

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

In the Matter of:	)	
	)	
Petition of the	)	
County of New Hanover, North Carolina	)	CSR-6411-R
	)	
For Recertification to Regulate the Basic Cable	)	
Service Rates of Charter Communications, Inc.,	)	
d/b/a/ Falcon Cable Media	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 23, 2008**

**Released: October 24, 2008**

By the Senior Deputy Chief, Policy Division, Media Bureau:

**I. INTRODUCTION**

1. The County of New Hanover, North Carolina (the “County”), filed a Petition for Recertification (“Petition”), pursuant to Section 623(a)(3) of the Communications Act of 1934, as amended (“Communications Act”),<sup>1</sup> and Section 76.916 of the Commission's rules. In the Petition, the County seeks recertification to regulate the rates for the basic cable service of Charter Communications, Inc., d/b/a Falcon Cable Media (“Charter” or the “Company”), in the parts of New Hanover County, North Carolina that are unincorporated and served by Charter. Charter filed an Opposition to Petition for Recertification (“Opposition”) and the County filed a Reply to Opposition.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,<sup>2</sup> as that term is defined by Section 623(l)(1) of the Communications Act<sup>3</sup> and Section 76.905 of the Commission's rules.<sup>4</sup> A cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that it does exist in its franchise area.<sup>5</sup> Once the presence of effective competition has been established, the local franchising authority is no longer authorized to regulate the basic service rates of the cable operator.<sup>6</sup> A local franchising authority may petition the Commission for recertification pursuant to Section 76.916 of the Commission's rules by demonstrating that: (1) it meets the requirements of Section 623(a)(3) of the Act;<sup>7</sup> (2) the cable system for

<sup>1</sup> 47 U.S.C. § 543(a)(3).

<sup>2</sup> 47 U.S.C. § 543(a)(2); 47 C.F.R. § 76.906.

<sup>3</sup> 47 U.S.C. § 543(l)(1).

<sup>4</sup> 47 C.F.R. § 76.905.

<sup>5</sup> See 47 C.F.R. §§ 76.907(b).

<sup>6</sup> 47 U.S.C. § 543(a)(2).

<sup>7</sup> These requirements are, in brief, that the franchising authority certify in writing to the Commission that (1) it will adopt and administer basic rate regulations that are consistent with those prescribed by the Commission, (2) it has the legal authority to adopt, and the personnel to administer, such regulations, and (3) the franchising authority's procedural laws and regulations provide a reasonable opportunity for consideration of the views of interested parties. 47 U.S.C. § 543(a)(3).

which it seeks recertification is not subject to effective competition; and (3) the reasons underlying the earlier certification revocation are no longer valid.<sup>8</sup>

3. In 2004, in our *Charter Decertification* decision, we found that Charter was subject to effective competition in the unincorporated New Hanover County under the “low penetration” test for effective competition.<sup>9</sup> This test requires that the cable operator show that “fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system.”<sup>10</sup> Because Charter had made that showing, we decertified New Hanover County and deprived it of regulatory authority over Charter’s basic cable service rates.

4. The County, in the Petition that is now before us, claims that Charter’s penetration has risen above 30 percent and that the Company is therefore no longer subject to low penetration effective competition.<sup>11</sup> In its Opposition, Charter’s claims that it is still subject to low penetration effective competition,<sup>12</sup> Charter also claims that it is now also subject to “competing provider” effective competition,<sup>13</sup> which we discuss in section II.B below. The County disputes this label in its Reply and urges that, if Charter believes it is subject to a new form of effective competition, it be required to prove that in a new petition for special relief and not in the responsive pleadings of the present recertification case.<sup>14</sup>

## II. DISCUSSION

### A. “Low Penetration” Effective Competition

5. Certain facts appear undisputed. Charter and Time Warner Cable each has a franchise from the County to provide cable service in the unincorporated areas of New Hanover County. Each has built a cable system in only some of those areas.<sup>15</sup> Neither system overlaps (competes with) the other.<sup>16</sup>

6. Charter’s Franchise Area. The principal dispute between Charter and the County in this case concerns the area in which Charter’s penetration will be measured for purposes of the low penetration effective competition test. The County asks that we measure it in only the part of unincorporated New Hanover County that it has chosen to serve. Charter asks that we measure its penetration in all of unincorporated New Hanover County, the full extent of the franchise that it has from

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<sup>8</sup> 47 C.F.R. § 76.916(b). The latter showing must be “clear” and supported by objectively verifiable data or an affidavit. 47 C.F.R. § 76.916(b)(3).

<sup>9</sup> *Charter Commun., LLC*, 19 FCC Rcd 7003, 7007 (2004) ¶¶ 10-12 (“*Charter Decertification*”).

<sup>10</sup> 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

<sup>11</sup> Petition at 8 & Exh. 5.

<sup>12</sup> See Opposition at 1.

<sup>13</sup> *Id.* at 3-4. Charter further labels the Petition as an untimely petition for reconsideration of our 2004 *Charter Decertification* decision. *Id.* at 2-3; see also 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(f). We disagree. This is not a case where a party is repeating arguments that were made and rejected before. The County is asserting new facts, many of which concern the intervening period since the *Decertification* decision. For example, Charter’s continued lack of territorial expansion adds additional strength to the County’s characterization of Charter’s service territory as its actual franchise area.

<sup>14</sup> Reply at 4-9.

<sup>15</sup> See *infra* ¶¶ 9-10.

<sup>16</sup> See Petition, Exh. 3 (map of parts of New Hanover County served by Charter, with handwritten note by former Charter employee stating “all the highlighted is Charter territory . . . Time Warner has all the other areas that are not highlighted.”).

the County.

7. Section 623(l)(1) of the Communications Act provides in pertinent part that low penetration effective competition “means that . . . fewer than 30 percent of the households in the *franchise area* subscribe to the cable service of a cable system.”<sup>17</sup> The Section goes on to allow competing provider effective competition to be shown “in the *franchise area*.”<sup>18</sup> When we first construed the term “franchise area” in the context of effective competition, we used its plain meaning: “[t]he term ‘franchise area’ is used for a variety of purposes within the statute and our rules and has a commonly understood meaning in the industry and in regulatory parlance. A franchise area is the area a system operator is granted authority to serve in its franchise.”<sup>19</sup> In this case, that would be all of unincorporated New Hanover County.

8. We do, however, allow for an exception to this outcome. Where the cable operator has made an affirmative decision, confirmed by its own conduct, to serve less than the whole area granted in its franchise, we will measure effective competition in the lesser area if the franchising authority so desires. To fit a case within this exception, the franchising authority must show more than that the cable operator has not yet extended its cable system into a particular part of the whole area covered by its franchise. It must show that the cable operator, through its own conduct, has self-defined the areas it will serve to exclude the particular part.<sup>20</sup>

9. In our 2004 *Charter Decertification* decision, we applied these holdings and found that Charter’s “franchise area” was all of unincorporated New Hanover County.<sup>21</sup> We rejected the County’s attempt to fit that case within the exception to the general rule. In the Petition that is now before us, the

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<sup>17</sup> 47 U.S.C. § 543(l)(1)(A) (italics added).

<sup>18</sup> 47 U.S.C. § 543(l)(1)(B)(i, ii), D (italics added); *see also* 47 U.S.C. § 543(l)(1)(C) (“in that franchise area”).

<sup>19</sup> *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation (“First Reconsideration”)*, 9 FCC Rcd 1164, 1180 (1993) ¶ 24 (discussing “low penetration” effective competition, 47 U.S.C. § 543(l)(1)(A)) (footnote omitted), *reconsidering* 8 FCC Rcd 5631, 5673 (1993) ¶ 49; *see also Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 5937, 5939 (1996) ¶ 6 (while implementing a new form of effective competition, describing the existing rule as providing that “a system is subject to effective competition in the area covered by *its local franchise* if any one of the following three tests are met: . . .”) (italics added), *rev’d on other grounds, Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir.), *cert. denied*, 534 U.S. 1054 (2001).

<sup>20</sup> *First Reconsideration*, 9 FCC Rcd at 1181 ¶ 25. For decisions implementing this exception, *see, e.g., Cablevision of Paterson*, 17 FCC Rcd 17239, 17240-41 (2002) ¶¶ 2-4 (“We have, however, acknowledged that in some limited circumstances a cable operator may voluntarily redefine its franchise area through its own conduct. In doing so, we indicated that the fact that a cable system’s construction was not yet complete would not, in of itself, demonstrate franchise redefinition.”) (footnote omitted); *Century Cable of Northern California, Inc.*, 14 FCC Rcd 18604, 18606-08 (1999) ¶¶ 4, 6-7 (“This record establishes more than merely that Century has not yet filled out its service area, it provides substantial evidence that Century has no intention to expand its system into the portions of San Buenaventura not now served and has thus redefined its service area”); *TKR Cable of Northern Kentucky*, 11 FCC Rcd 9973, 9882 (1996) ¶ 20 (“We find that TKR has not redefined its Boone County franchise area. . . . The Cable Board presents no evidence that TKR has made an affirmative decision to limit its franchise area to its current service area. In fact, TKR presents evidence that it has continued to build out its system in accordance with the density service requirements of its franchise agreement.”); *Cecilton CATV, Inc.*, 10 FCC Rcd 2937, 2939 (1995) ¶ 11 (“The record in this case demonstrates that Cecilton has made an affirmative decision to limit its franchise area.”).

We originally applied this exception in cases of low penetration effective competition, but we later applied it also in cases of competing provider effective competition, such as *Century Cable of Northern California, Inc.*, 14 FCC Rcd at 18606-08 (1999) ¶¶ 4, 6-7.

<sup>21</sup> *Charter Decertification*, 19 FCC Rcd at 7007 ¶ 11.

County presents us with additional evidence. The County presents testimony by Charter's former General Manager that

"Charter affirmatively and of its own volition, redefined its franchise area . . . to . . . only those areas not served by Time Warner Cable. . . . I was specifically told by my District Manager that we were not to provide service in areas served by Time Warner Cable. . . . Charter did not compete and had no intention of offering cable service in New Hanover County where Time Warner Cable provided service."<sup>22</sup>

Another former Charter employee states that

"It was common knowledge in the Company . . . that Charter never built, and was never to build, in any area of New Hanover County being served with Time Warner Cable plant. There was some kind of gentlemen's agreement between the two companies not to compete. This was a practice engaged in when I first became employed by [Charter's predecessor] and a practice that continued until the day I left Charter – seven years later."<sup>23</sup>

10. Also, an employee of a consulting firm that assists the County states that, shortly before the Petition was filed, Charter Customer Service Representatives told her that "I have been here for 25 years and for as long as I can remember [Charter] can't go in [Time Warner's] area and they can't go in ours" and that "if Time Warner serves them, we don't."<sup>24</sup> The same employee states, based on information supplied by Charter, that since 1999 Charter has built, at most, one mile of cable in areas served by Time Warner.<sup>25</sup>

11. It therefore appears, and Charter does not deny, that Charter's decision not to serve areas served by Time Warner began in the 1990s, continued past these employees' departure, and continues to the present time, two years after our *Charter Decertification* decision and three years after the close of the record in that case.

12. This evidence cannot be characterized as showing merely that Charter has not yet extended its cable system throughout unincorporated New Hanover County. It goes far beyond the showing that we found unsatisfactory when we decertified the County in 1994.<sup>26</sup> It amounts to a clear showing on the record that Charter has made an affirmative decision, confirmed by its own conduct over many years, to serve less than the whole area granted in its franchise, in particular to include only the areas it has been serving for several years and to exclude the areas served by Time Warner. We find it significant that Charter has not denied this.<sup>27</sup> Accordingly, for Charter in unincorporated New Hanover County, we will measure effective competition in only those parts of unincorporated New Hanover County that are actually served by Charter ("Charter's redefined franchise area"). The County has

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<sup>22</sup> Petition, Exh. 3 at ¶ 3 (Declaration of Patti Severt, Charter General Manager).

<sup>23</sup> *Id.* at ¶ 3 (Declaration of Lorraine Furr, Charter Lead Customer Service Representative).

<sup>24</sup> *Id.* at ¶¶ 3, 4 (Declaration of Catharine Rice, Associate of Action Audits, LLC).

<sup>25</sup> *Id.* at ¶ 2.

<sup>26</sup> *Charter Decertification*, 19 FCC Rcd at 7007 ¶ 11 ("We have never held that a cable operator's mere failure to build-out its entire franchise area supports a finding that the cable operator has redefined its franchise area to include only the built-out portion.").

<sup>27</sup> Charter has, however, denied that Time Warner and Charter have agreed not to compete. Opposition at 2.

supplied us with a map showing that area.<sup>28</sup>

13. Penetration in Charter's Franchise Territory. Section 76.916 of our rules requires that a franchising authority's petition seeking recertification must, among other things, "[c]ontain a clear showing, supported by either objectively verifiable data . . . , or by affidavit, that the reasons for the earlier . . . revocation no longer pertain."<sup>29</sup> In cases where a cable operator seeks decertification on grounds of low penetration effective competition, we typically require the cable operator to state the number of Census households and cable subscribers in the franchise area, and we require that the latter be less than 30 percent of the former.<sup>30</sup> In this case, Charter provided the County with a letter stating the numbers of its homes passed and basic service subscribers in its redefined franchise area. The County, however, has provided us with only a copy of that letter with the numbers deleted.<sup>31</sup> It appears that Charter requested the deletion on the ground that the numbers are proprietary.<sup>32</sup> The County alleges that the numbers show Charter's penetration rate in its redefined franchise area to be 57 percent.<sup>33</sup> This is well above the 30 percent the County needs to show to establish that low penetration effective competition no longer exists. Charter does not dispute the County's allegation.

14. Charter's showing of the absence of low penetration effective competition, however, is less than our rules require. The basic objective data are lacking. It is not supported by an affidavit.<sup>34</sup> It eschews the means that parties regularly use to submit proprietary information to us. We see no valid reason why Charter should be excused from supplying us with basic objective data of the kind that cable operators regularly supply us with in effective competition cases. Accordingly, we conclude that the County has established that the area in which Charter's penetration will be measured for purposes of the low penetration effective competition test is Charter's redefined franchise area.<sup>35</sup> On the present record, however, we cannot conclude that low penetration effective competition no longer exists in that area. Because the necessary objective data already exist and are easily available, we defer a final decision on the continued existence of low penetration effective competition in Charter's redefined franchise area for 30 days after release of this Memorandum Opinion and Order. We order Charter to submit to us (a) the number of subscribers it has in its redefined franchise area and (b) the number of households in that area. If Charter submits that data to us, we will promptly decide whether low penetration effective competition exists in Charter's redefined franchise area. If Charter fails to do so, we will promptly issue an order recertifying the County. In the alternative, based on the considerations outlined in paragraph 19 below, Charter is also free to file a new petition for a determination of competing provider effective competition, based on nine-digit "zip+four" data.<sup>36</sup>

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<sup>28</sup> Petition, Exh. 3 at 1.

<sup>29</sup> 47 C.F.R. § 76.916(b)(3).

<sup>30</sup> See e.g., *Mediacom Illinois LLC*, Memorandum Opinion & Order, 21 FCC Rcd 1175, 1180 (2006); *Alert Cable TV of South Carolina, Inc.*, Memorandum Opinion & Order, 21 FCC Rcd 269, 277 (2006); *Mediacom Illinois LLC*, Memorandum Opinion & Order, 20 FCC Rcd 20481, 20485 (2005); see also 47 U.S.C. § 543(l)(1)(A).

<sup>31</sup> Petition, Exh. 5 (Letter from Skip James, Charter Director of Government Relations, NC/VA, to Ms. Becky Howell, New Hanover County Attorney's Office, dated Oct. 4, 2004).

<sup>32</sup> *Id.* (stating "CONFIDENTIAL AND PROPRIETARY INFORMATION: Not for Public Inspection: . . . This information is labeled "Proprietary and Confidential" in accordance with FCC Rules and Regulations §76.9 Confidentiality of proprietary information").

<sup>33</sup> Petition at 8.

<sup>34</sup> See 47 C.F.R. § 76.916(b)(3).

<sup>35</sup> See Petition, Exh. 3.

<sup>36</sup> *Commission Revises & Suspends Pending OMB Approval New Standards for Showings of Effective Competition for Cable Service*, Public Notice DA 08-2030 (rel. Sept. 2, 2008), available at 2008 WL 4057098; *Commission* (continued...)

15. Other Requirements for Recertification. The New Hanover County Attorney has declared under penalty of perjury and to the best of her personal knowledge, information, and belief, that the County has adopted and will continue to administer regulations with respect to rates subject to regulation that are consistent with the regulations prescribed by the Commission; that the County has the legal authority to adopt, and the personnel to administer, such regulations; and that procedural laws and regulations applicable to rate regulation proceedings by the County provide a reasonable opportunity for consideration of the views of interested parties.<sup>37</sup>

16. Based on the foregoing, we conclude that the County has submitted sufficient evidence to demonstrate that Charter's cable system serving its redefined franchise area is no longer subject to low penetration effective competition and that the County has satisfied other requirements for it to be recertified to regulate the Charter's rates for basic cable service.

### **B. "Competing Provider" Effective Competition**

17. Charter claims that, even if it is no longer subject to *low penetration* effective competition in Charter's redefined franchise area, it is now subject to *competing provider* effective competition there and requests that we decertify the County afresh on that ground.<sup>38</sup> "Competing provider" effective competition has two prongs. The first requires that the cable operator show that its franchise area is served by at least two unaffiliated multichannel video programming distributors ("MVPDs"), each of which offers comparable video programming to at least 50 percent of the households in the franchise area. The second requires that the cable operator show that the number of households subscribing to the programming services of MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area.<sup>39</sup>

18. Charter presents objective data that, if we accept it, shows that Charter satisfies the second prong of competing provider effective competition, namely that two MVPDs other than the largest MVPD in Charter's redefined franchise area franchise have achieved subscribership in excess of 15 percent of the households in the franchise area.<sup>40</sup>

19. The County raises several objections against our acceptance of Charter's request. The strongest of them is that decertification may not be raised in the responsive pleadings to a request for recertification. Rather, the County argues, decertification must begin with a petition for special relief such as Charter filed in 2002 and resulted in our *Charter Decertification* decision.<sup>41</sup> We agree with the County. Our procedures do not expressly allow for the cable operator, in the midst of a recertification case, to raise and prove alternate grounds for decertification.<sup>42</sup> Instead, Section 76.916(b)(3) of our rules instructs us to focus on whether "the reasons for the earlier . . . revocation no longer pertain."<sup>43</sup> Our rules do not contemplate, in re-certification proceedings, consideration of new evidence for decertification

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*Announces New Standards for Showings of Effective Competition for Cable Service*, Public Notice DA 08-1892 (rel. Aug. 13, 2008).

<sup>37</sup> Petition, Exh. 4 (Declaration of Wanda Copley, County Attorney for the County of New Hanover).

<sup>38</sup> Opposition at 3-4.

<sup>39</sup> 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

<sup>40</sup> Opposition at 4, Declaration of Denise Williams (Director of Regulatory Compliance for Charter), & Att. A.

<sup>41</sup> Reply at 4-5.

<sup>42</sup> 47 C.F.R. § 76.916.

<sup>43</sup> 47 C.F.R. § 76.916(b)(3).

based on new factual evidence that is raised for the first time in the middle of the pleading cycle. A partial record, unanswered arguments, and a less than thorough decision could result. Accordingly, we dismiss Charter's claim of competing provider effective competition in the context of the present case, although we would entertain a renewed request for special relief as described in paragraph 14 above.

20. Because we have dismissed Charter's claim of competing provider effective competition on a procedural ground, we need not address what the County alleges are flaws in its showing of competing provider effective competition.<sup>44</sup> We caution Charter, however, that a new petition for decertification will be judged by the standards we apply to all such petitions and that it should comply with all applicable rules and precedents.

### III. ORDERING CLAUSE

21. Accordingly, **IT IS ORDERED** that the petition filed by the County of New Hanover, New Hanover, North Carolina, for recertification **IS DEFERRED** pending submission by Charter as described in paragraph 14 above.

22. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>45</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Senior Deputy Chief, Policy Division, Media Bureau

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<sup>44</sup> These are, in brief, that Charter has not submitted any information proving the first prong of the competing provider effective competition test (that two unaffiliated MVPDs offer comparable service to at least half the households in the franchise area, Reply at 5-6, citing 47 U.S.C. § 543(l)(1)(B)(i)) and that Charter has inflated the numbers of both MVPD subscribers and households (Reply at 7-8).

<sup>45</sup> 47 C.F.R. § 0.283.