

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

In the Matters of )
)
The County of New Hanover, North Carolina )
)
Petition For Recertification to Regulate the Basic )
Cable Service Rates of Charter Communications, ) CSR 6411-R
Inc., d/b/a/ Falcon Cable Media )
)
Charter Communications, on Behalf of Its )
Subsidiaries and Affiliates )
)
Petition For Determination of Effective )
Competition in New Hanover County, North ) CSR 8096-E
Carolina (CUIDs NC0152, NC0369) )
)

MEMORANDUM OPINION AND ORDER

Adopted: July 30, 2009

Released: July 31, 2009

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

I. INTRODUCTION AND BACKGROUND

1. This Memorandum Opinion and Order is the most recent of several decisions about whether a subsidiary or affiliate of the cable operator, Charter Communications ("Charter" or the "Company"), is subject to effective competition in part of unincorporated New Hanover County in the State of North Carolina. After reviewing the voluminous filings of the parties, we conclude that Charter has failed to sustain its burden of proof that it is subject to effective competition. Accordingly, we recertify the government of New Hanover County (the "County") to regulate the rates for Charter's basic cable service.

A. Applicable Law

2. Section 623(a)(2)(A) of the Communications Act of 1934, as amended (the "Act"), authorizes franchise authorities (typically, local governments such as the County) to regulate the rates charged for "basic" cable service by cable operators to which they have granted franchises and which are "not subject to effective competition."<sup>1</sup> Effective competition is a term defined in the Act and the Commission's rules,<sup>2</sup> and cable systems are presumed not to be subject to it.<sup>3</sup> A cable operator that wishes deregulation of its basic service rates must petition us and bear the burden of rebutting the presumption by showing that, within its franchise area, it is subject to effective competition.<sup>4</sup>

3. Section 623(l)(1) of the Act sets forth four alternative definitions of "effective

<sup>1</sup> 47 U.S.C. § 543(a)(2)(A); 47 C.F.R. § 76.910.

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

<sup>3</sup> 47 C.F.R. § 76.906.

<sup>4</sup> 47 C.F.R. §§ 76.906 & 907.

competition.” The two that are pertinent to this litigation are (1) “low penetration” effective competition, which exists when fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable operator<sup>5</sup> and (2) “competing provider” effective competition, which exists when the cable operator’s franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPDs”), 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 15 percent of the households in the franchise area.<sup>6</sup>

4. Our rules also permit a franchise authority, after a cable operator has been found subject to effective competition, to be re-certified to regulate the cable operator’s basic rates. The franchise authority must show that the operator is no longer subject to the kind of effective competition that it was earlier or that some other significant circumstances have changed.<sup>7</sup> One way that the cable operator may defeat re-certification and remain unregulated is to show that although its original form of effective competition no longer exists, it is now subject to another form of effective competition.

## B. History

5. The County granted Charter a franchise to provide cable service in all the unincorporated parts of the County.<sup>8</sup> The Commission certified the County to regulate the rates for Charter’s basic cable service in 1993. In late 2002, Charter petitioned the Commission to de-certify the County on the grounds that it was subject to low penetration effective competition. In early 2004, the Commission granted Charter’s petition, overruling the objections of the County and removing its certification to regulate Charter’s basic rates.<sup>9</sup>

6. About six months later, the County petitioned the Commission to re-certify it. The County claimed a significant change of circumstances, namely that Charter had for years failed to build a cable system in its full franchise area.<sup>10</sup> The County argued that, for purposes of the low penetration test, Charter’s subscribership should be measured within only the area in which Charter had actually built a cable system and was actually offering cable service (hereinafter “Charter’s actual service area”). The County claimed that, in Charter’s actual service area, its penetration was too high to show low penetration effective competition.<sup>11</sup>

7. The Commission, in a decision released in late 2008, agreed with the County that Charter’s penetration should be measured within Charter’s actual service area.<sup>12</sup> The record before the Commission did not, however, contain clear evidence of Charter’s actual service area and its subscriber

<sup>5</sup> 47 U.S.C. § 543(l)(1)(A); 47 C.F.R. § 76.905(b)(1).

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

<sup>7</sup> 47 C.F.R. § 76.916.

<sup>8</sup> Declaration of Patti Severt, former General Manager for Charter (dated Nov. 14, 2004) at ¶ 3, attached to Petition for Recertification, filed by the County in CSR 6411-R and dated Oct. 22, 2004.

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

<sup>10</sup> Petition for Recertification at 6-7.

<sup>11</sup> *County of New Hanover, North Carolina*, Memorandum Opinion & Order DA 08-2344 at ¶ 6 (rel. Oct. 24, 2008), available at 2008 WL 4693164.

<sup>12</sup> *Id.* at ¶ 12. This followed a line of decisions holding that, “[w]here the cable operator has made an affirmative decision, confirmed by its own conduct, to serve less than the whole area specified in its franchise, we will measure effective competition in the lesser area.” *Comcast of Greater Florida/Georgia, Inc.*, 22 FCC Rcd 4588, 4590, ¶ 6 (2007).

number in that area. Therefore, whether Charter was still subject to low penetration effective competition in that area could not be decided.<sup>13</sup> The Commission directed Charter to promptly submit reliable data about its penetration in its actual service area and/or file a second petition to de-certify the County on some grounds other than low penetration effective competition.<sup>14</sup>

8. In response, Charter filed two documents. One was a letter in which Charter agreed with the County that it no longer faced low penetration effective competition in its actual service area.<sup>15</sup> The second document Charter filed was a new Petition for Special Relief (the “New Petition”) in which it asserted that, in its actual service area, it was subject to competing provider effective competition.<sup>16</sup>

9. The County and Charter then engaged in lengthy investigations and correspondence about the precise scope of the Company’s actual service area.<sup>17</sup> This required extensions of time for the County to file its Opposition to the New Petition<sup>18</sup> and for Charter to file its Reply to the Opposition.<sup>19</sup> Extensions of time are not routinely granted,<sup>20</sup> but these proceedings have required each party to make factual investigations of unusual complexity. Accordingly, we grant the extensions that the parties have requested.<sup>21</sup> The parties’ lengthy investigations also caused them to file five additional pleadings<sup>22</sup> that are not contemplated by our rules.<sup>23</sup> We will allow all but the last of them because all but the last added some new facts to the record in response to the previous pleading. We strike the last filing, the County’s Response to Charter Surreply, because it consists entirely of repetitive argument and was not accompanied by a motion seeking its acceptance.

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<sup>13</sup> *Id.* at ¶¶ 13-14.

<sup>14</sup> *Id.* at ¶¶ 14, 21.

<sup>15</sup> Letter from Frederick W. Giroux, Esq., Davis Wright Tremaine LLP, counsel for Charter, to Ms. Marlene Dortch, Commission Secretary, at 1, dated Nov. 24, 2008.

<sup>16</sup> New Petition, dated Nov. 24, 2008. Charter appears to continue to dispute that its actual service area is, in fact, its correct franchise area. Petition for Special Relief at 1.

<sup>17</sup> *See, e.g.*, Letter from Robert Sepe, Action Audits, LLC, consultant to the County, to Mr. Giroux, dated March 16, 2009 (“March 16 Letter”); Letter from Mr. Giroux to Mr. Sepe, dated March 27, 2009 (“March 27 Letter”).

<sup>18</sup> Opposition to Petition for Special Relief (“Opposition”), dated April 15, 2009.

<sup>19</sup> Reply to Opposition (“Reply”), dated May 20, 2009.

<sup>20</sup> 47 C.F.R. § 1.46(a).

<sup>21</sup> E-mails to John W. Beresford, Esq., Commission counsel, from Ms. Catherine Rice, Action Audits, LLC, dated February 23 and April 10, 2009; Consent Motion for Extension of Time filed by Charter and dated April 28, 2009.

Another factor necessitating an extension for the County to file its Opposition was an error in the Commission’s Public Notice of the filing of Charter’s Petition. Public Notice, *Special Relief & Show Cause Petitions*, Report # 0273 (Dec. 8, 2008). The Public Notice identified the Petition as concerning “New Haven County, North Carolina,” and thus failed to notify the County that time was running on the time it had to prepare an opposition.

<sup>22</sup> The County filed a Supplement to Opposition with an accompanying motion for leave to file it, dated June 17, 2009; Charter filed a Response to Supplement with an accompanying motion, dated June 23, 2009; the County filed a Reply to Charter Supplement Response without an accompanying motion, dated July 6, 2009; Charter filed a Surreply with an accompanying Motion, dated July 10, 2009; and the County filed a Response to Charter Surreply without an accompanying Motion, dated July 14, 2009.

<sup>23</sup> *See* 47 C.F.R. § 1.45.

## II. CHARTER'S CLAIM OF COMPETING PROVIDER EFFECTIVE COMPETITION

10. We begin our analysis of the issues herein by accepting that Charter is no longer subject to low penetration effective competition in actual service area. Both Charter and the County agree that this is the case, and the evidence before us supports that conclusion.<sup>24</sup> Accordingly, unless Charter shows that it is subject to competing provider effective competition in its actual service area, we will re-certify the County to regulate Charter's basic rates.

### A. The First Prong

11. The competing provider test, set forth in paragraph 3 above, consists of two prongs. The first prong requires Charter to show that its franchise area is served by at least one other MVPD, unaffiliated with Charter, which offers comparable video programming to at least 50 percent of the households there.<sup>25</sup> It is undisputed that Charter's franchise area, whatever its size, is served by two providers of Direct Broadcast Satellite ("DBS") service – DirecTV, Inc., and Dish Network – and that these two MVPDs are unaffiliated with each other and Charter. A franchise area is considered "served by" an MVPD if that MVPD's service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service's availability.<sup>26</sup>

12. Concerning whether consumers in Charter's franchise area are "reasonably aware" of the availability of DBS service, the County briefly objects that Charter has failed to introduce any specific evidence that consumers there are, in actual fact, reasonably aware that DBS service is available to them.<sup>27</sup> The County is correct, but we have no reason to disregard the well known ubiquity of DBS service, the nationwide subscribership to DBS at almost twice the level needed to show competing provider effective competition,<sup>28</sup> and the many decisions that the Commission has released over many years finding effective competition to exist based on subscribership to DBS service.<sup>29</sup> These authorities show real, widespread awareness among American households that DBS service is available to them. We are confident in relying on those materials in this instance. In addition, even the lowest estimates of DBS subscribership stated in the following paragraphs show significant awareness of DBS service in Charter's franchise area. The County has produced no evidence, and does not allege, that households there are not reasonably aware that DBS service is available to them. We see no reason to believe that households in Charter's franchise area are less informed about DBS service than other American households. Accordingly, we find, consistent with the evidence herein, our longstanding presumptions, and case law, that consumers in Charter's franchise area, whatever its size, are reasonably aware that they may purchase DBS service.

13. The "comparable programming" element of the first prong of the competing provider test

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<sup>24</sup> See Petition for Recertification at 8 & *supra* note 15.

<sup>25</sup> 47 U.S.C. § 543(l)(1)(B)(i); 47 C.F.R. § 76.905(b)(2)(i).

<sup>26</sup> See New Petition at 3; see also 47 C.F.R. § 76.905(e)(2).

<sup>27</sup> Opposition at 2 n.6.

<sup>28</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 24 FCC Rcd 542, 684 (2009) ("*Thirteenth Cable Competition Report*") (Table B-1, showing steady annual growth in the numbers and percent of MVPD subscribers receiving DBS service, rising to 29% of households subscribing to an MVPD in the most recent reported year).

<sup>29</sup> See, e.g., *Mediacom Southeast LLC*, 24 FCC Rcd 2398, 2400, ¶ 7 (2009); *Comcast Cable Commun., LLC*, 24 FCC Rcd 1780, 1789, ¶ 28 (2009); *Comcast Cable Commun., LLC*, 23 FCC Rcd 10939, 10943, ¶ 14 (2008).

is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.<sup>30</sup> The Petition contains copies of channel lineups for both DBS providers that exceed those requirements.<sup>31</sup> Also undisputed is Charter's assertion that both DBS providers offer service to at least "50 percent" of the households in its new franchise area, whatever its size, because of their national satellite footprint.<sup>32</sup> Accordingly, we find that Charter has satisfied all the requirements of the first prong of the competing provider test.

## B. The Second Prong

14. The second prong of the competing provider effective competition test asks whether MVPDs other than the largest one have penetration of over 15 percent of the households in the relevant franchise area. Charter alleges that it is the largest MVPD in its actual service area.<sup>33</sup> The County does not dispute Charter's allegation. We find that Charter is the largest MVPD in its actual service area, however it be defined.

15. The remaining issue under the second prong of the competing provider test is whether the remaining MVPDs, namely the DBS providers, have a subscribership in excess of 15 percent. This first step towards deciding this issue is to know the dimensions of Charter's actual service area. Initially, Charter filed a map that purported to show that area.<sup>34</sup> The County claimed that that map significantly overstated Charter's actual service area by including incorporated parts of New Hanover County,<sup>35</sup> areas consisting of seasonal homes (which are not counted as "households"),<sup>36</sup> and areas where Charter has no cable system.<sup>37</sup> Charter agreed to correct most of these alleged errors, but only for the sake of argument and without conceding that it had overstated its actual service area.<sup>38</sup>

16. Later, it emerged that Charter had included in its actual service area another neighborhood that it does not serve and had excluded a neighborhood that it does serve.<sup>39</sup> Charter admitted these errors.<sup>40</sup> The County also produced evidence that one aspect of how Charter estimated the number of households in one neighborhood had an error rate of 35%.<sup>41</sup>

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<sup>30</sup> See 47 C.F.R. § 76.905(g). See also New Petition at 4-5.

<sup>31</sup> See New Petition at Exh. 2.

<sup>32</sup> See *id.* at 3.

<sup>33</sup> *Id.* at 7.

<sup>34</sup> *Id.*, Exh. 4 at 2.

<sup>35</sup> *Id.* at 3 & Exh. 1, attached map titled "Appendix-4" (areas labeled "CB" for Carolina Beach and "KB" for Kure Beach).

<sup>36</sup> *Id.* at 5 ("boat basin," an apparent reference to waterfront homes); 47 C.F.R. § 76.905(c) ("households" shall not include those dwellings that are used solely for seasonal, occasional, or recreational use"). New Hanover County is a coastal community, in parts of which such homes are common.

<sup>37</sup> *Id.* at 3 & Exh. 1, map titled "Appendix-5"; March 16 Letter at 1-2. It appears that some of this area is served by Time Warner and some has no cable system.

<sup>38</sup> See, e.g., March 27 Letter at 2 ("*without* conceding the propriety of the 'redefinition' of the franchise area suggested in your March 16 Letter") (italics in original).

<sup>39</sup> Supplement to Opposition at 7-8 & Exh. 2 (Declaration of New Hanover County's Consultant).

<sup>40</sup> Response to Supplement.

<sup>41</sup> Reply to Charter Supplement Response at 5 & Exh. 2 (Declaration of New Hanover County's Consultant, hereinafter "Declaration") at ¶ 6(a). Charter in turn accused the methodology underlying the County's 35% allegation of being 22% inaccurate. Charter Surreply at 2, citing Declaration at ¶ 4(a).

17. The genesis of all this uncertainty appears to be the way in which Charter drew its initial map of its actual area, which initially governs the crucial numbers of DBS subscribers and households. How Charter's map was drawn remains unclear, for Charter simply states that its consultant Media Business Corporation ("MBC") "created a custom map."<sup>42</sup> The County proposed that it and Charter make a map of the actual service area based on Charter's internal records of "homes passed."<sup>43</sup> Charter refused although it had used those records earlier in these proceedings<sup>44</sup> and presumably still has them.<sup>45</sup>

18. The resulting uncertainty is not trivial. In the area alleged in Charter's New Petition, DBS subscribership is 30.26%, more than twice the statutory minimum.<sup>46</sup> After all the County's suggested corrections – the ones Charter accepts *arguendo* and the ones it admits are proper – DBS subscribership is half that. The County estimates that it is as low as 13.87%<sup>47</sup> (slightly below the statutory minimum) and Charter estimates that it is as high as 17.51% (slightly above).<sup>48</sup> The corrections have changed all Charter's underlying numbers at least 20% from the ones stated in its New Petition – the DBS subscriber number is lower and the household number is higher.

19. Among the variables in the parties' estimates are the number of seasonal homes<sup>49</sup> and vacant homes,<sup>50</sup> which do not count as "households," and a reliable measure of growth in households since the 2000 Census.<sup>51</sup> The greatest variable, however, is Charter's actual service area. This is ordinarily simple and uncontroversial, and the pertinent facts are in the filing cable operator's possession. Nevertheless, in these proceedings, after many rounds of pleadings we are still unsure what Charter's actual service area is. We are even unsure what Charter thinks its actual service area is. Charter appears to have originally overstated its actual service area with the result of overstating DBS subscribership by approximately 100 percent. Apparent errors were revealed by the County; there may be more. Many

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<sup>42</sup> New Petition at 6 n.23. MBC states only that it used "a multi-step process." March 27 Letter, Exh. A (Declaration of Pinna Gallant, MBC.) at ¶ 2.

<sup>43</sup> "Homes passed" are the total number of households capable of receiving cable television service. *Thirteenth Cable Competition Report*, 24 FCC Rcd at 553 n.54.

<sup>44</sup> Opposition to Petition for Recertification at 4 (Charter using "its own records of homes passed" in calculating DBS subscribership) & attached Declaration of Denise Williams, Charter's Director of Regulatory Compliance, at ¶ 3 ("I obtained . . . the number of 'homes passed' by Charter").

<sup>45</sup> March 27 Letter at 2 ("Charter did not rely on a 'homes passed' list to prepare its Petition and cannot be expected to create one now for the County's purposes").

<sup>46</sup> New Petition at Exh. 6. These and all following statements of DBS subscribership were derived from customary sources, namely the 2000 Census, MBC's estimate of nine-digit Zip Code data, and DBS subscriber numbers gathered by Satellite Broadcasting and Communications Association. New Petition at 5-7.

<sup>47</sup> Opposition at 7.

<sup>48</sup> Reply at 5.

<sup>49</sup> Opposition at 7 n.17.

<sup>50</sup> *Id.* at 7 n.18.

<sup>51</sup> See *Texas Cable Partners, L.P.* 16 FCC 4718, 4720, ¶ 5 (2001); Opposition at 6 n.15; *id.* at 7 n.18.

We express no opinion on whether the County's reduction of Charter's number of households to account for seasonal and/or vacant housing is proper. If Charter started with the Census Bureau's number of "households," which consists only of housing units that are occupied full time, seasonal and vacant housing units may have already been deducted. See *Implementation of Section of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation*, 9 FCC Rcd 4316, 4324, ¶ 17 (1994), *reversed in part on other grounds, Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996); US Census Bureau, *American Fact Finder, Glossary*, [http://factfinder.census.gov/home/en/epss/glossary\\_h.html](http://factfinder.census.gov/home/en/epss/glossary_h.html) (visited May 29, 2009) (definition of "household").

errors of which we are aware are merely apparent because Charter does not say whether it agrees with them.

20. The record herein amounts to a failure of proof by Charter, which bears the burden of proof in these proceedings.<sup>52</sup> The Company's inability to establish the dimensions of its actual service area leaves uncertain the number of DBS subscribers and households in that service area and whether the ratio of those numbers satisfies the statutory test. Given this record, we conclude that Charter has failed to show that in the parts of unincorporated New Hanover County, North Carolina, in which it is actually offering cable service, the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households.

21. Charter may file a new Petition for Special Relief and make more solid showings. We express no opinion whether any such petition must be based on the homes passed address list that the County requested, or about the County's other challenges to Charter's evidence.<sup>53</sup> We conclude only that based on the record herein, Charter has failed to sustain its burden of proof that it is subject to effective competition in the parts of unincorporated New Hanover in which it provides cable service.

### III. THE COUNTY'S PETITION FOR RE-CERTIFICATION

22. Because of Charter's admission that it is not subject to low penetration effective competition in its actual service area in unincorporated New Hanover County and its inability to prove that it is subject to competing provider effective competition there, the area is ripe for re-regulation by the County. The County asks to be re-certified to regulate Charter's basic rates, apparently retroactive to the October 25, 2004, date on which the County petitioned for re-certification.<sup>54</sup> Its Petition for Recertification is in order,<sup>55</sup> and we grant it. We caution the County to observe the requirements of Section 76.910(c-e) of our rules before it resumes regulation of Charter's rates for basic cable service. Pursuant to Section 76.910(e), unless the Commission notifies the County otherwise and subject to the other qualifications in subsection (e), thirty days after filing the written certification with this Commission, the County will be re-certified to regulate Charter's basic cable service retroactive to October 25, 2004.

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<sup>52</sup> 47 C.F.R. §§ 76.906, 76.097(b).

<sup>53</sup> See, e.g., Supplement to Opposition at 2-5.

<sup>54</sup> See Letter from Mr. Sepe to Mr. Berresford at 2, dated Dec. 17, 2008.

<sup>55</sup> Petition for Recertification at 8 & Exh. 4 (Declaration of Wanda Copley, County Attorney); *County of New Hanover, North Carolina* at ¶ 15.

**IV. ORDERING CLAUSES**

23. Accordingly, **IT IS ORDERED** that Petition for Special Relief filed by Charter Communications on behalf of its subsidiaries and affiliates in CSR 8096-E and dated November 24, 2008, **IS DENIED**.

24. **IT IS FURTHER ORDERED** that the Petition for Recertification filed by New Hanover County, North Carolina, in CSR 6411-R and dated October 22, 2004, **IS GRANTED**.

25. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.<sup>56</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

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<sup>56</sup> 47 C.F.R. § 0.283.