

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

In the Matter)
Charter Communications, on behalf of its)
subsidiaries and affiliates,)
Petition For Determination of Effective)
Competition in New Hanover County, North)
Carolina (CUIDs NC0152, NC0369))
CSR 8242-E

MEMORANDUM OPINION AND ORDER

Adopted: December 1, 2009

Released: December 1, 2009

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

I. INTRODUCTION

1. This Memorandum Opinion & Order resolves procedural questions that have arisen in the most recent litigation concerning cable rate regulation and effective competition in part of New Hanover County, North Carolina (the "County"). Charter Communications ("Charter") filed a "Petition for Reconsideration of Rate Regulation Certification" ("Petition") on November 12, 2009. Our rules provide that such petitions automatically stay the County's rate regulation "pending the outcome of the reconsideration proceeding." Accordingly, the County may not assert rate regulation authority over Charter until and subject to release of the Commission's final findings in this matter.

2. To regulate the Charter's rates in part of New Hanover County, North Carolina, the County government filed a Form 328 in 1993. By operation of the Commission's rules, 30 days later the County acquired the authority to regulate Charter's rates. In 2004 Charter filed a petition for a finding of effective competition. The Commission granted Charter's petition and revoked the County's rate regulation authority.

3. The County later petitioned for re-certification to regulate Charter's rates on the grounds of changed circumstances and alleged that Charter was no longer subject to effective competition. Charter, in response, filed a new petition claiming that it was still subject to effective competition. Ruling on these rival petitions earlier this year, the Commission found that Charter had not shown it was subject

1 For brevity's sake, we are using one name, Charter, for corporate names that have changed over the years.

2 47 C.F.R. § 76.911(b)(1).

3 "Certification of Franchising Authority to Regulate Basic Cable Service Rates and Initial Finding of Lack of Effective Competition," http://www.fcc.gov/Forms/Form328/328.pdf (visited Nov. 24, 2009).

4 47 C.F.R. § 76.910(e).

5 Charter Commun., LLC, 19 FCC Rcd 7003 (2004). In this and all subsequent litigations, Charter alleged that circumstances – the area served by Charter and/or the number of homes served by Charter or its competitors – had changed since the evidence introduced in the previous litigation.

to effective competition.⁶ The Commission allowed the County to resume regulating Charter's rates upon compliance with the certification procedures set forth in our rules, 47 C.F.R. §§ 76.910 *et seq.*, which requires to County to execute a new Form 328.⁷ The County did this and the Commission received the County's new Form on September 24, 2009. Pursuant to the Commission's rules, the County could resume regulating Charter's rates 30 days later (on October 26, 30 days plus a weekend).

4. On November 12, 2009, Charter filed its Petition alleging that, under current circumstances, it was again subject to effective competition.⁸ Our rules provide that such petitions automatically stay the franchising authority's certification "pending the outcome of the reconsideration proceeding."⁹

II. ISSUES AND ANALYSIS

5. In a series of e-mails with the Bureau and Charter,¹⁰ the County has asked several procedural questions. These are (1) whether Charter's Petition is authorized; (2) whether it is the kind of petition for reconsideration that triggers an automatic stay of rate regulation; (3) whether Charter's Petition was timely; and (4) how many days the County has to respond to Charter's Petition.

6. First, the County correctly notes that our most recent decision offered Charter the opportunity to file a petition for a finding of effective competition by initiating a new proceeding,¹¹ but then wrongly argues that this language foreclosed to Charter the right to file a petition for reconsideration. Nothing in our decision prevents Charter from filing a petition for reconsideration as specifically contemplated by our rules. Charter's Petition is authorized and proper.

7. Second, the County argues that the only petitions for reconsideration that stay rate regulation are ones filed after the filing of a *first* Form 328, and that *subsequent* forms and petitions do not stay rate regulation.¹² The County reads our rules too narrowly. The Commission rule that provides for reconsideration of automatic certifications of rate authority, 47 C.F.R. § 76.911, does not say that it applies only to first filings and certifications and does not apply to subsequent ones. The rule's terms apply to certifications to regulate rates generally and without qualification. Accordingly, section 76.911 of our rules governs Charter's Petition and, pursuant to section 76.911(b), that Petition stays the County's resumption of regulating Charter's rates pending the outcome of this reconsideration proceeding. If the petition for reconsideration is ultimately denied, the cable operator may be required to issue refunds for any charges in excess of authorized rates for a period of up to one year from the date the authorized rates are implemented.¹³

⁶ *County of New Hanover, North Carolina*, 24 FCC Rcd 10130 (2009). See also *County of New Hanover, North Carolina, Memorandum Opinion & Order* DA 08-2344 (rel. Oct. 24, 2008), available at 2008 WL 4693164.

⁷ *County of New Hanover, North Carolina*, 24 FCC Rcd at 10136, ¶ 22.

⁸ 47 C.F.R. § 76.911(a)(1).

⁹ 47 C.F.R. § 76.911(b)(1).

¹⁰ E-mail from Catharine Rice, Action, Audits, LLC, consultant to the County, to John W. Beresford, Esq., Commission counsel (Nov. 19, 2009, 4:27 PM) ("First E-Mail"); E-Mail from Ms. Rice to Mr. Berresford (Nov. 20, 2009, 9:47 AM) ("Second E-Mail"); E-Mail from Steven Horvitz, Esq., Davis Wright Tremaine LLP, counsel for Charter, to Mr. Berresford (Nov. 20, 2009, 12:51 PM) ("Third E-Mail"); E-mail from Ms. Rice to Mr. Berresford (Nov. 20, 2009, 3:07 PM) ("Fourth E-Mail").

¹¹ First E-Mail at 1; *County of New Hanover, North Carolina*, 24 FCC Rcd at 10136, ¶ 21.

¹² First E-Mail at 1.

¹³ 47 C.F.R. § 76.911(b)(3).

8. The third issue is the timeliness of Charter's Petition. As noted above, the date for the County's automatic certification to regulate Charter's rates was October 26th, 2009. The deadline for a petition for reconsideration of that certification was 30 days later, November 25th.¹⁴ Charter's Petition was filed on November 12th, and is therefore timely.

9. Finally, with regard to the number of days the County has to respond to Charter's Petition, our rules provide that the opposition to a petition for reconsideration is due ten days after the petition is filed (in this case, November 23rd, ten days after November 12th plus a weekend), and a reply is due seven days thereafter (in this case, November 30th).¹⁵ The County has requested an extension of time in which to file its opposition and, although extensions of time are not routinely granted,¹⁶ this proceeding is unusually complicated, involving disputes about material geographic areas and the proper method of counting several kinds of housing in those areas. The County notes the complexity of Charter's filing,¹⁷ the need to review it carefully, and the upcoming holidays.¹⁸

10. Charter counters that, in preparing its Petition this past September, it chose the measurement advocated by the County ("homes passed") and offered to work together with the County to agree on a calculation of effective competition.¹⁹ The County appears to have spurned Charter's offer.²⁰ The County has had Charter's Petition since mid-November and is not a newcomer to measuring effective competition. Indeed, its previous filings in these proceedings have shown great familiarity with different parts of New Hanover County and facility with demographic data about it. Accordingly, we will hold the County to reasonable promptness in examining Charter's data and preparing its opposition. Taking into consideration all the factors noted above, we require the County to file its response to Charter's Petition for Reconsideration no more than twenty (20) days after the date of release of this Memorandum Opinion and Order. We further require that Charter file its reply to that response no more than fourteen (14) days after the County files its response.

11. In light of the complexity of the facts herein, we *sua sponte* waive the page limitations that normally apply in reconsideration proceedings.²¹ We further caution the parties that, absent a showing of extraordinary circumstances, no pleadings in addition to the opposition and reply (as outlined in the preceding paragraph) will be allowed. We urge the parties to observe the Commission's rules concerning the format of pleadings²² and to serve each other with copies of any further procedural questions submitted to the Bureau.

¹⁴ Compare 47 U.S.C. § 405(a) (petitions for reconsideration must be filed within 30 days of public notice of the action taken) and 47 C.F.R. § 76.911(a) (referencing § 1.106 of the Commission's rules) with 47 C.F.R. § 1.106(f) (same as § 405(a)) and 47 C.F.R. § 1.4(c) (when Commission procedures require the computation of a period of time after an act occurs (absent public notice), "the first day to be counted . . . is the day after the day on which the act . . . occurs"); see also Third E-Mail at 1.

¹⁵ 47 C.F.R. § 1.106 (g, h).

¹⁶ See 47 C.F.R. § 1.46(a).

¹⁷ Second E-Mail at 1.

¹⁸ Fourth E-Mail at 1.

¹⁹ Petition, Exh. 1.

²⁰ Third E-Mail at 2; Petition, Exh. 2.

²¹ 47 C.F.R. § 1.106 (g, h).

²² See generally 47 C.F.R. §§ 1.49 – .52.

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that further proceedings herein shall occur in accordance with the foregoing analysis and the deadlines set forth in paragraphs 10 and 11 above.

13. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²³

FEDERAL COMMUNICATIONS COMMISSION

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²³47 C.F.R. § 0.283.