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

In the Matter of	)	
	)	
Marcus Cable Associates, LLC d/b/a Charter Communications	)	
	)	
	)	CSR 5927-E
Petition for Determination of Effective Competition in Denton, TX (TX0580)	)	
	)	
	)	
Application for Review	)	

MEMORANDUM OPINION AND ORDER

Adopted: April 21, 2010 **Released: April 22, 2010**

By the Commission:

I. INTRODUCTION

1. Before the Commission is an application for review filed by the City of Denton, Texas ("Denton" or the "City"), seeking review of a Memorandum Opinion and Order adopted by the Media Bureau ("Bureau") finding that Marcus Cable Associates, LLC d/b/a Charter Communications, Inc. ("Charter") is subject to effective competition in Denton.[1] For the reasons discussed below, we affirm the Bureau's decision and deny the application for review.

II. BACKGROUND

2. Under Section 623 of the Communications Act of 1934, as amended (the "Act"), a certified local franchising authority[2] may regulate the basic service tier ("BST") rates of a cable system in its franchise area that is not subject to "effective competition" as defined by the Act and Section 76.905 of the Commission's Rules.[3] In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition.[4] A cable system subject to rate regulation may file a petition with the Commission to demonstrate that it is subject to effective competition and that, accordingly, the

[1] *Marcus Cable Associates, LLC d/b/a Charter Communications,* Order on Reconsideration, 18 FCC Rcd 9649 (MB 2003) ("*Reconsideration Order*"); *see Marcus Cable Associates, LLC d/b/a Charter Communications*, Memorandum Opinion and Order, 17 FCC Rcd 16652 (MB 2002) ("*Initial Order*"). Charter filed an opposition to the City's application for view, to which Denton replied.

[2] *See generally* 47 U.S.C. § 543. In order to exercise such power, a local franchising authority ("LFA") must take certain affirmative steps to become certified to regulate cable rates. *See* 47 U.S.C. § 543(a)(3)-(4).

[3] Effective competition as defined by the Act may take one of four specified forms. 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

[4] 47 C.F.R. § 76.906.

local franchising authority should no longer be authorized to regulate its BST rates.[5] 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.[6]

3. Section 623(l)(1)(B) of the Act provides that a cable operator is subject to effective competition if the cable operator demonstrates that its franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors ("MVPD"), 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 the MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the franchise area.[7]

4. In the *Reconsideration Order*, the Bureau found that Charter satisfied its burden under the Commission's rules for the provision of subscriber information for effective competition purposes;[8] clarified that the use of alternative housing data from the North Central Texas Council of Governments ("NCTCOG") was inappropriate for effective competition purposes;[9] made adjustments to Charter's census household data; and concluded that Charter demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in Denton.[10] In reaching its determination, the Bureau reviewed DBS subscriber data generated by Sky Trends, an independent data-collection firm, which Charter submitted in support of its original petition in this proceeding.

5. Denton argues that it is a rapidly growing city and unless adjustments are made to the household data, there will be an erroneous finding that the DBS penetration rate exceeds 15 percent based on the 2000 Census household count for Denton.[11] In support of its application for review, Denton submits data from the Texas Real Estate Center, which it claims demonstrates that the occupancy rate for the Dallas area, of which Denton is part of for purposes of the U.S. Census, is 93.09 percent, and thus the number of households in Denton in 2003 was actually 33,193.[12] Denton argues that the Bureau wrongly excluded 3,312 dormitory rooms from local universities that should have been included in the household count, contending that they are within the definition of households because they are occupied on at least a nine-month basis and are not seasonal.[13] According to Denton, if the dormitory rooms were included in

[5] 47 U.S.C. § 543(a)(2); 47 C.F.R. § 76.905(a).

[6] *See* 47 C.F.R. §§ 76.906, 907.

[7] 47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

[8] Under the Commission's rules, cable operators may obtain subscriber information from competitors for the purpose of making a showing of effective competition within the relevant franchise area(s).. *See* 47 C.F.R. § 76.907(c). We agree with the Bureau that it is appropriate to rely upon subscriber data compiled by independent entities such as Sky Trends on behalf of the DBS providers in satisfaction of the Section 76.907(c) requirements. *Reconsideration Order* at 9651 (noting that such information may be limited to numerical totals and that SkyTrends does not publicly release zip code information beyond the general methodology and aggregate DBS subscriber total).

[9] In the *Reconsideration Order,* the Bureau pointed out that the NCTCOG numbers related to housing units. For effective competition purposes, the Commission utilizes the United States Census Bureau's definition of "households" which is "occupied housing units." Under this definition, "households" is a subset of "housing units," the latter being comprised of both occupied and unoccupied year round residences. *See Reconsideration Order,* 18 FCC Rcd at 9651.

[10] *See Reconsideration Order,* 18 FCC Rcd at 9651-52.

[11] Denton Application for Review at 6-7.

[12] *Id.* at 7.

[13] *Id*.

the household count, there would be 36,386 households and the percentage of non-Charter subscribers would only be 10.18 percent.[14] The City also claims that the SkyTrends' data is inherently suspect and should be stricken because SkyTrends has admitted to serious data inaccuracies and the data is not subject to verification and scrutiny.[15] Furthermore, Denton states that it has asked, but Charter has refused to allow it to verify the satellite subscriber data.[16] Finally, Denton argues that Charter failed to submit adequate evidence reflecting the offering of DBS service in the franchise area; that households are reasonably aware that service is available; and that the local programming stated in advertisements is actually offered in the area.[17]

6. In opposition, Charter argues that the City's application for review does not merit any further Commission consideration, let alone reversal, and the Bureau properly concluded that Charter's Denton franchise area is subject to effective competition.[18] Charter asserts that the Bureau properly relied upon SkyTrends data and argues that the City failed to explain how access to SkyTrends' data would lead to a substantive change.[19] According to Charter, the Commission has repeatedly affirmed the accuracy and reliability of SkyTrends' reports, and the company obtained zip code+4 reports to prove the presence of effective competition because that customized methodology was structured to avoid the potential over reporting problem associated with five digit zip code reports.[20] In addition, Charter states that its reliance on the 2000 U.S. Census to determine the number of households in Denton is consistent with established Commission policy.[21] Charter claims that the City's attempt to factor in the Texas Real Estate Center's metropolitan Dallas apartment vacancy rate is misguided and should not be used to adjust a Denton-specific household calculation through a metropolitan-wide apartment figure.[22] Furthermore, Charter asserts that the Bureau properly rejected Denton's contention that local university dormitories be added to the City's household total, especially since such facilities are not included in official Census Bureau household tallies.[23] Charter also argues that the Bureau properly concluded that DBS offers service to at least 50 percent of Denton households and states that, contrary to the City's assertion, it is simply not credible for the City to allege that the majority of Denton households are unaware that they can subscribe to the two major DBS service providers.[24] Finally, Charter points out that even if the Commission used Denton's latest proposed household figure (36,386), the competing provider penetration in the franchise area is 16.60 percent and the effective competition test is satisfied.[25]

---

[14] *Id.* at 8 (3,706 Denton DBS/SMATV subscribers ÷ 36,386 households = 10.2%).

[15] *Id.* at 8-9.

[16] *Id.* at 9-10.

[17] *Id.* at 10-11.

[18] Charter Opposition at 1.

[19] *Id.* at 2.

[20] *Id.* at 2, 4. Charter points out that SkyTrends offers monthly DBS subscriber reports on a five digit zip code basis and a more targeted zip code plus four analysis. This analysis allocates DBS subscribers to a franchise area using zip code plus four information that generally reflects franchise area boundaries in a more accurate fashion than standard five digit zip code information. *See Initial Order,* 17 FCC Rcd at 16655 n15.

[21] *Id.* at 5; *see Initial Order,* 17 FCC Rcd at 16655 n.19.

[22] Charter Opposition at 5.

[23] *Id.*

[24] *Id.* at 6.

[25] *Id.* (6,040 Denton DBS/SMATV subscribers ÷ 36,386 households = 16.60%).

7. Denton, in reply, argues that when both the cable operator and franchising authority submit household numbers more current than the most recent available Census data, it is the cable operator's burden to demonstrate that it's more current household numbers are more accurate and reliable than those submitted by the franchising authority.[26] Denton argues that the City submitted more current household numbers and provided NCTCOG data which reflected housing units.[27]

III. STANDARD OF REVIEW

8. The Commission reviews the Bureau's orders to determine whether: the action taken conflicts with statute, regulation, case precedent, or established policy; a previously unresolved question of law or policy is involved; the application of existing precedent should be overturned; an erroneous finding as to an important or material question of fact has occurred; or there has been prejudicial procedural error.[28]

IV. DISCUSSION

9. We affirm the *Reconsideration Order* adopted in the above-captioned matter and deny the application for review. The facts, applicable law, and the Bureau's analysis were fully set forth in the underlying decision. With regard to Denton's contention that the household figure calculated for Denton should be changed, we disagree. The U.S. Census Bureau defines "occupied housing unit" as "occupied if it is the usual place of residence of the person or group of people living in it at the time of enumeration."[29] When the Commission adopted the term occupied household from the Census, it did so to purposely bar cable operators from counting in their penetration calculations those dwelling units that were empty a significant portion of the year—reasoning that people who are not present cannot be presumed to be choosing local competitive alternatives.[30] Furthermore, the Commission stated in the *Third Reconsideration Order* that occupied households were the appropriate measurement because they represent the best and most constant indicator of local viewers' choices; full-time residents of an area are the consumers most affected by a decision on whether basic-tier cable rates will remain subject to regulation.[31] As indicated in the *Reconsideration Order*, pursuant to the U.S. Census Bureau definition, 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.[32] Also, although Denton submits data from the Texas Real Estate Center which reportedly indicates the occupancy rate for the general Dallas area, such occupancy data fails to specifically provide data regarding occupied housing units in Denton. Moreover, Denton provides no information regarding the definition of the term "occupancy rate." Therefore the Denton-specific population information based on zip code data cannot be replaced based on such general Dallas-area population data.

---

[26] Denton Reply at 4.

[27] *Id.*

[28] *See* 47 C.F.R. § 1.115(b)(2).

[29] *See* Census Definitions at http://factfinder.census.gov/home/en/epss/glossary_g.html

[30] *See Prime Cable of Chicago, Inc., Order on Reconsideration,* 10 FCC Rcd 10032, 10036 (MB 1995).

[31] *Third Order on Reconsideration*, 9 FCC Rcd 4316, 4323-4325 (1994).

[32] *See* Census Glossary at www.census.gov/dmd/www/glossary.html. *See Reconsideration Order,* 18 FCC Rcd at 9652.

10. The City questions the integrity and reliability of SkyTrends data. Denton believes that Charter arbitrarily increased the number of DBS subscribers in Denton, pointing out that while SkyTrends reported 3,585 records of subscribers, Charter reported that there were 5,919 DBS subscribers in Denton. Charter notes that the SkyTrends method utilizes zip code+4 "records" which represent geographical locations, not actual DBS subscribers.[33] Charter submitted to the Commission and Denton information in which SkyTrends explained its methodology and has further explained that a single "record" may contain multiple DBS subscribers.[34] Therefore, we find that the methodology used by SkyTrends is acceptable. As concluded in the *Reconsideration Order,* the Bureau has repeatedly affirmed the accuracy and reliability of SkyTrends' zip code+4 reports to prove the presence of effective competition.[35] In addition, with regard to the assertion that SkyTrends does not allow scrutiny of its data, Charter provided the Commission and Denton with the relevant portion of the SkyTrends report regarding the City, a copy of the methodology detailing how SkyTrends reaches the result, documentation that SkyTrends does not publicly release zip code+4 data beyond its general methodology, and the aggregate DBS subscriber total for the franchise area.[36] Denton has not provided sufficient evidence to undermine SkyTrends subscriber reports or to support its view that the data is suspect.

11. Upon review, we believe that Charter has established the availability of DBS service in the Denton 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 a franchise area are made reasonably aware that the service is available through national, regional or local media.[37] The two DBS providers' subscriber growth reached approximately 26.1 million as of June 2005, comprising approximately 27.7 percent of all MVPD subscribers nationwide; DirecTV has become the second largest, and DISH the third largest, MVPD provider.[38] Charter provided evidence of the national and regional advertising used by DBS providers to promote their services in the franchise area.[39] The advertising documentation provided by Charter served to demonstrate that potential subscribers in Denton were reasonably aware of DBS providers and the services offered. We also affirm the finding of the *Initial Order* that Charter provided comparable programming.[40] For purposes of establishing programming comparability, the competing provider has to offer at least 12 channels of video programming, including at least one non-broadcast channel.[41] The City has failed to demonstrate that the Commission should reach a different conclusion on this matter.

---

[33]Charter Opposition at 3.

[34]*See* Charter Opposition to Petition for Reconsideration at 2.

[35]*Cox Communications Louisiana, LLC*, Memorandum Opinion and Order, 22 FCC Rcd 4053 (MB 2007); *Mediacom Minnesota LLC*, Memorandum Opinion and Order, 20 FCC Rcd 4984 (MB 2005); *MCC Missori LLC*, Memorandum Opinion and Order, 20 FCC Rcd 17909 (MB 2005).

[36]*See Reconsideration Order,* 18 FCC Rcd at 9651.

[37]*See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992,* 8 FCC Rcd 5631, 5660-61 (1993); *see also Third Order on Reconsideration* at 4321-4322.

[38]*Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, Report, 21 FCC Rcd 2503 at ¶¶ 6, 13, 72-73 (2006).

[39]*See* Charter Petition for Special Relief at 3 Exhibit 1 (Charter provided copies of local print brochures and direct mail advertisements in additional to national print advertisements).

[40]*See Initial Order* at 16653.

[41]*See* 47 C.F.R. § 76.905(g).

V. ORDERING CLAUSE

12. Accordingly, **IT IS ORDERED** that the application for review filed by the City of Denton, Texas of the Media Bureau's *Reconsideration Order* in *Marcus Cable Associates, LLC d/b/a Charter Communications* **IS DENIED.**

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary