City, the resulting competitive penetration level, based upon the 6,040 DBS and SMATV subscribers documented by Charter, would  
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7. Finally, Denton contends that adjustments should be made to the household data employed in our effective competition analysis in order to compensate for the rapid growth of the City in recent years.<sup>22</sup> Denton specifically seeks the addition of 3,312 dormitory rooms from local universities, 1,365 residential units recently granted certificates of occupancy, and 200 households in the Robson Ranch subdivision which was recently annexed to the City.<sup>23</sup> While we decline to make adjustments based upon the dormitory and certificate of occupancy numbers provided by Denton, we will add the households attributable to the Robson Ranch area to Charter's Census household data. Pursuant to U.S. Census Bureau definitions, college or university dormitories are noninstitutional group quarters rather than households.<sup>24</sup> As such, they fall outside the scope of our effective competition analysis. With respect to residences recently granted certificates of occupancy, we do not believe that local inspections and permits indicating that a building is ready for occupancy demonstrates that the building is in fact occupied full time such that it would qualify as a household under the Census definition.<sup>25</sup> In the case of the Robson Ranch subdivision, Charter concedes that this development "contains approximately 200 households."<sup>26</sup> We accordingly adjust the 2000 Census household tally for Denton of 30,895 to 31,095. Taking into account this adjustment, Charter has nonetheless 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 Denton.<sup>27</sup>

#### IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the petition for reconsideration filed by the City of Denton **IS DENIED**.

9. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>28</sup>

FEDERAL COMMUNICATIONS COMMISSION

William Johnson  
Deputy Chief, Media Bureau

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exceed fifteen percent (5,919 DBS subscribers + 121 SMATV subscribers ÷ 36,987 NCTCOG estimated housing units = 16.3%).

<sup>22</sup> Denton First Reply at 1-2.

<sup>23</sup> Denton First Reply at 2; Denton Second Reply at 1.

<sup>24</sup> See Census Glossary.

<sup>25</sup> The City of Denton's website indicates that certificates of occupancy, which are issued following an inspection of the premises, are a prerequisite for occupancy or use of a building pursuant to Section 110 of the International Building Code. See <[www.cityofdenton.com/pages/certificateoccup.cfm](http://www.cityofdenton.com/pages/certificateoccup.cfm)>.

<sup>26</sup> Charter Response at 1-2, n.2.

<sup>27</sup> 5,919 DBS subscribers + 121 SMATV subscribers ÷ 31,095 adjusted Denton households = 19.4%.

<sup>28</sup> 47 C.F.R. § 0.283.