

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

In the Matter of:)	
)	
Charter CommunicationsVIII Operating, LLC d/b/a)	
Charter Communications)	CSR-5889-E
)	
Petition for Determination of Effective)	
Competition in Winona, Minnesota (MN0010))	
)	

MEMORANDUM OPINION AND ORDER

Adopted: January 22, 2003

Released: January 23, 2003

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Charter Communications VIII Operating, LLC d/b/a Charter Communications (“Charter”) has filed with the Commission a petition pursuant to Section 76.7 of the Commission's rules for a determination of effective competition in Winona, Minnesota.¹ Charter alleges that its cable system serving Winona is subject to effective competition 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, and seeks revocation of the certification of the local franchising authority in Winona to regulate basic cable service rates.² Charter claims the presence of effective competition in Winona stems from the competing services provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. and EchoStar Communications Corporation (“EchoStar”), and a cable overbuilder, Hiawatha Broadband Communications (“Hiawatha”). No opposition to the petition was filed.

II. DISCUSSION

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. Based on the record

¹ 47 C.F.R. § 76.7.

² 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(2).

³ 47 C.F.R. § 76.906.

⁴ 47 C.F.R. § 76.905.

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 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 (15%) of the households in the franchise area.⁵

4. Turning to the first prong of the competing provider 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 available.⁶ Charter has provided evidence of the advertising of DBS service in news media serving Winona.⁷ 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.⁸ Charter has demonstrated that Winona is 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 Winona, that there exists no regulatory, technical, or other impediments to households within Winona taking the services of the DBS providers, and that potential subscribers in Winona have been made reasonably aware of the MVPD services of DirecTV and EchoStar.⁹ Therefore, the first prong of the competing provider test is satisfied.

5. 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 has obtained subscriber numbers for Hiawatha, a cable overbuilder operating in Winona.¹⁰ Charter also sought to determine the competing provider penetration in its franchise area by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers in Winona on a five-digit zip code basis.¹¹ 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 Winona.¹² To account for such a possibility, Charter has devised a formula that compares U.S. Census household data for Winona and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber count.¹³ Charter also reduces the estimated DBS subscriber count by 10

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

⁶ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁷ Petition at 3 and Exhibit 1.

⁸ *See* 47 C.F.R. § 76.905(g). *See also* Petition at 3-4 and Exhibits 2, 3. Exhibit 2 includes the channel line-up for Charter's cable system serving Winona and Exhibit 3 contains the nationwide channel lineups of DirecTV and EchoStar.

⁹ Petition at 2-4.

¹⁰ *Id.* at 6 and Exhibits 8-10. *See* Letter from Kent A. Gernander, Secretary, Hiawatha Broadband Communications, Inc., to Cody J. Harrison, Cole, Raywid & Braverman, L.L.P. (Dec. 27, 2002).

¹¹ Petition at 5.

¹² *Id.*

¹³ *Id.* at 5-6 and Exhibits 4-6.

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.¹⁴ The Commission believes that Charter's methodology is sound since it seeks to accurately quantify subscribers using the best available DBS subscriber data.

6. Charter asserts that it is the largest MVPD in Winona because Charter's subscribership exceeds both the Hiawatha and the aggregate DBS subscribership for that community.¹⁵ Based upon the 54.3 percent aggregate competitive subscriber penetration level, calculated using 2000 Census household data,¹⁶ 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 Winona. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable system serving Winona is subject to effective competition.

III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by Charter Communications VIII Operating, LLC d/b/a Charter Communications **IS GRANTED**.

8. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service in Winona, Minnesota **IS REVOKED**.

9. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.¹⁷

FEDERAL COMMUNICATIONS COMMISSION

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

¹⁴ *Id.* at 6. According to documentation previously provided to the Commission, 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 (rel. Aug. 6, 2002).

¹⁵ Petition at 4-5 and Exhibit 4.

¹⁶ *See id.* at Exhibit 5 (4,714 Hiawatha subscribers + 881 DBS subscribers ÷ 10,301 Winona 2000 Census households = 54.3%).

¹⁷ 47 C.F.R. § 0.283.