

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

In the Matter of:
Charter Communications
Five Petitions for Determination of Effective
Competition in Seven Local Franchise Areas in
Missouri
CSR 6761-E
CSR 6762-E
CSR 6763-E
CSR 6764-E
CSR 6765-E

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 2006

Released: February 7, 2006

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Order considers five petitions filed with the Commission by Charter Communications, on behalf of its affiliates, ("Charter") pursuant to Sections 76.7, 76.905(b)(1) & (2) and 76.907 of the Commission's rules for a determination that Charter's cable systems serving seven Missouri communities (the "Communities") are subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act") and are therefore exempt from cable rate regulation. The Communities are listed in Attachment A. An opposition was filed by the City of Cape Girardeau. We grant the petitions finding that the Charter cable systems are subject to effective competition in the listed Communities.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 623(1) of the Communications Act, and Section 76.905 of the Commission's rules. 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.

1 47 C.F.R. §§ 76.7, 76.905(b)(1)& (2), 76.907; 47 U.S.C. § 543(a)(1).

2 The City of Cape Girardeau's Answer is based on the mistaken premise that the petition should be denied so that the Federal Communications Commission will continue to regulate Charter's cable television rates. The Commission does not regulate cable television rates in Cape Girardeau. The Answer contains no substantive arguments, and as such, requires no further analysis.

3 47 C.F.R. § 76.906.

4 47 C.F.R. § 76.905.

5 See 47 C.F.R. §§ 76.906 & 907.

II. DISCUSSION

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, 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 23.16 million as of June 30, 2004, comprising approximately 23 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the fourth 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 each of the communities listed on Attachment A are DBS subscribers, we conclude that the population of 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 further find that the Charter cable systems have 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.¹⁰ Charter has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and DISH.¹¹ 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 sought to determine the competing provider penetration in the Communities by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association ("SCBA") that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code basis.¹² Charter asserts that it is the largest MVPD in the majority of the Communities because

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 *Eleventh Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 05-13, at ¶¶ 54-55 (rel. Feb. 4, 2005).

⁹ *See* 47 C.F.R. § 76.905(g).

¹⁰ Charter Petitions at 5 and Exhibit 2.

¹¹ *Id.* at 4 and Exhibit 1.

¹² *Id.* at 6-7. Charter acknowledges that a standard five-digit zip code in certain cases may not coincide precisely with the boundaries of a cable operator's franchise area. To overcome this potential problem, Charter has applied a competitive penetration methodology. The Commission has approved this methodology for determining DBS subscribership. *See, e.g., In re Petition for Determination of Effective Competition in San Luis Obispo County, California*, 17 FCC Rcd 4617 (2002); *Fibervision, Inc. Petition for Determination of Effective Competition in Laurel, MT and Park City, MT*, 17 FCC Rcd 16313 (2002).

its subscribership exceeds the aggregate DBS subscribership for those franchise areas.¹³ With respect to the community of West Plains, Charter asserts that the aggregate allocated DBS subscriber count (2,182) is slightly larger than Charter's subscriber count (1,656). However, Charter contends that because there are two major DBS providers in West Plains, it is likely that Charter is still the largest individual MVPD in the West Plains franchise area.¹⁴

5. 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 those noted Communities. With regard to the community of West Plains, we are able to conclude that this portion of the test is met by analyzing the data submitted for both Charter and the DBS providers. If the subscriber penetration for both Charter and the aggregate DBS information each exceed 15 percent in the franchise area, the second prong of the competing provider test is satisfied.¹⁵ In West Plains, the combined DBS penetration rate is 48.4 percent and Charter's penetration rate is 36.6 percent.¹⁶ 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 their cable systems serving the Communities set forth on Attachment A are subject to competing provider effective competition.

III. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED** that the petitions filed by Charter Communications for a determination of effective competition in the Communities listed on Attachment A **ARE GRANTED**.

7. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service rates granted to any of the local franchising authorities overseeing Charter Communications in the affected Communities **ARE REVOKED**.

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

FEDERAL COMMUNICATIONS COMMISSION

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¹³ Charter Petitions at 6. *See also* Declaration of Denise Jones-Williams, Director of Regulatory Compliance for Charter Communications (May 5, 2005).

¹⁴ Charter Petitions at n.15. *See also* Declaration of Denise Jones-Williams, Director of Regulatory Compliance for Charter Communications (May 5, 2005).

¹⁵ *See Time Warner Entertainment Advance/Newhouse Partnership, et al.*, 17 FCC Rcd 23587, 23589 (MB 2002).

¹⁶ 2,186 DBS subscribers ÷ 4,518 West Plains 2000 Census Households = 48.4%; 1,656 Charter subscribers ÷ 4,518 West Plains 2000 Census Households = 36.6%.

¹⁷ 47 C.F.R. § 0.283.

Attachment A

Charter Cable Systems Subject to Competing Provider Effective Competition**CSR-6761-E through CSR-6765-E**

Communities	CUIDS	CPR*	2000 Census Households+	DBS Subscribers+
Cape Girardeau	MO0152	16.5%	14,380	2,378
Marston	MO0092	18.1%	259	47
Sikeston	MO0053, et al.	16.9%	6,779	1,144
Nevada	MO0042	29.8%	3,463	1,033
Warrensburg	MO0024	22.7%	5951	1,353
West Plains	MO0680, et al.	48.4%	4,518	2,186
El Dorado Springs	MO0020	42.3%	1,654	700

CPR = Percent DBS penetration

+ = See Charter Petitions