

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

In the Matter of:)
Charter Communications) CSR-6759-E
Petitions for Determination of Effective) CSR-6760-E
Competition in Mount Vernon, Okawville, Salem)
and Richmond, Illinois)

MEMORANDUM OPINION AND ORDER

Adopted: March 30, 2006

Released: March 31, 2006

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Charter Communications has filed with the Commission two petitions pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that Charter's cable systems serving four Illinois 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.1 The City of Salem, Illinois ("Salem") filed an opposition against one of the petitions and Charter filed a reply.2 Charter also filed a supplement to its reply.3 We grant the petitions finding that the Charter cable systems are subject to effective competition in the noted Communities.

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

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

2 The opposition is filed against CSR-6759-E and only affects Salem, Illinois. Originally, all four Communities that are the subjects of this proceeding - Mount Vernon, Okawville, Salem and Richmond - were listed on one petition filed with the Commission. It was later determined that the Village of Richmond required the filing of a separate petition because it was a separate Charter cable system that required a separate filing fee. That petition was assigned the filing number CSR-6760-E by the Commission. Charter also filed a motion for extension of time to file its reply. The City of Salem consented to the requested extension. The motion is granted.

3 Charter also filed a motion for leave to file its supplement. Charter argues that acceptance and consideration of the supplement is in the public interest and will provide the Commission with a full and accurate record. Accordingly, Charter's motion is granted.

4 47 C.F.R. § 76.906.

5 47 C.F.R. § 76.905.

6 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.⁷ 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.⁸ 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.⁹ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in the Communities at issue 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.¹⁰ 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.¹¹ 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.¹² Despite arguments presented by Salem and addressed below regarding Charter's compliance with the first prong of the competing provider test, we find that Charter had satisfied the first prong of this test.

4. In opposition, Salem argues that Charter has not demonstrated that satellite service has been made available to 50 percent of the residents of Salem.¹³ Salem argues that the DBS advertisements submitted by Charter from newspaper ads from the Mt. Vernon Register, a newspaper not generally received by the residents of Salem, does not provide adequate evidence to support its petition.¹⁴ Salem argues that Charter should have used the local newspaper, the Salem Times-Commoner, to show that DBS service was available.¹⁵ Salem also disputes Charter's reliance on direct mail circulars sent to

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

⁸ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁹ *Twelfth Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 06-11 at ¶¶ 6, 13, 72-73 (rel. March 3, 2006).

¹⁰ *See* 47 C.F.R. § 76.905(g).

¹¹ Charter Petitions at 5 and Exhibits 2 & 3.

¹² *Id.* at 3 and Exhibit 1.

¹³ Salem Opposition at 3.

¹⁴ *Id.*

¹⁵ *Id.*

residences in its community. Salem argues that Charter's petition does not indicate the extent to which circulars were received by residents and does not provide information regarding how many residents were targeted by circulars.¹⁶ Salem also argues that satellite Internet advertising does not provide adequate evidence to support Charter's petition. Salem argues that not all households want or can receive Internet access and there is no information made available by Charter to show that local residents have visited satellite web sites.¹⁷

5. In reply, Charter argues that Salem's opposition ignores the underlying reality of DBS competition.¹⁸ Charter states that it submitted sample DBS advertising material to the Commission simply to confirm a reasonable awareness of DBS service in the local marketplace.¹⁹ Charter argues that it is not credible that the residents of Salem are not aware of DBS service.²⁰

6. We agree with Charter. Given the saturation of DBS advertising on all facets of today's media and the subscribership that DBS has garnered in Salem, it is difficult to credit that residents of Salem are not reasonably aware of the availability of DBS services. The sample advertising submitted by Charter merely serves to confirm that the residents of Salem, and the other Communities at issue, are reasonably aware of DBS service in their franchise areas.

7. 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 using a subscriber tracking report from the Satellite Broadcasting and Communications Association ("SBCA") that identified the number of subscribers attributable to the DBS providers within the Communities on a five-digit zip code basis.²¹ Charter asserts that it is the largest MVPD in the Communities because its subscribership exceeds the aggregate DBS subscribership for those franchise areas.²² Charter asserts that the subscriber base for the DBS providers in Salem is 32 percent; Mount Vernon 21.85 percent; Okawville 34.1 percent; and in Richmond 29.16 percent.²³

8. In opposition, Salem alleges that Charter has not met its burden of demonstrating that the number of households subscribing to DBS providers exceeds 15 percent of the households in Salem.²⁴ In

¹⁶ *Id.*

¹⁷ *Id.* at 4.

¹⁸ Charter Reply at 5.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Charter Petition at 6. Charter states that a standard five-digit zip code in certain cases may not coincide precisely with the boundaries of a cable operator's franchise. To overcome this problem, Charter states that it has applied a competitive penetration methodology. Charter notes that the Commission has previously 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).

²² *Id.* at 6. Charter provides the Declaration of Denise Jones-Williams, Director of Regulatory Compliance for Charter Communications (May 5, 2005) stating that she reviewed Charter's subscriber numbers for the franchise areas at issue and Charter is the largest MVPD in those areas.

²³ *Id.* at 7 and Exhibit 7. $1,040 \text{ DBS subscribers} \div 3,249 \text{ Salem 2000 Census Households} = 32\%$; $1,527 \text{ DBS subscribers} \div 6,988 \text{ Mount Vernon 2000 Census Households} = 21.85\%$; $194 \text{ DBS subscribers} \div 569 \text{ Okawville 2000 Census Households} = 34.1\%$; and $121 \text{ DBS subscribers} \div 415 \text{ Richmond 2000 Census Households} = 29.16\%$

²⁴ Salem Opposition at 4.

support of its position, Salem performed a “windshield survey” and concluded that of the 3,268 households in Salem, only 435 of them (as opposed to Charter’s number of 1,040) were found to have satellite dish installations.²⁵ Salem contends that this demonstrates a satellite penetration rate of 13.31 percent, less than the required penetration rate of 15 percent.²⁶

9. Salem further argues that Charter has not properly calculated the penetration of DBS subscribers based on SBCA data for the zip code 62881. In other words, according to Salem, Charter’s methodology relies on statistical projections of DBS subscribers residing within the entire 62881 zip code that are then prorated based upon the number of households inside and outside of the corporate limits found in the 2000 Census to show only the number of DBS subscribers that reside within the corporate limits of Salem.²⁷ Salem argues that Charter’s method of prorating DBS subscribers within the corporate limits from those found in the entire 62881 zip code assumes that the level of penetration inside the corporate limits is the same as outside the limits.²⁸ Salem argues that Charter’s cable system passes all of the households within the Salem corporate limits and Charter has a significant penetration rate, but households outside the corporate limits in more rural areas are more likely to be DBS subscribers.²⁹ Salem argues that the absence of specific DBS subscriber numbers within the 62881 zip code inside the Salem corporate limits contributes to defects in Charter’s submitted statistics.³⁰ Salem argues that if Charter used “Zip Plus 4” reports available from the U.S. Postal Service, more useful and accurate information could have been provided.³¹

10. In reply, Charter submits Zip+4 – based DBS subscriber numbers demonstrating a DBS penetration rate of 18.6 percent in Salem.³² Charter also states that since filing its petition, it has learned that it also faces competition in Salem from US Sonet, a Local Exchange Carrier (“LEC”).³³ Charter claims that the mere provision of video services in Salem by a LEC is itself grounds for a determination of effective competition.³⁴ Charter submitted a supplement to its reply reporting that US Sonet has 904 subscribers within Salem and this figure exceeds local DBS subscribership.³⁵ For purposes of its analysis, Charter states that it is relying on the standard 15 percent competing provider test and is not seeking to rely on what it refers to as the easier test available for LEC-affiliated competition.³⁶ According to

²⁵ *Id.* at 5 and Exhibit 1. Salem also claims that the number of households in Salem is 3,268 as opposed to the 2000 Census number of 3,249 submitted by Charter. Additionally, Salem notes that of the 3,268 household units that it has determined exist within the corporate limits of the City, this number does not include 71 vacant units. *Id.* at 6 and Exhibit 2. Without conceding the accuracy of Salem’s household figure, Charter does not object to utilizing the number provided by the City. Charter Reply at n.4.

²⁶ *Id.* at 5.

²⁷ *Id.* at 6.

²⁸ *Id.* at 7.

²⁹ *Id.* at 8.

³⁰ *Id.* at 9.

³¹ *Id.*

³² Charter Reply at 3 and Exhibit 1. According to SBCA, there are 608 DBS subscribers in Salem based on the ZIP+4 postal codes in the franchise area. Charter also used Salem’s household figure of 3,268 in recalculating the DBS penetration rate. Charter finds an 18.6% penetration rate in Salem (608 DBS subscribers ÷ 3,268 Salem households).

³³ *Id.* at 3. Charter states that it was initially made aware of US Sonet’s service in the franchise area during a conversation with the City Manager of Salem after the City submitted its Opposition. *Id.* at n.10.

³⁴ *Id.* at 4. See also 47 U.S.C. § 543(1)(1)(D) and 47 C.F.R. § 76.905(b)(4).

³⁵ Charter Supplement to Reply at 1.

Charter, using Salem's own household figure of 3,268, US Sonet alone has a local penetration rate of 27.66 percent.³⁷ Further, Charter asserts that if US Sonet's subscribership is coupled with local DBS subscribership, the penetration rate of competing MVPDs in Salem exceeds 46 percent.³⁸

11. We are satisfied with the information submitted by Charter utilizing the Zip+4 methodology to show that it has a DBS penetration rate of 18.6 percent in Salem. The Commission has previously approved the use of this methodology in order to determine the competing provider penetration rate for the second prong of the test.³⁹ Because of the submission of Zip + 4 data, we need not rely on Charter's originally submitted standard five-digit zip code methodology or Salem's "windshield survey." With regard to Salem's survey, an Interoffice Memorandum attached to its opposition states that while its survey resulted in a count of 435 satellite dishes, it is possible that some dishes were missed due to obstructions.⁴⁰ We agree with Charter's observation that it is not unusual for DBS subscribers to place satellite dishes behind houses or other obstructions for the aesthetic purpose of avoiding visibility.⁴¹ In this regard, we find Salem's survey to be less reliable than Charter's Zip + 4 data. We also note that Salem states that its opposition includes sworn affidavits from City of Salem inspectors and the City's Director of Code Enforcement attesting to their observations of satellite dishes throughout Salem.⁴² Instead, what is included in Salem's opposition are individual informal statements from various Salem employees stating that each person certifies to the date that the survey was completed and that the survey contains the addresses of the houses with satellite dishes in Salem that were visible during the time the survey was conducted.⁴³ The Commission has stated that unsworn declarations under penalty of perjury in lieu of affidavits are acceptable for submission involving Commission matters; however, we find that Salem's informal submissions that are not certified under penalty of perjury do not quality under our rules.⁴⁴ While we do not doubt the veracity of the statements made by Salem employees, we believe that this procedural flaw further weakens the survey results submitted by Salem. We will therefore rely on Charter's Zip+4 submission in this matter and we note that even Salem suggests in its opposition that this method would provide more useful and accurate information in efforts to determine the DBS count in Salem.⁴⁵

12. Charter also cites the presence of LEC competition in Salem to further bolster its case.⁴⁶ Charter alleges that US Sonet alone has a local penetration rate 27.66 percent and coupled with DBS

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³⁶ *Id.* at n.1.

³⁷ $904 \text{ US Sonet subscribers} \div 3,268 = 27.66\%$.

³⁸ Charter Supplement to Reply at 2. $904 \text{ US Sonet subscribers} + 608 \text{ DBS subscribers [Zip + 4 calculated]} \div 3,268 = 46.27\%$. Furthermore, Charter asserts that even if it were to use the reduced DBS results reported by Salem in its "windshield" survey (435), the combined penetration rate for competing MVPDs still would be 41% ($435 + 904 \div 3,268 = 41\%$).

³⁹ See, e.g., *Marcus Cable Associates, LLC d/b/a Charter Communications, Inc.*, 17 FCC Rcd 16652 (2002), *aff'd* 18 FCC Rcd 9649 (2003); *Vicksburg Video*, 17 FCC Rcd 16659 (2002); *Kilgore Video, Inc.*, 17 FCC Rcd 16662 (2002).

⁴⁰ Salem Opposition at 5 and Exhibit 1.

⁴¹ Charter Reply at 2.

⁴² Salem Opposition at 5 and Exhibit 1.

⁴³ Salem Opposition at Exhibit 1.

⁴⁴ See 47 C.F.R. § 1.16.

⁴⁵ Salem Opposition at 9.

⁴⁶ Charter Reply at 4.

subscribership, the penetration is 46 percent.⁴⁷ Charter asserts, however, that it does not wish to take advantage of the LEC effective competition test.⁴⁸ Instead, Charter asserts that it wants to rely on the standard competing provider test.⁴⁹ In that regard, in addition to submitting DBS subscriber numbers, Charter also submits US Sonet's channel line-up.⁵⁰ Charter, however, does not completely respond to the first prong of the competing provider test by making a showing that US Sonet is physically able to offer service to Salem subscribers or that there exists no regulatory, technical, or other impediments to potential subscribers taking US Sonet services or if Salem residents are reasonably aware of this LEC's services.⁵¹ We have already concluded that the two DBS providers satisfy the first prong of the competing provider test. It is not inappropriate for us to consider the competitive presence of US Sonet for purposes of the second prong of the test.⁵² In view of the above and because we are satisfied with the DBS numbers submitted in this case, we do not believe it is necessary to include Charter's supplemental information regarding US Sonet in order to make a determination in this case.

13. Based upon the aggregate DBS subscriber penetration levels as reflected in the Communities at issue, 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. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that their cable systems serving those noted Communities are subject to competing provider effective competition.

III. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED** that the petitions filed by Charter Communications for a determination of effective competition in the noted Communities **ARE GRANTED**.

15. **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**.

16. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁵³

FEDERAL COMMUNICATIONS COMMISSION

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⁴⁷ Charter Supplement at 1-2.

⁴⁸ Charter Supplement at n.1; 47 C.F. R. § 76.905(b)(4).

⁴⁹ *Id.* at n.1; 47 C.F.R. § 76.905(b)(2).

⁵⁰ *Id.* at n.1 and Attachment A.

⁵¹ Charter does submit two articles from the Salem Times-Commoner regarding US Sonet's success and expansion plans in Salem. See Charter Reply at n.10 and Exhibit 2.

⁵² See *Time Warner Entertainment Co., L.P., et al. v. FCC*, 56 F. 3d 151, 189 (D.C. Cir. 1995).

⁵³ 47 C.F.R. § 0.283.