

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

In the Matter of:)	
)	
Charter Communications, LLC d/b/a Charter Communications.)	CSR 6076-E
)	
Petition for Determination of Effective Competition in Fourteen North Carolina Communities)	
)	
Charter Communications, Inc., on behalf of Falcon Cable Media; Robin Media Group, Inc. ; The Helicon Group, LP; Marcus Cable Associates; Charter Communications Properties, LLC; and HPI Acquisition Co., LLC)	CSR 6092-E
)	
Petition for Determination of Effective Competition in Thirteen North Carolina Communities)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 2004

Released: April 19, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Charter Communications, LLC d/b/a Charter Communications, and Charter Communications, Inc., on behalf of Falcon Cable Media; Robin Media Group, Inc. ; The Helicon Group, LP; Marcus Cable Associates; Charter Communications Properties, LLC; and HPI Acquisition Co., LLC (“Charter”) have filed with the Commission two petitions for a determination of effective competition in the twenty seven North Carolina Communities listed in Attachment A (the “Communities”) pursuant to Section 623(a) of the Communications Act,¹ and the Commission's implementing rules.² Charter alleges that its cable systems serving those Communities are subject to effective competition and are therefore exempt from cable rate regulation. More particularly, Charter claims that the presence of effective competition in twenty four of the Communities stems from the competing services provided by two unaffiliated direct broadcast satellite (“DBS”) providers, DirecTV and EchoStar. Charter claims it is subject to effective competition in these Communities under the “competing provider” effective

¹47 U.S.C. § 543(a).

²47 C.F.R. § 76.905(b).

competition test set forth in Section 623(1)(1)(B) of the Communications Act. Charter further claims that it is subject to effective competition in Chatham County, New Hanover County, and Onslow County, North Carolina, because fewer than 30 percent of the households in these communities subscribe to Charter's cable services. Charter asserts that it is thus subject to effective competition in these communities under the "low penetration" effective competition test set forth in Section 623(1)(1)(A) of the Act. The local franchising authority of each of these Communities (the "LFAs") filed joint Oppositions to the petitions, and Charter filed replies.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 623(1) of the Communications Act, and Section 76.905 of the Commission's rules.⁵ 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.⁶ Section 623(1) of the Communications Act provides that a cable operator is subject to effective competition, if either one of four tests for effective competition set forth therein is met.⁷ A finding of effective competition exempts a cable operator from rate regulation and certain other of the Commission's cable regulations.⁸

III. APPLICATION OF THE "COMPETING PROVIDER" EFFECTIVE COMPETITION TEST IN TWENTY FIVE CAROLINA COMMUNITIES

3. Section 623(1)(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.⁹ Turning to the first prong of this 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.¹⁰ Charter has provided evidence of the advertising of DBS service in regional and national media serving the franchise areas.¹¹ Moreover, the two DBS providers' subscriber growth reached approximately 20.4 million as of

³ Charter filed motions to withdraw the petitions with respect to Granite Falls, Lenoir, and Weaverville, North Carolina, which the LFAs opposed. A request for Commission action may be withdrawn as a matter of right unless restricted by regulation. *See for example* 47 C.F.R. 1.420(j). No such regulation applies to petitions for determination of effective competition filed pursuant to 47 C.F.R. §§ 76.7 & 76.907. Additionally, the unopposed Motions for Extension of Time filed by Charter are granted.

⁴47 C.F.R. § 76.906.

⁵*See* 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁶*See* 47 C.F.R. §§ 76.906 & 907.

⁷*See* 47 U.S.C. § 543(1)(1)(A)-(D).

⁸*See* 47 C.F.R. §76.905.

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

¹⁰*See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

¹¹*See* Petitions at 4-5 and Exhibit 1.

June 30, 2003, comprising approximately 20 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and EchoStar the fourth largest, MVPD provider.¹² We conclude that the population of the Communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test. With respect to the issue of program comparability, 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.¹³ We further find that Charter has demonstrated that the 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. Therefore, the first prong of the competing provider test is satisfied.

4. The LFAs also contended that Charter failed to establish that the Community populations have been sufficiently made aware of the availability of DBS services to satisfy the first prong of the competing provider test. This argument is rejected. Charter provided numerous examples of local, regional and national advertisements for DBS service to which this population has been exposed, and referred to the extensive round of DBS national advertising in the Fall of 2002 during such high-profile sporting events such as professional baseball playoffs and NFL football games.¹⁴ Moreover, in view of DBS subscriber growth reaching approximately 20.4 million, and the two DBS providers becoming the second and fourth largest MVPDs as noted above, we find it reasonable to conclude that the population of the Communities at issue here are aware of the availability of DBS services for purposes of the first prong of the competing provider test. Charter's showing that more than 20 percent of households in the Communities at issue have become DBS subscribers further supports this conclusion.

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's assertion that it is the largest MVPD provider in each of these Communities was not disputed by the LFAs.¹⁵ Charter provided 2000 Census data showing the number of households for each of the twenty four Communities.¹⁶ Charter then compared the 2000 Census households for each of the Communities with the households in each of the U.S. Postal Zip Code areas encompassing each Community, and allocated that proportion of the DBS subscribers within each such Zip Code to each Community.¹⁷ The resulting numbers of DBS subscribers were then compared to the household numbers for each Community to demonstrate that in each Community the DBS MVPD providers collectively have attained subscriber penetration levels ranging from 19.8 percent in Sugar Mountain, North Carolina, to 41.7 percent in Benson, North Carolina, or in excess of 15 percent in each of the Communities.¹⁸ Based on this information we find that Charter has satisfied the second prong of the competing provider test in these twenty four Communities.

¹² *Tenth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 04-5, released January 28, 2004, at Par. 65-67.

¹³ See 47 C.F.R. § 76.905(g). See also Charter Petition at 4-5 and Exhibit 2 & 3. Exhibits 2 & 3 include channel line-ups for Charter's cable systems serving the Communities as well as those of DirecTV and EchoStar.

¹⁴ Petitions at 3-5 and Exhibit 1; Replies at 5-6.

¹⁵ Petitions at 5 and Exhibit 4.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 5-7 and Exhibit 5. The penetration rate for each Community is set forth on Attachment A.

6. In opposition, the LFAs disputed Charter's penetration figures for each of the Communities on the grounds that they were based on flawed data. First, the LFAs faulted Charter's DBS subscriber allocations based on the use of the five digit Zip Code data. The LFAs contend that higher DBS penetration rates exist in the rural portion of the Zip Codes outside of each Community, accompanied by lower penetration rates within each Community. They contend that such lower penetration rates are not reflected by five digit Zip Code data from the SkyTrends report utilized by Charter in developing its DBS subscriber figures. However, the LFAs failed to provide any data that supports this contention. Instead, the LFAs' data tend to confirm that provided by Charter by their replication, without additional data or analysis, of the figures supplied by Charter for franchise and Zip Code households, and DBS subscribers.¹⁹ Therefore, we cannot accept the LFAs' data as a credible basis for rejecting the data and DBS subscriber allocations presented by Charter.²⁰

7. The LFAs also criticized Charter's failure to support its petition with SkyTrends' Zip Code plus four data, which they contend is available and would more accurately identify the numbers of DBS subscribers within each Community than the five digit Zip Code data used. Charter met its initial burden of coming forward with evidence relative to effective competition in the Communities at issue, by presenting DBS subscriber penetration levels developed from subscriber allocation figures based on the five digit Zip Code data discussed above. LFA argument alone that such data may be flawed failed to rebut Charter's evidentiary showing. Although the Commission accepts Zip Code plus four data, it has not expressed a preference for one form of data over another and accepts five digit Zip Code data as reliable for purposes of determining effective competition.

8. We believe the data provided by Charter provides a reasonable basis for finding that DBS penetration exceeds 15 percent in these twenty four Communities. First as noted earlier, Charter's data provide penetration levels ranging from 19 percent to 41 percent. These ranges are consistent with the 24 percent DBS penetration level for the whole state of North Carolina.²¹ We believe these penetration rates provide a sufficient margin of error with respect to the 15 percent competing provider test threshold to overcome any concerns raised by unsupported arguments about DBS penetration imbalances in rural and urban areas.

9. We also reject the LFAs' argument that Charter's DBS subscriber data is unreliable because data from certain Zip Code areas were used in making more than one subscriber allocation. Use of such data as the denominator in multiple allocation ratios cannot affect the Community subscriber estimates derived from the separate resulting ratios. We further find that Charter appropriately separated the unincorporated portions of certain counties from incorporated areas, and disregarded certain Zip Codes that referred only to post office boxes, in the process of making its DBS subscriber allocations,²² and reject the LFAs' argument to the contrary.

¹⁹ Compare Oppositions at 11-20 with Petitions at 7.

²⁰ A request by The Village of Sugar Mountain, North Carolina, submitted by letter received February 5, 2003, for denial of the petition with respect to that community, based on essentially the same unsupported criticism of Charter's Zip Code data as that presented by the LFAs, is also rejected.

²¹ Replies at 6.

²² See Petitions at 7, 17 and Exhibit 4.

IV. APPLICATION OF THE “LOW PENETRATION” EFFECTIVE COMPETITION TEST IN CHATHAM COUNTY, NEW HANOVER COUNTY, AND ONSLOW COUNTY, NORTH CAROLINA

10. Another test by which a cable system will be deemed subject to effective competition is if fewer than 30 percent of the households in the systems' franchise area subscribe to the system's service.²³ Charter has provided information under the low penetration test showing that only 373 (or 2.3%) of the 19,741 households in Chatham County, North Carolina subscribe to its cable services; only 4,420 (or 15.0%) of the 29,530 households in New Hanover County, North Carolina subscribe to its cable services; and only 2,630 (or 8.9%) of the 29,520 households in Onslow County, North Carolina subscribe to its cable services.²⁴ Charter's household data is taken from the 2000 Census.²⁵

11. We reject as unsupported the LFAs' argument that Charter has redefined its Chatham County, New Hanover County and Onslow County franchise areas to include only built-up areas of the county adjacent to the city limits of nearby urban areas.²⁶ Other than to note that another cable operator also holds a franchise to provide cable services to these franchise areas and that neither cable operator provides service in the portions of the counties served by the other, the LFAs provide no specific evidence that Charter has affirmatively redefined these franchise areas. We have never held that a cable operator's mere failure to build-out its entire franchise area supports a finding that the cable operator has redefined its franchise area to include only the built-out portion.

12. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable systems serving the twenty five North Carolina Communities set forth on Attachment A as well as Chatham County, New Hanover County and Onslow County, North Carolina, are subject to effective competition.

²³See 47 U.S.C § 543(I)(I)(A) & 47 C.F.R. S 76.905(b)(I), which set forth the “low penetration” effective competition test.

²⁴Petitions at 7-8 and Exhibits 6 & 7.

²⁵ *Id.*

²⁶ The LFAs assert that 373 DBS subscribers among 546 households in the built-up area of Chatham County would constitute a 68 percent penetration rate; 4,522 DBS subscriber among 10,277 households in the built-up area of New Hanover County would constitute a 44 percent penetration rate; 2,630 DBS subscriber among 5,891 households in the built-up area of Onslow County would constitute a 44.6 percent penetration rate. However, “low penetration” test penetration rates are based on total franchise areas; not merely the built-up area as the LFAs suggest with these data.

V. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the petitions for a determination of effective competition in the twenty four North Carolina Communities set forth on Attachment A and in Chatham County, New Hanover County, and Onslow County, North Carolina, filed by Charter Communications, LLC d/b/a Charter Communications, and by Charter Communications, Inc., on behalf of Falcon Cable Media; Robin Media Group, Inc.; The Helicon Group, LP; Marcus Cable Associates; Charter Communications Properties, LLC; and HPI Acquisition Co., LLC **ARE GRANTED**.

14. **IT IS FURTHER ORDERED** that the Motions to Withdraw the petition with respect to Granite Falls, and Weaverville, North Carolina **ARE GRANTED WITHOUT PREJUDICE**.

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

ATTACHMENT A

File No. CSR 6076-E & CSR 6092-E

COMMUNITIES SERVED BY

Charter Communications, LLC d/b/a Charter Communications

Charter Communications, Inc., on behalf of Falcon Cable Media; Robin Media Group, Inc., ; The Helicon Group, LP; Marcus Cable Associates; Charter Communications Properties, LLC; and HPI Acquisition Co., LLC

Competing Provider Test

Communities	2000 Census Households**	Zip Code Households	Alloc	DBS Subs Per Zip Code	DBS Subs Allocated	CPR*
Benson, NC	1,230	5,814	21.2%	2,419	513	41.7%
Burke County, NC	22,311	34,786	64.1%	7,980	5,115	22.9%
Clyde, NC	547	4,567	12.0%	1,596	192	35.1%
Coats, NC	755	2,543	29.7%	629	187	24.8%
Holly Ridge, NC	321	2,693	11.9%	601	72	22.40%
Lee County, NC	9,516	25,066	38.0%	6,604	2,510	26.4%
Lillington, NC	799	5,556	14.4%	1,607	231	28.9%
Lincoln County	20,163	47,065	42.8%	11,015	4,714	23.4%
Lincolnton, NC	3,855	13,682	28.3%	3,102	878	22.6%
Marion, NC	2,146	12,545	17.1%	3,374	577	26.9%
North Topsail Beach, NC	451	2,970	15.2%	769	177	25.9%
North Wilkesboro, NC	1,639	9,544	17.2%	2,071	356	21.7%
Old Fort, NC	441	3,277	13.5%	1,108	150	34.0%
Richlands, NC	399	4,273	9.3%	1,570	146	36.6%
Roxboro, NC	3,666	5,987	61.2%	2,026	1,240	33.8%
Sanford, NC	8,550	22,589	37.9%	5,784	2,192	25.65
Siler, NC	2,386	6,792	35.1%	2,641	927	38.9%
Sugar Mountain, NC	121	5,635	2.1%	1,153	24	19.8%
Surf City, NC	689	2,693	25.6%	601	154	22.4%
Top Sail Beach, NC	252	2,693	9.4%	601	56	22.4%
Wallace, NC	1,329	3,961	33.6%	1,594	536	40.3%

*CPR = Percent DBS penetration rates

**See Charter Petition at Exhibits 4, 5, & 6.

ATTACHMENT A

File No. CSR 6076-E & CSR 6092-E

(Continued)

Communities	2000 Census Households**	Zip Code Households	Alloc	DBS Subs Per Zip Code	DBS Subs Allocated	CPR*
Whispering Pines, NC	970	5,688	17.1%	2,122	363	37.4%
Wilkes, NC	23,499	42,476	5.3%	12,715	7,031	29.9%
Wilkesboro, NC	1,305	5,488	23.8%	1,409	335	25.7%

*CPR = Percent DBS penetration rates

**See Charter Petition at Exhibits 4, 5, & 6.