

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

In the Matter of:)	
)	
CC VIII Operating, LLC d/b/a Charter Communications.)	CSR 6038-E
)	
Petitions for Determination of Effective Competition in Twelve Minnesota Communities)	

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 2004

Released: April 5, 2004

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. CC VII Operating, LLC d/b/a Charter Communications (“Charter”) has filed with the Commission a petition for a determination of effective competition in the twelve Minnesota Communities listed in Attachment A (the “Communities”) pursuant to Section 623(a) of the Communications Act,¹ and the Commission's implementing rules² and is therefore exempt from cable rate regulation. More particularly, Charter claims that the presence of effective competition in 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 competition test set forth in Section 623(1)(1)(B) of the Communications Act. An opposition to the petition has been filed only with respect to the City of Lakeville by the City of Lakeville (the “City”). Charter filed a reply, and the City filed an unauthorized additional reply pleading.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

¹47 U.S.C. § 543(a).

²47 C.F.R. § 76.905(b).

³ The City's additional pleading, which responds to new information submitted with Charter's Reply, is considered herein as part of a more complete record.

⁴47 C.F.R. § 76.906.

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

presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ Section 623(l) 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

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.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 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 as of June 2003.¹² 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 several non-broadcast channels.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 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 provided information showing that its residential subscribership in the Communities, subject to the competing provider test, exceeds the aggregate total subscribership of the DBS and other MVPD providers, thus establishing that it is the largest MVPD provider in each of these Communities.¹⁴

5. Charter provided 2000 Census data showing the number of households for each of the

⁶See 47 C.F.R. §§ 76.906 & 907.

⁷See 47 U.S.C. § 543(l)(1)(A)-(D).

⁸See 47 C.F.R. §76.905.

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

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

¹¹See Petition at 4-5 and Exhibit 1.

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.

¹³See 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 Petition at 5 and Exhibit 4.

twelve Communities.¹⁵ 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.¹⁶ The resulting numbers of DBS subscribers were then compared to the household numbers for each Community to demonstrate that in each Community the DBS MPVD providers collectively have attained subscriber penetration levels ranging from 17.3 percent in the City of Cokato, Minnesota, to 35.0 percent in the City of Dassel, Minnesota, or in excess of 15 percent in each of the Communities.¹⁷

6. In opposition, Lakeville disputed Charter's penetration figure for the City of Lakeville on the grounds that it was based on flawed data. First, Lakeville faults Charter's allocation of DBS subscribers on the basis of the five digit zip code data used in the SkyTrends DBS subscriber reports utilized by Charter. Without providing any verified supporting data, Lakeville contended that higher DBS penetration rates exist outside of the city limits, which would necessarily be accompanied by lower penetration rates within the City. The City also asserted that rapid household growth outside the City since 2000 renders the 2000 Census household data unreliable. The City failed to provide any verified data in support of either of these contentions. Therefore, we cannot accept the City's contention as a credible basis for rejection of the verified data and allocation calculations presented by Charter.

7. Although the City failed to support its challenge to the use of five digit zip codes, Charter, in reply, provided a SkyTrends Zip Code plus four report, which identifies DBS subscriber locations within zip codes in relation to their geographic coordinates. This report thus provided a more accurate picture of DBS subscriber locations with respect to political boundaries.¹⁸ This report estimated there to be 2,267 DBS subscribers in Lakeville, which represents a 16.66 percent DBS subscriber penetration of the 13,609 Lakeville households shown by 2000 Census data. In response to this new information provided in Charter's reply, the City asserted that currently 15,400 occupied households exist in Lakeville.¹⁹ This household number is based on data provided by the Lakeville city manager, who increased "U.S. Census data of 14,252 homes" in Lakeville, based on construction permits for residential units granted since the 2000 Census. However, the 2000 Census data shows 13,609 households in Lakeville, not 14,252 households as suggested by the city manager. The city manager's post-Census growth from 14,252 homes to 15,400 current homes produces 1,148 construction permits for new Lakeville homes. We have no way of determining how many of these 1,148 building permits has resulted in occupied households within Charter's Lakeville franchise area. However, for purposes of argument we will add these 1,148 new Lakeville homes to the published 2000 Census count of 13,609 households, to obtain a current count of 14,757 homes in Lakeville.

8. Finally, Lakeville argued that the 2,267 DBS subscriber count in the Zip Code plus four report is not reliable, because no rational connection is provided between that number and the "1,398 records associated with Charter franchises (per this request)" mentioned in that report.²⁰ We believe Lakewood has misconstrued this language from the report. The report clearly is discussing the number of "records associated with Charter franchises," which necessarily implies study of other Charter franchises

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 5-7 and Exhibit 5. The penetration rate for each Community is set forth on Attachment A.

¹⁸ *See* Charter Reply at 4-5 and Exhibit 1.

¹⁹ Lakeville Reply at 2-3 and Exhibit 1.

²⁰ *Id.* at 3.

besides Charter's Lakeville franchise. This language does not purport to address the DBS subscriber count in Charter's Lakeville franchise at issue. That information is set forth on a single line on a separate page from the report attached to Charter's Reply. Accordingly, we reject the City's criticism and accept the report's figure of 2,267 DBS subscribers in Lakeville as reasonable. The 2,267 DBS subscriber count provided in the Zip Code plus four report represents a 15.36% DBS subscriber penetration of the current 14,757 Lakeville homes, which we accept as reasonable yet conservative, since the record does not establish that all 1,148 construction permits have resulted in households as does the Census data. Based on this information we find that Charter has satisfied the second prong of the competing provider test in Lakeville, as well as in the other eleven Minnesota Communities.

9. In summary, we conclude that Charter has submitted sufficient evidence demonstrating that its cable systems serving the twelve Minnesota Communities set forth on Attachment A are subject to effective competition.

III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition in the twelve Minnesota Communities set forth on Attachment A filed by CC VIII Operating, LLC d/b/a Charter Communications **IS GRANTED**.

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

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

²¹ 47 C.F.R. § 0.283.

ATTACHMENT A

File No. CSR 6038

**COMMUNITIES SERVED BY
CC VII Operating, LLC d/b/a Charter Communications**

Competing Provider Test

Communities	CUIDS	CPR*	2000 Census Households**	Subscribers 50/15 Test Charter**	DBS**
City of Big Lake	MN0451	30.0%	2,117	1,259	635
City of Buffalo	MN0468	20.6%	3,702	2,859	761
City of Cokato	MN0542	17.3%	990	516	171
City of Dassel	MN0453	35.0%	515	232	180
City of Delano	MN0454	20.4%	1,368	871	279
City of Elk River	MN0455	24.8%	5,664	3,084	1,404
City of Lakeville	MN0055	15.36%	14,757	10,578	2,267
City of Maple Lake	MN0456	31.8%	621	336	197
City of Montevideo	MN0004	20.4%	2,353	2,245	480
City of Monticello	MN0469	21.9%	2,994	2,104	645
City of Rockford	MN0457	22.1%	1,296	664	287
City of Watertown	MN-459	23.2%	1,078	733	250

*CPR = Percent DBS penetration rates

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