

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

In the Matter of:)
Marcus Cable Associates, L.P.) CSR-5145-E
Charter Communications Entertainment II, L.P. and)
Long Beach Acquisition Corp.) CSR-5070-E
Petitions for Determination of Effective)
Competition)
Applications for Review)

MEMORANDUM OPINION AND ORDER

Adopted: August 13, 2001

Released: August 16, 2001

By the Commission:

I. INTRODUCTION

1. Before the Commission are two petitions seeking review of orders adopted by the Cable Services Bureau (the "Bureau"), in which the Bureau denied petitions filed by two cable operators seeking a determination that they are each subject to local exchange carrier ("LEC") effective competition.1 The following orders and petitions are involved: application for review filed by Marcus Cable Associates, L.P. ("Marcus");2 and application for review filed by Charter Communications Entertainment II, L.P. and Long Beach Acquisition Corp. ("Charter").3 As discussed below, the applications for review are denied.

1 The Communications Act defines the term "local exchange carrier" as:

any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a Commercial mobile service under Section 332(c), except to the extent that the Commission finds that such service should be included in the definition of such term.

47 U.S.C. § 153(26).

2 Marcus Cable Associates, L.P., 13 FCC Rcd 9326 (1998)

3 Charter Communications Entertainment II, L.P. and Long Beach Acquisition Corp., 13 FCC Rcd 8506 (1998).

II. BACKGROUND

2. Section 623(a)(4) of the Communications Act of 1934, as amended (“Communications Act”) allows franchising authorities to become certified to regulate basic cable service rates of cable operators which are not subject to effective competition.⁴ In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition as defined in the Communications Act.⁵ The cable operator bears the burden of rebutting the presumption that such effective competition does not exist and so must provide evidence sufficient to demonstrate that effective competition, as defined by Section 76.905 of the Commission’s rules, is present in the franchise area.⁶ Section 623(1)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁷ The Conference Report to the 1996 Act provided that “[f]or purposes of the [LEC test] ‘offer’ has the same meaning given that term in the Commission’s rules as in effect on the date of enactment of [the 1996 Act].”⁸ In order to establish that the competing LEC service is “offered” in its franchise area, the incumbent must show, *inter alia*, that no regulatory, technical or other impediments to household service exist and that the LEC is marketing its service so that potential customers are aware that the LEC’s services may be purchased.⁹

III. DISCUSSION

3. The cable operators seeking review request that the Commission reverse the two Bureau orders denying a determination of effective competition. We consolidate consideration of these petitions because the legal arguments presented by the parties are nearly identical and the interests of administrative efficiency will be advanced thereby.

4. We affirm the orders adopted by the Cable Services Bureau in the above-captioned matters and deny the associated applications for review. The facts, applicable law, and the Bureau’s detailed analyses were fully set forth in the underlying decisions.¹⁰ The Bureau denied petitioners’ requests for a determination of effective competition based on petitioners’ failure to demonstrate that subscribers in the relevant areas are “offered” a competing service because they are not “reasonably aware” of the availability of the competing multichannel video service provided by a LEC affiliate.¹¹

⁴ 47 U.S.C. § 543(a)(4).

⁵ 47 U.S.C. § 543(1); *see also* 47 C.F.R. § 76.906.

⁶ 47 C.F.R. § 76.905; *see also* 47 C.F.R. § 76.906 & 76.907.

⁷ Communications Act, § 623(1)(1)(D), 47 U.S.C. § 543(1)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 623(1) may be referred to as the “LEC” effective competition test.

⁸ H.R. Rep. No. 458, 104th Cong., 2d Sess. 170 (1996) (“Conference Report”); *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) (“Cable Reform Order”).

⁹ 47 C.F.R. § 76.905(e); *Cable Reform Order*, 14 FCC Rcd at 5305.

¹⁰ *See supra* nn. 2, & 3.

¹¹ *See* 47 C.F.R. § 76.905(e)(2).

5. The parties do not dispute that the standard that the competing LEC service be offered in the franchise area, including the reasonable awareness component thereof, was the correct standard to apply in this proceeding. Instead, on review, the parties each argue that the Bureau failed to correctly interpret and apply the requirement that the competing programming be “offered” to subscribers by a LEC affiliate. Specifically, the parties contend that the Bureau did not correctly interpret the requirement that subscribers be “reasonably aware” that the competing service is available.

6. Upon review, we find that although the Bureau makes a singular reference to a “broad awareness” of the availability of a competing service offered by a LEC affiliate in the rulings pertaining to Marcus and Charter, there is no reason to believe that the Bureau gave substantive weight to that singular reference or intended to depart from the “reasonably aware” standard in the rules. In any case, we independently find that the Bureau’s conclusions were correct under the “reasonably aware” standard.¹²

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED** that the Applications for Review filed by Marcus Cable Associates, L.P., and Charter Communications Entertainment II, L.P. and Long Beach Acquisition Corp., of the Cable Services Bureau’s orders in *Marcus Cable Associates, L.P.*, and *Charter Communications Entertainment II, L.P. and Long Beach Acquisition Corp.*, **ARE DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹² We note that our decision today is without prejudice to any of the affected cable operators from re-filing a petition for determination of effective competition based on changed circumstances or updated information sufficient to overcome the presumption of no effective competition. See 47 C.F.R. §§ 76.7, 76.907.