

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

In the Matter of:	)	
	)	
	)	
Charter Communications	)	CSR-7030-E
	)	
	)	
Petition for Determination of Effective	)	
Competition in Kearney, Nebraska	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 2006

Released: September 29, 2006

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Charter Communications (“Charter”) has filed with the Commission, on behalf of its affiliates, pursuant to Section 76.7 and 76.905 of the Commission’s rules, for a determination of the effective competition in Kearney, Nebraska (“Franchise Area”). Charter claims that its cable system serving Kearney, Nebraska is subject to effective competition pursuant to Section 623(l) of the Communications Act of 1934, as amended (“Communications Act”),<sup>1</sup> and the Commission’s implementing rules, and is therefore exempt from cable rate regulation. Charter alleges that it qualifies for effective competition because two unaffiliated direct broadcast satellite (“DBS”) providers, DirecTV Inc. (“DirecTV”) and DISH Network (“Dish”), offer and provide service to residents in the Franchise Area. As such, Charter argues that it qualifies for a determination of effective competition based on the “competing provider” test set forth in Section 623(1)(1)(B) of the Communications Act.<sup>2</sup> No opposition to the petition was filed.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>3</sup> as the term is defined by Section 623(l) of the Communications Act of 1934, as amended, and Section 76.905 of the Commission’s rules.<sup>4</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.<sup>5</sup>

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<sup>1</sup> 47 U.S.C. § 543 (l).

<sup>2</sup> See 47 U.S.C. § 543 (l)(1)(B).

<sup>3</sup> 47 C.F.R. § 76.906.

<sup>4</sup> See 47 U.S.C. § 543 (l); 47 C.F.R. § 76.905.

<sup>5</sup> See 47 C.F.R. §§ 76.906 & 907.

## II. DISCUSSION

### A. Competing Provider Effective Competition

3. Section 623 (l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the cable operator demonstrates that 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 the programming services offered by the MVPDs, other than the largest MVPD, exceeds fifteen percent of the households in the franchise area.<sup>6</sup> In analyzing the first prong of the test, DirecTV Inc. and Dish’s DBS service is presumed to be technically available because of its nationwide satellite footprint, and as long as the households in a franchise area are reasonably aware that the service is available, we presume it to be actually available.<sup>7</sup> As of June 2005, DirecTV and Dish provided service to approximately 26.1 million people, comprising approximately 27.7 percent of all MVPD subscribers nationwide. DirecTV is the second largest MVPD provider, and Dish the third largest.<sup>8</sup> Considering the growth of DBS, and the data discussed below showing that these DBS providers serve more than 15 percent of the Franchise Area’s population, we conclude that residents of the Franchise Area may be deemed reasonably aware of the availability of DBS services for the purpose of the first prong of the competing provider test. With regard to program comparability, we find that the DBS providers offer substantially more than 12 channels of video programming, including more than one non-broadcast channel, and that programming provided by Charter, DirecTV, and Dish are comparable.<sup>9</sup> Charter has satisfied the first prong of the “competing provider” test by demonstrating that at least two unaffiliated MVPDs, namely DirecTV and Dish, offer comparable video programming to at least 50 percent of the households in the Franchise Area.

4. The second prong of the competing provider test requires that the number of households subscribing to the MVPDs, not including the largest MVPD, exceed 15 percent of the households in a franchise area. The information provided by Charter illustrates that its subscribership in the Franchise Area exceeds the aggregate total subscribership of the DBS and other MVPD providers, thus establishing it as the largest MVPD provider in the Franchise Area.<sup>10</sup>

5. In an effort to prove the second prong of the competing provider test, which requires the DBS providers to penetrate a least 15 percent of the market in the Franchise Area, Charter purchased a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SCBA”). This report identified the number of subscribers attributable to the DBS providers within Kearney on a five digit zip code basis.<sup>11</sup> Charter used the subscriber count information provided by SCBA in

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

<sup>7</sup> *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

<sup>8</sup> *Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 21 FCC Rcd 2503 at ¶¶ 6, 13, 72-73 (2006).

<sup>9</sup> *See* 47 C.F.R. § 76.905 (g); *see also* Charter Petition at Exhibits 2 & 3.

<sup>10</sup> Charter Petition at 5.

<sup>11</sup> Not every standard five digit zip code coincides exactly with the boundaries of the cable operator’s franchise area. In order to avoid this potential conflict, Charter applied a competitive penetration methodology. The Commission has approved this methodology for determining DBS subscribership. *See e.g., US Cable of Coastal-Texas, LP Petition for Determination of Effective Competition in Fort Stockton, Texas*, DA 06-623 at ¶ 5 (rel. Mar. 21, 2006); *see also In re Petition for Determination of Effective Competition in San Luis Obispo County, California*, 17 FCC Rcd 4617 at ¶ 6 (2002); *Fibervision, Inc. Petition for Determination of Effective Competition in Laurel, MT*, 17 FCC Rcd 16313 at ¶ 5 (rel. Aug. 27, 2002).

combination with the 2000 U.S. Census household data for Kearney, and derived an allocation figure to apply to the Franchise Area.<sup>12</sup> After comparing the allocation figure to the 2000 U.S. Census household data for each community, Charter calculated a DBS penetration rate of 18.2 percent.<sup>13</sup>

6. Charter satisfied the first prong of the competing provider test, by demonstrating that the DBS providers offer comparable programming to at least fifty percent of the Franchise Area. In addition, Charter has satisfied the second part of the competing provider test by establishing that the DBS providers serve at least 15 percent of the Franchise Area. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable system serving the Franchise Area is subject to “competing provider” effective competition.

### III. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the petition filed by Charter Communications for a determination of effective competition in Kearney, Nebraska **IS GRANTED**.

8. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates of Kearney, Nebraska **IS REVOKED**.

9. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.<sup>14</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
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<sup>12</sup> Charter Communications Petition at Exhibit 6.

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

<sup>14</sup> 47 C.F.R. § 0.283.