

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

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| In the Matter of: |) | |
| |) | |
| Charter Communications Entertainment I LLC |) | CSR 6916-E |
| |) | |
| Petition for Determination of Effective Competition in St. Louis, Missouri (CUID MO0545) |) | |

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 2011

Released: April 18, 2011

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

I. INTRODUCTION

1. Charter Communications Entertainment I LLC (“Charter” or “the Company”) has filed with the Commission a Petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission’s rules for a determination that the Company is subject to effective competition in St. Louis, Missouri. Charter alleges that its cable system serving St. Louis is subject to effective competition pursuant to Section 623(1)(1)(B) of the Communications Act of 1934, as amended (“Communications Act”)¹ and the Commission’s implementing rules,² and is therefore exempt from cable rate regulation there because of the competing service provided by two direct broadcast satellite (“DBS”) providers, DIRECTV, Inc., and DISH Network.

2. Filings. In response to the Petition, the government of the City of St. Louis (“the City”) filed objections to the Petition, and Charter replied.³ The Media Bureau sent the Company a letter (“the Bureau Letter”) requesting that it send the City additional information about some of its evidence. That evidence originated with the Satellite Broadcasting and Communications Association (“SBCA”).⁴ Charter mailed the City that information,⁵ and the City filed “Supplemental Comments” about it.⁶ Charter then filed a “Motion for Leave to File Surreply” (the “Motion”) and a “Surreply to Supplemental Comments” directed at the City’s most recent submission (the “Surreply”). Pleadings such as Charter’s Surreply require a showing of “extraordinary circumstances,”⁷ but the production of SBCA’s additional information at the Bureau’s request and Charter’s Supplemental Comments on it amount to extraordinary circumstances. Charter’s Surreply also contains useful insights into the City’s Supplemental Comments.

¹ See 47 U.S.C. § 543(a)(1).

² 47 C.F.R. § 76.905(b)(2).

³ Earlier in this proceeding, we stayed a rate order of the City pending the release of this Memorandum Opinion and Order. *Charter Commun. Entm’t I, LLC*, 22 FCC Rcd 13890 (MB 2007).

⁴ Letter from Steven A. Broeckaert, Deputy Chief, Policy Division, Media Bureau, to Steven J. Horvitz, Esq., Davis Wright Tremaine LLP, counsel for Charter, et al.; Letter from Frederick E. Ellrod III, Esq., Miller & Van Eaton, P.L.L.C., counsel to the City, to Mr. Broeckaert at 1 (“Ellrod Letter”).

⁵ See Letter from Mr. Horvitz to Marlene H. Dortch, Commission Secretary (“Horvitz Letter”).

⁶ Supplemental Comments of the City of St. Louis Regarding Charter’s Petition for Special Relief (“Supplemental Comments”).

⁷ 47 C.F.R. § 76.7(d).

Accordingly, we grant Charter's Motion and accept its Surreply.

3. The City then filed a letter with the Commission concerning the disputed issue of the number of households in St. Louis.⁸ The City does not show extraordinary circumstances for the letter, which amounts to an unauthorized pleading. The substance of the City's letter does little more than restate positions that the City has already stated. Accordingly, the City's letter is stricken. For the same reasons, we strike a responsive letter that Charter filed two days later.⁹

4. Summary. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,¹⁰ as that term is defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.¹¹ 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.¹² For the reasons set forth below, we grant the Petition based on our finding that Charter is subject to effective competition in St. Louis.

II. DISCUSSION

5. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the 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.¹³ This test is referred to as the "competing provider" test.

A. Competing MVPDs

6. Turning to the first part of this test, it is undisputed that St. Louis is "served by" both DBS providers and that these two MVPDs are unaffiliated with Charter or with each other. 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.¹⁴ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second part of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.¹⁵ Charter has provided sufficient evidence of DBS advertising in local, regional, and national media that serve St. Louis to support their assertion that potential customers there are reasonably aware that they may purchase the service of these MVPD providers.¹⁶ The "comparable programming" element is met if a competing MVPD provider offers at least 12 channels of video

⁸ Letter from Mr. Ellrod to John W. Berresford, Esq., Commission Attorney.

⁹ Letter from Mr. Horvitz to Mr. Berresford.

¹⁰ 47 C.F.R. § 76.906.

¹¹ See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

¹² See 47 C.F.R. §§ 76.906 & 907.

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

¹⁴ See Petition at 2-3.

¹⁵ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹⁶ 47 C.F.R. § 76.905(e)(2).

programming, including at least one channel of nonbroadcast service programming¹⁷ and is supported in this petition with copies of channel lineups for both DBS providers.¹⁸ Also undisputed is Charter's assertion that both DBS providers offer service to at least "50 percent" of the households in the Communities because of their national satellite footprint.¹⁹ Accordingly, we find that the first part of the competing provider test is satisfied.

7. The City asserts generally that the presence of DBS alone cannot amount to effective price competition to a cable system.²⁰ We have rejected this assertion in several decisions,²¹ and we reject it here for the reasons stated therein. The definition of "MVPD" that we use in effective competition cases is in a statute that explicitly includes DBS providers.²² Moreover, the City's argument is against the standards set forth by Congress in Section 623(l)(1)(B) of the Communications Act.²³ The Commission has no authority to alter either provision of the statute.²⁴

B. Competing MVPD Penetration

8. The second part 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 asserts that it is the largest MVPD in the Communities.²⁵ The City does not disagree, so we accept Charter's assertion. The competing provider test thus required Charter to create a ratio, the numerator of which is the number of DBS subscribers in St. Louis and the denominator of which is the number of households there.

9. To create its numerator, Charter started by obtaining from its own billing records a list of "Zip+4" or nine-digit zip codes all or part of which are in St. Louis. Charter gave that list to SBCA, which then calculated that there were 24,756 DBS subscribers in those zip codes.²⁶ Charter divided that number into its denominator – 147,076, which was the number of households that the 2000 Census counted in St. Louis.²⁷ These numbers produced a ratio of 16.83 percent.²⁸ This more than satisfies the

¹⁷ See 47 C.F.R. § 76.905(g). See also Petition at 4-5.

¹⁸ See Petition at Exh. 2.

¹⁹ See *id.* at 3.

²⁰ Opposition at 2 n.4.

²¹ *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 11-522 at ¶ 6 (rel. March 22, 2011), available at 2011 WL 996346; *Comcast Cable Commun., LLC*, 25 FCC Rcd 13340, 13343-44, ¶¶ 12-14 (2010); *Comcast Cable Commun., LLC*, 25 FCC Rcd 12819, 12821-22, ¶ 11 (2010); see also *CoxCom, Inc.*, 22 FCC Rcd 4522, 4524, ¶¶ 4-5 (2007).

²² 47 U.S.C. § 522(13) (MVPD "means a person such as, but not limited to, . . . a direct broadcast satellite service . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming").

²³ 47 U.S.C. § 543(1)(1)(B).

²⁴ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984):

"When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."

²⁵ Petition at 1, 5.

²⁶ *Id.* at 6 & Exh. 4 ("ECTR – Effective Competition Tracking Report").

²⁷ *Id.*, Exh. 5 at 1 ("Geographic Comparison Tables – American Fact Finder"), 2 ("St. Louis City, Missouri – Selected Housing Characteristics: 2003"); Opposition of the City of St. Louis, Missouri to Charter's Petition for Special Relief ("Opposition") at 3.

second part of the competitive provider test.

1. The City's Challenges to Charter's Evidence

a. Number of DBS Subscribers in St. Louis

10. Charter's data from SBCA shows 24,756 DBS subscribers in St. Louis. The City first faults Charter for not excluding inactive and complimentary accounts from its data.²⁹ Charter answers that SBCA's data routinely excludes inactive accounts.³⁰ Charter continues that it is proper to include complimentary accounts in the DBS subscriber count because those households, in fact, do receive DBS service.³¹ We find that the inclusion of complimentary accounts in the DBS subscriber count is not an error. In the first place, we presume that the number of complimentary accounts is *de minimis*. Additionally, the existence of free DBS service shows a cable operator that is subject to intense competition to serve such households. A subscriber receiving free DBS service would have to perceive significant choice and service advantages from a cable operator to subscribe to its service.³² Accordingly, we reject the City's allegations about inactive and complimentary accounts.

11. Second, the City charges that Charter's list of nine-digit zip codes includes ones, containing 509 DBS subscribers, that may be fictitious because they end in 0000.³³ Charter, in reply, states that these are real zip codes whose last four digits are unknown. Also, all but one of them lie entirely within the City, Charter shows, and the one remaining code, in its part that lies outside the City, probably contains one DBS subscriber.³⁴ We find that Charter has sufficiently answered the City's charge of fictitious zip codes except as to one DBS subscriber. We will remove that subscriber from Charter's numerator. That will not, however, lower the subscribership of DBS service in St. Louis appreciably. Also, we dismiss the City's general claim that Charter has included nonresidential zip codes, because SBCA specifically states that in its data of DBS subscription, "commercial . . . accounts are not included."³⁵

12. The City, in its Supplemental Comments, makes new criticisms of Charter's estimate of 24,756 DBS subscribers in St. Louis based on the additional information referred to in paragraph 2 above. That information is a several hundred-page long list of each nine-digit zip code all or part of which was in St. Louis and the number of DBS subscribers in each one. It now appears that the City had this

(...continued from previous page)

²⁸ Petition at 6-7.

²⁹ Opposition at 6-7.

³⁰ Petition, Exh. 4. In light of this, we do not understand the City's complaint that SBCA "did not have a breakdown on . . . inactive accounts." Opposition at 6 n.10.

³¹ Reply at 6 (noting that DBS service is a particularly strong competitor when it is free).

³² *Accord Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 11-557 at ¶ 8 (rel. March 28, 2011), available at 2011 WL 1113910; *Comcast Cable Commun., LLC*, 25 FCC Rcd 4967, 4972, ¶ 17 (2010); *Bright House Networks, LLC*, 22 FCC Rcd 4390, 4394, ¶ 11 (2007); *Adelphia Cable Commun.*, 20 FCC Rcd 20536, 20540, ¶ 13 (2005).

³³ Opposition at 6.

³⁴ Reply at 2-3 & Att. A (Letter from Doug Larson, Director, Competitive Intelligence, Media Business Corp., to Cole, Raywid & Braverman, LLP, counsel for Charter).

³⁵ Petition, Exh. 4.

information from early in this proceeding, although it was not in the Commission's record.³⁶

13. In its Supplemental Comments, the City lists a number of instances in which Charter's list includes zip codes and DBS subscribers that lie outside St. Louis.³⁷ The inclusion of such subscribers in the calculations described in paragraph 9 above wrongly inflates Charter's count of DBS subscribers in St. Louis. Based on the instances it lists, the City proposes a 10 percent reduction in Charter's claim of 24,756 DBS subscribers in St. Louis.³⁸ This reduction, if combined with the City's proposed increase in the number of households in St. Louis, would reduce DBS penetration in St. Louis to 15 percent or lower, which is below the minimum necessary to show competing provider effective competition.³⁹

14. The City's analysis of Charter's additional information does not fatally weaken Charter's case, however. In addition to finding instances in which Charter overcounts DBS subscribers in St. Louis, the City also found many instances in which Charter undercounts it (by mistakenly excluding from its count of DBS subscribers zip codes and their resident subscribers that are in St. Louis).⁴⁰ Specifically, it appears that the City lists a total of 16 "overcounts" by Charter and 33 "undercounts."⁴¹ A net increase in 17 DBS subscribers in St. Louis, far from fatally weakening Charter's case, would marginally improve it. Nor is it clear how the City arrived at its 10 percent proposed reduction in DBS penetration, or why we should extrapolate from a number of errors in Zip+4 Codes on the City's edge and assume that errors were also made in zip codes that lie entirely within the City. Most important, however, even if we were to reduce Charter's number of DBS subscribers by 10 percent as the City suggests, DBS penetration in St. Louis would remain over 15 percent.⁴² DBS penetration would fall below 15 percent only if we used the City's proposed household number for St. Louis, which we address below.

15. We conclude that, for purposes of this proceeding, there are 24,755 DBS subscribers in St. Louis. This is one less than the number proposed by Charter, for the reason stated in paragraph 11 above.

b. Number of Households in St. Louis

16. The City challenges Charter's number of households (147,076) on several grounds. First, it claims that Charter underestimates the number of households in St. Louis. The City alleges that in 2004 the Census Bureau raised its estimate of St. Louis's population from 2003 and that a similar rise in households, calculated by the City based in part on recently issued housing permits, yields a total of 154,906 "occupied housing units" in mid-2005.⁴³ Charter disputes these calculations, alleging that 2004

³⁶ Letter from Mr. Horvitz to Mr. Broeckaert, at 2; E-mails from Mr. Horvitz to Mr. Berresford and from Mr. Ellrod to Mr. Berresford ("As Mr. Horvitz states that it is the same information, the City will not dispute this").

³⁷ Supplemental Comments at 4-11. We assume that the City's brief challenges to Petitioner's nine-digit zip code data in its Opposition were subsumed into the more detailed challenges made in its Supplemental Comments.

³⁸ *Id.* at 3, 12, & Exh. 2 (Declaration of Richard D. Treich, Chief Executive Officer of Front Range Consulting, Inc., dated Aug. 3, 2007) at ¶ 15.

³⁹ If the number of households in St. Louis were, as the City suggests, 154,906 (*see infra* note 43) and if Charter's claimed number of DBS subscribers (24,756) were reduced by 10 percent (to 22,280), DBS penetration in St. Louis would be 14.38 percent.

⁴⁰ Supplemental Comments at 7-11.

⁴¹ *Id.* at 6-11, Tables 1-4.

⁴² $147,076 \div 22,280 = 15.15\%$.

⁴³ Opposition at 3-4 & Exhs. 2, 3 (correspondence between the City and the U.S. Census Bureau); Supplemental Comments at 12.

Census data showed St. Louis's households, contrary to the City's estimates, falling to 139,286.⁴⁴ Charter also points to Census data from 2005 stating that St. Louis has 141,408 occupied housing units.⁴⁵

17. We will rely on Census data from 2000 and reject the City's proposed mid-2005 estimate. We have relied on decennial Census data in many cases, even several years after the data was issued.⁴⁶ Although we may accept more recent household numbers that are as reliable as the Census count,⁴⁷ the City's mid-2005 estimate appears flawed in two respects. First, it is based in part on recent housing permits. Our effective competition test measures households, we reject estimates based on housing permits and the like, which may reflect housing units that are unoccupied.⁴⁸ Second, the City's mid-2005 estimate of the number of households in St. Louis appears to be based on an estimate of the City's population that includes "group quarters."⁴⁹ For the reasons stated in the following two paragraphs, however, we generally do not include residents of group quarters in counts of households in effective competition proceedings.

18. Next, the City argues that Charter has also underestimated the number of households in St. Louis by omitting nursing homes, other senior and group housing, and university dormitories.⁵⁰ The City claims in particular that student dwellings in university dormitories should be counted as households.⁵¹ This argument is directly contrary to the Commission's 2010 ruling in *Marcus Cable*

⁴⁴ Reply to Opposition of the City of St. Louis, Missouri to Charter's Petition for Special Relief ("Reply"), filed Oct. 20, 2005, at 4-5 & Att. B (U.S. Census Bureau data at http://factfinder.census.gov/servlet/ACSSAFFacts?_event=&geo_id=16000US2965000&_geoContext=01000US%7C04000US29%7C16000US2965000&_street=&_county=St.+Louis&_cityTown=St.+Louis&_state=04000US29&_zip=&_lang=en&_sse=on&ActiveGeoDiv=&_useEV=&pctxt=fph&pagsl=160) (visited by Charter Nov. 17, 2005).

⁴⁵ Surreply at 9.

⁴⁶ See, e.g., *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 11-466 at ¶ 8 (rel. March 10, 2011), available at 2011 WL 828968; *Subsidiaries of Cablevision Systems Corp.*, 23 FCC Rcd 14141, 14143-45, ¶¶ 10-14 (2008), application for review pending; *Comcast Cable Commun., LLC*, 23 FCC Rcd 10939, 10942-43 n.30, ¶ 13 (2008) & authorities cited therein; *Cablevision of Rockland/Ramapo Inc.*, 22 FCC Rcd 11487, 11493, ¶ 16 (2007), application for review pending; *CoxCom, Inc.*, 22 FCC Rcd 4533, 4538, ¶ 13 (2007) ("*CoxCom*"); *Jones Intercable, Inc.*, 15 FCC Rcd 7254, 7256, ¶ 5 n.12 (2000).

⁴⁷ *Adelphia Cable Commun.*, 22 FCC Rcd 4458, 4462-63, ¶ 14 (2007); *Bright House Networks, LLC*, 20 FCC Rcd 16823, 16827 ¶ 10 (2005); *MCC Iowa LLC*, 20 FCC Rcd 15267, 15270, ¶ 8 (2005) ("*MCC Iowa*").

⁴⁸ *Comcast Cable Commun., LLC*, Memorandum Opinion & Order DA 11-496 at ¶ 33 (rel. March 18, 2011), available at 2011 WL 933540; *MCC Iowa*, 20 FCC Rcd at 15269-70, ¶¶ 6-7 & nn.22-23 (2005) (at ¶ 7: "The Commission has determined, that for effective competition purposes, the term 'household' has the same meaning as that used by the U.S. Census Bureau. The U.S. Census Bureau defines 'households' as '[a] person or group or persons who live in a housing unit' or 'occupied housing units.' The Commission has long distinguished between vacant and occupied homes in reference to the effective competition tests.") (footnotes omitted; brackets in original); *Adelphia Cable Commun.*, 20 FCC Rcd 4979, 4982, ¶ 9 & n.20 (2005) ("*Adelphia*"); *Cablevision of Raritan Valley, Inc.*, 19 FCC Rcd 6966, 6968, ¶ 6 (2004); *Mediacom Minnesota LLC*, 18 FCC Rcd 12768, 12770-70, ¶ 8 & n.27 (2003); *Marcus Cable Assocs, LLC*, 18 FCC Rcd 9649, 9652, ¶ 7 (2003) ("*Marcus*").

⁴⁹ Opposition, Exh. 2 (Letter from John F. Long, Chief, Population Division, U.S. Census Bureau, Economics & Statistics Administration, U.S. Department of Commerce, to The Honorable Francis G. Slay, Mayor of St. Louis).

⁵⁰ Opposition at 4-6 (at 5, noting that St. Louis has several universities). Our pertinent rule, 47 C.F.R. § 76.905(c), provides a definition of household by stating that "each separately billed or billable customer will count as a household subscribing to or being offered video programming services, with the exception of multiple dwelling buildings billed as a single customer. Individual units of multiple dwelling buildings will count as separate households. The term 'households' shall not include those dwellings that are used solely for seasonal, occasional, or recreational use."

⁵¹ Opposition at 5 & n.8.

Associates, LLC, that “college or university dormitories are noninstitutional group quarters rather than occupied households, and as such, they fall outside the scope of the effective competition analysis.”⁵² The City argues that student dwellings are households because, under Section 76.905(c) of our rules, they are not “dwellings that are used solely for seasonal, occasional, or recreational use.”⁵³ We respectfully disagree with the City. When we adopted the just quoted words in Section 76.905(c), we addressed “dwelling units that are empty for a significant portion of the year” and observed that

“[p]eople who are not present cannot be presumed to be choosing local competitive alternatives. We believe that the best and most constant indicator of local viewers' choices is represented by the full-time residents of an area. Moreover, it is the full-time residents who are most affected by the determination whether their cable rates are subject to regulation.”⁵⁴

19. It is entirely consistent with Section 76.905(c) and these observations to exclude university students in dormitories from our definition of households. University students are present in dormitories for only part of the year (the academic year or summer school). Dormitory rooms are also often unoccupied because students transfer, move off campus, and spend time in distant locations during vacations and internships. We apply the same reasoning to the City's argument that nursing homes and other senior and group housing constitute households for purposes of measuring effective competition.⁵⁵ These facilities lack the attributes of voluntary long-term residency and significant control by the resident over uses of the private dwelling space, which are important attributes of households.⁵⁶

20. Accordingly, we find that for purposes of this proceeding, there are 147,076 households in St. Louis.

2. Conclusion

21. The ratio of DBS subscribers to households in St. Louis, Missouri, is 24,755 over 147,076, which translates into 16.83 percent. The more recent Census estimates submitted by Charter in its Reply and Surreply only bolster this conclusion. Using the 2004 Census number of households produces a ratio of 24,755 over 139,286, or 17.78 percent. Using the 2005 Census number, 141,408, produces a ratio of 17.51 percent. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that both parts of the competing provider test are satisfied and Charter is subject to effective competition in St. Louis, Missouri.⁵⁷

⁵² *Marcus Cable Assocs, LLC*, 25 FCC Rcd 4369, 4372, ¶ 9 (2010) (“*Marcus*”).

⁵³ Opposition at 5 n.8, citing 47 C.F.R. § 76.905(c).

⁵⁴ *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation, Buy-Through Prohibition*, 9 FCC Rcd 4316, 4324, ¶ 17 (1994).

⁵⁵ *Marcus*, 25 FCC Rcd at 4372, ¶ 9; *Comcast Cable Commun., LLC*, *supra* note 46, at ¶ 33; *CoxCom*, 22 FCC Rcd at 4538, ¶ 13.

⁵⁶ See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units & Other Real Estate Developments*, 22 FCC Rcd 20235, 20238, ¶ 7 (2007), *aff'd*, *National Cable & Telecommun. Ass'n v. FCC*, 567 F.3d 659 (D.C. Cir. 2009).

⁵⁷ We are constrained by the statute to determine the existence of effective competition. We note that household information based on the 2010 Census will soon be available. If the City believes that effective competition is no longer present within its franchise area, it may file a petition for recertification pursuant to Section 76.916 of the Commission's rules. 47 C.F.R. § 76.916.

III. PROCEDURAL MATTERS

A. Alleged Procedural Improprieties

22. The Bureau Letter, referred to in paragraph 2 above, was not sent to the City or any other franchise authority. The City learned of it from another source.⁵⁸ Charter responded to the Bureau Letter by sending the City the additional SBCA data that the Letter called for. Charter did so earlier than the Bureau Letter asked.⁵⁹

23. The City alleges that the Bureau Letter violated the Commission's *ex parte* rules. Specifically, the City alleges that this effective competition proceeding is a "restricted" one within terms of the *ex parte* rules, "in which *ex parte* presentations to and from Commission decision-making personnel are generally prohibited."⁶⁰ The City argues that the Bureau Letter, sent to Charter but not simultaneously disclosed to the City, was such a prohibited *ex parte* presentation from the Bureau to Charter.

24. The City's allegations are without merit. The Commission's *ex parte* rules, specifically 47 C.F.R. § 1.1202(a), define a "presentation" as a "communication directed to the merits or outcome of a proceeding." This means, in general, a communication advocating an outcome on the merits, in this case a finding that effective competition does or does not exist in St. Louis. The Bureau Letter was not such a communication. It advocated no outcome on the merits. Rather, it was a request that one party furnish factual evidence to another party. Not being a "presentation" within the terms of the *ex parte* rules, the Bureau Letter did not violate the rules' prohibition on *ex parte* presentations.

25. Second, the Bureau Letter was completely consistent with our *ex parte* rules. An express exemption to the *ex parte* rules permits Commission requests for further information.⁶¹ That exemption required only service to Charter, and, in turn, required Charter to serve the other parties in the matter with its response. Charter made such service on the City. Thus, the City was given proper notice of the Bureau Letter. The City concedes it received that response a full four weeks before it was asked to comment on the SBCA data contained in Charter's response.⁶² The City does not substantiate its claim that four weeks was inadequate time to comment on the data.⁶³ Indeed, Charter alleges, and the City does

⁵⁸ Ellrod Letter at 1.

⁵⁹ Horvitz Letter.

⁶⁰ 47 C.F.R. § 1.1200(a), citing § 1.1208.

⁶¹ See 47 C.F.R. § 1.1204(a)(10)(ii). Section 1.1204(a)(10)(ii) of the Commission's rules provides that "The following types of presentations are exempt from the prohibitions in restricted proceedings . . . The presentation is requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction evidence, or for the resolution of issues, including possible settlement, subject to the following limitations . . . In restricted proceedings not designated for hearing, any new written information elicited from such request . . . shall promptly be served by the person making the presentation on the other parties to the proceeding." *Id.* In fact, the Bureau Letter expressly directed Charter to "Please serve a copy of your supplement and this letter on each of the affected local franchise authorities." Bureau Letter at 2.

⁶² Ellrod Letter at 1. The Bureau Letter required responses within 50 days of its February 23, 2007, date. Therefore, the reply deadline was April 14, which was on a Saturday. April 16 was the next business day after that deadline. Out of an abundance of consideration for the City, that deadline was later extended to August 6, 2007. E-mail from Mr. Berresford to Mr. Ellrod, dated July 16, 2007, 10:12 AM.

⁶³ In this regard, we note that the general pleading requirements of Section 76.7 only permit 20 days for local franchising authorities to file oppositions to effective competition petitions. See 47 C.F.R. § 76.7(b)(1). We fail to perceive how the City was prejudiced by the Bureau in effect multiplying this time period severalfold.

not deny, that the City had the same data for years.⁶⁴

26. The City also argues that the Bureau Letter was unfair and, as such, violated the requirement of our rule, 47 C.F.R. § 76.7(e)(2), which speaks of additional data tending to a “full, fair, and expeditious resolution of the proceeding.”⁶⁵ This argument, too, is erroneous. The Bureau Letter was not unfair to the City and inflicted no prejudice or other harm on it. On the contrary, the Letter’s purpose and effect were to put into the City’s hands evidence with which it might strengthen its case. Far from being an attempt to injure the City’s cause in this proceeding, the Letter was an attempt to give it an additional opportunity, with additional evidence, to oppose the Petition.

27. It is a mischaracterization for the City to imply that the Bureau was “a complaining party” that was obligated “to serve other affected parties”⁶⁶ with its Letter. It is similarly incorrect for the City to invoke 47 C.F.R. § 76.907(c), which provides that, in effective competition cases, the Bureau “may issue an order directing one or more persons to produce information relevant to the petition's disposition,” an ‘order’ being a public document “provided to all parties, giving each a full and fair chance to respond.”⁶⁷ That rule merely states that the Bureau “may” issue an order; it does not prohibit less formal actions such as the Bureau Letter. Also, we do not understand how the City would exercise any “full and fair chance to respond” to the Bureau Letter, which did not ask the City to do anything. The City did have a chance to respond to the SBCA data because of the Bureau Letter. Finally, a careful reading of 47 C.F.R. § 76.907(c) shows that the cited language applies specifically to so-called “LEC” effective competition test, not the competing provider test for effective competition that is involved in this case.⁶⁸

B. Date of Relief.

28. Charter asks that we find that effective competition existed in St. Louis on the date of the first DBS subscriber information provided by SBCA.⁶⁹ The City correctly notes that the Commission, when it grants a cable operator’s petition for a finding of effective competition, recognizes the filing date of the petition as the date on which the cable operator was subject to effective competition.⁷⁰ We do so here, and find that Charter has been subject to effective competition in St. Louis since the date it filed the Petition herein.

⁶⁴ See *supra* note 36.

⁶⁵ Ellrod Letter at 2.

⁶⁶ *Id.*, citing 47 C.F.R. § 76.7(a)(3).

⁶⁷ Ellrod Letter at 2.

⁶⁸ The City states that 47 C.F.R. 76.907 indicates that “a request by the Commission for additional data in an effective competition proceeding should be by order.” Ellrod Letter at 2. Presumably, the City is referring to the following language: “In addition, with respect to petitions filed seeking to demonstrate the presence of effective competition pursuant to §76.905(b)(4), the Commission may issue an order directing one or more persons to produce information relevant to the petitions disposition.” 47 C.F.R. § 76.907(c). The rule cited, 47 C.F.R. 76.905(b)(4), is used for assessing whether effective competition exists in franchise areas where local exchange carriers provide MVPD service.

⁶⁹ Petition at 7.

⁷⁰ Opposition at 7-8; *Comcast Cable of Dallas, L.P.*, 20 FCC Rcd 19282, ¶ 3 (2005); *Mediacom Minnesota, LLC*, 20 FCC Rcd 15687, 15688, ¶ 4 (2005); *Alert Cable T.V. of North Carolina, Inc.*, 19 FCC Rcd 80, 81, ¶ 5 (2004); *Rifkin & Associates, Inc.*, 17 FCC Rcd 14233, 14234, ¶ 5 (2002).

IV. ORDERING CLAUSES

29. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Charter Communications Entertainment I LLC **IS GRANTED**.

30. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to St. Louis set forth on Attachment A **IS REVOKED**.

31. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁷¹

FEDERAL COMMUNICATIONS COMMISSION

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

⁷¹ 47 C.F.R. § 0.283.

ATTACHMENT A

CSR 6916-E

COMMUNITY SEVED BY CHARTER COMMUNICATIONS ENTERTAINMENT I LLC

| Community | CUID | CPR* | 2000 Census Households | Estimated DBS Subscribers |
|------------------|-------------|-------------|-------------------------------|----------------------------------|
| St. Louis | MO0545 | 16.83% | 147076 | 24755 |

CPR = Percent of competitive DBS penetration rate