

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

In the Matter of )
Charter Communications )
Twelve Petitions for Determination of Effective )
Competition in Twenty-Three Local Franchise )
Areas in Oregon )
CSR-6461-E (Lane County)
CSR-6464-E (Lincoln County)

ORDER ON RECONSIDERATION

Adopted: July 18, 2016

Released: July 18, 2016

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

I. INTRODUCTION

1. Charter Communications (Charter) filed a Petition for Partial Reconsideration, pursuant to Section 1.106 of the Commission’s rules, of the Media Bureau’s Memorandum Opinion and Order (Order), granting in part and denying in part Charter’s Petition for Special Relief in the above-referenced proceeding. In its Petition for Partial Reconsideration, Charter contends that the Media Bureau denied its initial Petition with respect to Lane County and Lincoln County because Charter derived its DBS allocation figures from the total number of homes passed by the systems rather than from the 2000 Census Household data, and that use of the homes passed figure was justified with respect to these two counties. No opposition was filed. For the reasons set forth below, we grant Charter’s Petition for Partial Reconsideration.

II. BACKGROUND

2. In June 2015, a Commission order adopted a rebuttable presumption that cable operators are subject to one type of effective competition, commonly referred to as “competing provider effective competition.” Accordingly, in the absence of a demonstration to the contrary, the Commission now presumes that cable systems are subject to competing provider effective competition, and it continues to

1 Charter Communications Petition for Partial Reconsideration at 1 (Jul. 13, 2005) (Petition for Partial Reconsideration).

2 47 C.F.R. § 1.106.

3 Charter Communications: Twelve Petitions for Determination of Effective Competition in Twenty-Three Local Franchise Areas in Oregon, Memorandum Opinion and Order, 20 FCC Rcd 10679 (MB 2005) (Order). The Order found all that all franchise areas at issue were subject to competing provider effective competition except the unincorporated areas within Clackamas, Lane, and Lincoln Counties.

4 Petition for Partial Reconsideration at 1. Charter states that it also disagrees with the Order’s denial of its Petition with respect to Clackamas County, Oregon, but it is not seeking reconsideration of that portion of the decision at this time. Charter states that it intends to gather more information regarding DBS penetration in Clackamas County and will file a separate petition if warranted. Id. at n.1. To date, we have not received any filings from Charter with regard to Clackamas County.

5 See Amendment to the Commission’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act, Report and Order, 30 FCC Rcd 6574 (2015) (Effective Competition Order).

presume that cable systems are not subject to any of the other three types of effective competition, as defined by Section 623(l) of the Communications Act and Section 76.905 of the Commission's rules.<sup>6</sup>

3. In its initial Petition, Charter argued that it was subject to competing provider effective competition in twenty-three Oregon communities (the Communities).<sup>7</sup> The Initial Petition was unopposed. The *Order* found that twenty communities were subject to effective competition and granted Charter's Initial Petition for a determination of effective competition in those communities.<sup>8</sup> However, in the unincorporated areas within Clackamas, Lane and Lincoln Counties, the Bureau found that Charter failed to justify its use of the homes passed figure to calculate the respective DBS penetration rates.<sup>9</sup> Therefore, the Bureau was unable to accurately conclude with the data presented that in the unincorporated areas within Clackamas, Lane and Lincoln Counties, the number of households subscribing to programming services offered by multichannel video programming distributors (MVPDs) other than the largest MVPD exceeded the 15 percent penetration threshold.<sup>10</sup> Accordingly, the *Order* denied Charter's initial Petition for a determination of effective competition in the unincorporated areas of Clackamas, Lane and Lincoln Counties.<sup>11</sup>

### III. DISCUSSION

4. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to competing provider effective competition if the franchise area is (a) served by at least two unaffiliated 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>12</sup> Pursuant to the *Effective Competition Order*, absent evidence to the contrary, the Commission presumes that the competing provider test is met.<sup>13</sup> Under the modified rules, franchising authorities remain free to rebut the presumption of competing provider effective competition.<sup>14</sup>

#### A. First Part

5. The first part of this test has three elements: the franchise area must be "served by" at least two unaffiliated MVPDs who offer "comparable programming" to at least "50 percent" of the households in the franchise area.<sup>15</sup> As explained in the *Effective Competition Order*, "we find that the ubiquitous nationwide presence of DBS providers, DIRECTV and DISH Network, presumptively satisfies" the first part of the test for competing provider effective competition, absent evidence to the contrary.<sup>16</sup> The *Order* found under the old presumption that Charter adequately demonstrated the presence of DBS providers in the communities in order to satisfy the first part of the test.<sup>17</sup> No party seeks reconsideration of the findings regarding this part of the test. In accordance with the presumption

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<sup>6</sup> See 47 U.S.C. § 543(l)(1); 47 CFR §§ 76.905(b), 76.906.

<sup>7</sup> Charter Communications Petition for Special Relief at 1 (Nov. 30, 2004) (Initial Petition).

<sup>8</sup> *Order*, 20 FCC Rcd at 10679, 10680-81, paras. 4-5.

<sup>9</sup> *Id.* at 10681-82, para. 6.

<sup>10</sup> *Id.* at 10682, para. 6.

<sup>11</sup> *Id.* at 10682, para. 10.

<sup>12</sup> 47 U.S.C. § 543(l)(1)(B); 47 CFR § 76.905(b)(2).

<sup>13</sup> *Effective Competition Order*, 30 FCC Rcd at 6587, para. 17.

<sup>14</sup> *Id.*

<sup>15</sup> 47 CFR § 76.905(b)(2)(i).

<sup>16</sup> *Effective Competition Order*, 30 FCC Rcd at 6580-81, para. 8.

<sup>17</sup> *Order*, 20 FCC Rcd at 10680, para. 3.

of competing provider effective competition, as well as the Bureau's previous findings, we thus find that the first part of the test is satisfied.

## B. Second Part

6. The second part of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area.<sup>18</sup> As explained in the *Effective Competition Order*, “[w]ith regard to the second prong of the test, we will presume that more than 15 percent of the households in a franchise area subscribe to programming services offered by MVPDs other than the largest MVPD.”<sup>19</sup>

7. Charter is seeking reconsideration of the *Order's* findings under the old presumption regarding the method used to calculate the DBS penetration rates of the unincorporated areas of Lane and Lincoln Counties.<sup>20</sup> In its initial petition, the Bureau found that Charter failed to justify its use of homes passed by to calculate the DBS penetration rate.<sup>21</sup> The Bureau found that Charter did not provide sufficient evidence that the number of homes passed by its systems was a suitable equivalent for the number of households, meaning occupied households units, in the franchise areas.<sup>22</sup> In seeking reconsideration regarding the DBS penetration figures for the unincorporated areas of Lane and Lincoln Counties, Charter asserts that the use of homes passed was the most logical method for measuring DBS penetration rate.<sup>23</sup>

8. For the unincorporated areas of Lane County, Charter asserts that it was correct in its use of homes passed for determining the DBS penetration rate there because it accurately reflects the franchise area and the limited portion of the county served by Charter.<sup>24</sup> Charter asserts that, with regard to Lane County, the franchise area is defined as the unincorporated areas of Lane County served by the system.<sup>25</sup> Charter contends that, by definition, the number of homes passed is effectively equivalent to the number of households in the Lane County franchise area.<sup>26</sup> While homes passed by may not exactly match the number of households in the franchise area, Charter contends that the calculated DBS penetration rate of 32.3 percent is sufficiently above the 15 percent threshold as to render insignificant any minor discrepancies between the two figures.<sup>27</sup>

9. With regard to the unincorporated areas of Lincoln County, Charter asserts that it has provided service to subscribers in the unincorporated portions of the county without a franchise agreement, pursuant to the grandfathering clause of Section 621(b)(2) of the Communications Act.<sup>28</sup> According to Charter, since its service in the county without a franchise agreement was grandfathered and

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<sup>18</sup> 47 C.F.R. § 76.905(b)(2)(ii).

<sup>19</sup> *Effective Competition Order*, 30 FCC Rcd at 6581-82, para. 9. Charter asserts that it is the largest MVPD in the Communities. See Petition at 7.

<sup>20</sup> Petition for Partial Reconsideration at 1.

<sup>21</sup> *Order*, 20 FCC Rcd at 10681, para. 6.

<sup>22</sup> *Id.*

<sup>23</sup> Petition for Partial Reconsideration at 1-3.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at n.5.

<sup>28</sup> *Id.* at 2; 47 U.S.C. § 541(b)(2). Charter contends that it is therefore not clear that the County is a franchising authority authorized to regulate cable rates. Nonetheless, Charter asserts that the Commission does not need to consider this issue, because under any possible circumstances, DBS penetration exceeds the 15 % threshold. Petition for Partial Reconsideration at 2.

was limited to a portion of the county, it reasoned that the use of homes passed was the most logical method of calculating DBS penetration.<sup>29</sup> This calculation yielded a DBS penetration rate of 21.7 percent.<sup>30</sup> Alternatively, Charter submits that the only other way to analyze the DBS penetration rate in Lincoln County is to assume that, absent specific franchise boundaries pursuant to a franchise agreement, Charter is entitled to serve the entire unincorporated portion of the county and can use the 2000 Census Household figure to derive the DBS figure.<sup>31</sup> Charter asserts that by using a combination of Census and postal code data the resulting DBS penetration rate for the entire unincorporated portion of Lincoln County increases to 25.2 percent.<sup>32</sup>

10. For the above reasons, Charter effectively demonstrated that the DBS penetration rate in Lane and Lincoln Counties exceeds 15 percent, and the record does not contain arguments to the contrary. In accordance with the presumption of competing provider effective competition, and based on the information submitted by Charter, we thus find that the second prong of the test is satisfied for these Communities.

#### IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED** that pursuant to Section 1.106 of the Commission's rules,<sup>33</sup> the Petition for Partial Reconsideration filed by Charter Communications **IS GRANTED**.

12. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any local franchising authority overseeing Charter Communications in the unincorporated portions of Lane County and Lincoln County, Oregon **IS REVOKED**.

13. This action is taken pursuant to delegated authority under Section 0.283 of the Commission's rules.<sup>34</sup>

#### FEDERAL COMMUNICATIONS COMMISSION

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<sup>29</sup> Petition for Partial Reconsideration at 3.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> 47 CFR § 1.106.

<sup>34</sup> *Id.* § 0.283.