

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

In the Matter of:)	
)	
Charter Communications)	
)	CSR 6417-E, 6418-E, 6419-E
Petition for Determination of Effective Competition)	
in various Nevada Communities)	
)	
)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2006

Released: October 5, 2006

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Charter Communications (“Charter”) has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for determinations of effective competition in several Nevada communities pursuant to Section 623(1) of the Communications Act of 1934, as amended (“Communications Act”),¹ and the Commission's implementing rules,² and is therefore exempt from cable rate regulation in the communities listed in Attachment A. The cities of Carson City, Reno, Sparks, Nevada and Washoe County Nevada (collectively, “LFAs”) filed an opposition, to which Charter replied.

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 623(1) of the Communications Act of 1934, as amended, and 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.⁵ Based on the record in this proceeding, Charter has met this burden.

¹ 47 U.S.C. § 543(1).

² 47 C.F.R. § 76.905(b)(4).

³ 47 C.F.R. § 76.906.

⁴ See 47 U.S.C. § 543(1) and 47 C.F.R. § 76.905.

⁵ 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 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.⁶ Turning to the first prong of this test, we find that the DBS service of DirecTV Inc. ("DirecTV") and DISH Network ("Dish") 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.⁷ The two DBS providers' subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the third largest, MVPD provider.⁸ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in the communities listed on Attachment A are DBS subscribers, 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 substantially more than 12 channels of video programming, including more than one non-broadcast channel.⁹ We find further 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. In its opposition, the LFAs do not believe that Charter has satisfied the second prong of the competing provider test. The LFAs contend that Charter has not met its burden of demonstrating that the number of DBS subscribers within the LFAs exceed 15 percent of the households in the Charter franchise area for each LFA.¹⁰ The LFAs argue that Charter cites to reports provided by Satellite Broadcasting and Communications Association ("SBCA") that identify the number of DBS subscribers associated with a five-digit zip code.¹¹ The LFAs state that what Charter fails to consider in its analysis is the fact that many of the reported DBS subscribers reside outside the LFAs' jurisdictional limits yet still are covered by the SBCA five-digit zip code data.¹² The LFAs argue that the data relied upon by Charter is not sufficiently precise to determine whether the DBS subscribers that Charter attributes to the LFAs actually live outside of the LFAs but share the same zip code as residents within the LFAs.¹³ Moreover,

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

⁷ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁸ *Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11, 21 FCC Rcd 2503 at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

⁹ *See* 47 C.F.R. § 76.905(g).

¹⁰ LFA Opposition at 3.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 4.

the LFAs assert that the availability of more accurate zip code information from SBCA through the purchase of Zip+4 reports would avoid questionable and overly broad results.¹⁴ In addition, the LFAs state that some of Charter's calculations reveal mathematical errors which result in alternative penetration rates.¹⁵ The LFAs assert that Charter is making an apples and oranges comparison when it divides year 2000 household census data by zip code residential data from 2004 to arrive at an allocation percentage.¹⁶ Given the rapid growth in the number of households in the LFAs between 2000 and 2004, the LFAs argue that there is no consistency in Charter's equation, which makes it difficult for the Commission to ascertain whether the DBS penetration rate has exceeded 15 percent.¹⁷

5. In its Reply, Charter argues that although the LFAs claim that DBS does not enjoy a 15 percent penetration level in the LFAs, the LFAs' opposition fails to offer any credible basis to reject the figures presented by Charter, and the local DBS penetration easily exceeds the 15 percent threshold.¹⁸ Charter asserts that the LFAs' position is particularly suspect because the reported DBS penetration rates in Carson City, Reno, Sparks, and Washoe County are all greater than 20 percent, which would indicate that Charter's allocation methodology would have to be dramatically flawed to not meet the 15 percent threshold.¹⁹ In addition, Charter states that if the Cities were convinced that Charter's methodology was flawed, they could have obtained Zip+4 data and produced corroborating evidence instead of merely speculating about the reliability of the penetration rates.²⁰ Moreover, Charter asserts that the Cities allegations regarding mathematical errors, inaccurate comparisons between year 2000 household census data with zip code 2004 residential data, and general criticisms of Charter's allocation factor are unwarranted.²¹

6. 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 sought to determine the competing provider penetration in the franchise areas by using a subscriber tracking report that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code basis. Charter asserts that it is the largest MVPD in the Communities because its subscribership exceeds the aggregate DBS subscribership for each franchise area. Based upon the aggregate DBS subscriber penetration levels as reflected in Attachment A, calculated using 2000 Census household data, 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 the franchise area. Therefore, the second prong of the competing provider test is satisfied.

7. The LFAs' argument regarding the percentage of DBS subscribers in the franchise areas fails to rebut Charter's evidentiary showing regarding DBS penetration figures. Although the Commission accepts zip code plus four data, it has not expressed a preference for one form of data over

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 5.

¹⁷ *Id.*

¹⁸ Charter Reply at 1.

¹⁹ *Id.* at 2.

²⁰ *Id.* at 2-3.

²¹ *Id.* at 4.

another and accepts five digit zip code data as reliable for purposes of determining effective competition.²² Therefore, the established methodology utilized by Charter for demonstrating that effective competition exists in the Communities under the 15 percent element of the competing provider test continues to be acceptable. We accept the data provided by Charter as providing a reasonable basis for finding that DBS penetration exceeds 15 percent in these Communities. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable system serving the franchise areas set forth on Attachment A are subject to competing provider effective competition.

B. Low Penetration Effective Competition

8. Section 623(l)(1)(A) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if “fewer than 30 percent of the households in the franchise area subscribe to the cable service of the cable system.”²³ Charter provided information showing that less than 30 percent of the households within the franchise areas subscribe to its cable services. Accordingly, we conclude that Charter has demonstrated the existence of low penetration effective competition under our rules.

III. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the petition filed by Charter Communications for a determination of effective competition in the Communities listed thereon **IS GRANTED**.

10. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to the local franchising authorities overseeing Charter Communications **IS REVOKED**.

11. This action is taken pursuant to authority delegated under Section 0.283 of the Commission’s rules.²⁴

FEDERAL COMMUNICATIONS COMMISSION

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²² See *Charter Communications, Inc. on behalf of Falcon Cable Media, a California Limited Partnership; Charter Communications VI, LLC; and Interlink Communications Partners, LLC*, Petition for Determination of Effective Competition in Eight Virginia Communities, 19 FCC Rcd 6878 (MB 2004).

²³ 47 U.S.C § 543(l)(1)(A).

²⁴ 47 C.F.R. § 0.283.

Attachment A

Cable Operator Subject to Competing Provider Effective Competition

CHARTER COMMUNICATIONS: CSR 6417-E, 6418-E

Communities	CUIDS	2000 Census CPR*	DBS Households⁺	Subscribers⁺
Carson City	NV 0004	23.1%	4,669	20,171
Reno	NV 0006, NV0049	20.4%	15,100	73,904
Sparks	NV0007	26.0%	6,401	24,601
Washoe	NV0050 NV0086 NV0020	27.9%	9,237	33,108

Cable Operator Subject to Low Penetration Effective Competition

CHARTER COMMUNICATIONS: CSR 6419-E

Communities	CUIDS	Franchise Area Households	Cable Subscribers	Penetration Level
Clark County	NV0092 NV0094	2,192	437	19.9%

CPR= Percent DBS penetration

+ = See Cable Operator Petitions