

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

In the Matter of:)	
)	
Charter Communications d/b/a)	
Marcus Cable Associates, LLC)	
)	CSR 5915-E
Petition for Determination of Effective)	
Competition in Fort Worth, Lake Worth and)	
Certain Other Texas Communities)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 2002

Released: August 6, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Charter Communications d/b/a Marcus Cable Associates, LLC (“Charter”) has filed with the Commission a petition alleging that Charter is subject to effective competition from competing service providers in the fourteen franchise areas in Texas listed in Attachment A (collectively, the “Communities”). Charter alleges that its’ cable systems serving the Communities are subject to effective competition, pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended (“Communications Act”),¹ and Sections 76.7(a)(1) and 76.905(b)(2) of the Commission’s rules, and seeks revocation of the certifications of the local franchising authorities in the Communities to regulate basic service rates.² Charter bases its allegation of effective competition on the competing services provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. (“DirecTV”) and EchoStar Communications Corporation (“EchoStar”), and a SMATV operator, TVMAX, Inc. No opposition to the petition was filed.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,³ as that term is defined by Section 76.905 of the Commission’s rules.⁴

¹47 U.S.C. § 543.

²47 C.F.R. § 76.905(b)(2).

³47 C.F.R. § 76.906.

⁴47 C.F.R. § 76.905.

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. Based on the record in this proceeding, Charter has met this burden.

3. Section 623(1)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if 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 MVPDs other than the largest MVPD exceeds fifteen percent of the households in the franchise area.⁵

4. Turning to the first prong of this test, 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.⁶ Charter has provided evidence of the advertising of DBS service in national media serving the franchise areas.⁷ We find that the programming of the DBS providers satisfies the Commission's program comparability criterion because the DBS providers offer more than 12 channels of video programming, including more than one non-broadcast channel.⁸ Charter has demonstrated that the fourteen Communities are served by at least two unaffiliated MVPDs, namely the two DBS providers, each of which offers comparable video programming to at least 50 percent of the households in the franchise area. Therefore, the first prong of the competing provider test is satisfied.

5. The second prong 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. In certain of the Communities, Charter has obtained subscriber numbers from TVMAX, Inc., a SMATV operator.⁹ Charter also sought to determine the competing provider penetration in its franchise areas by purchasing a report from SkyTrends that identified the number of subscribers attributable to the DBS providers in the Communities on a five-digit zip code basis.¹⁰ However, rather than simply accepting SkyTrends' figures, Charter assumes that some of the DBS subscribers identified in the report may actually live in zip codes outside of the Communities.¹¹ To account for such a possibility, Charter has devised a formula that compares U.S. Census household data for the Communities and the relevant zip codes in order to derive an allocation to apply against the DBS subscriber count.¹² To further bolster its claim of effective competition, Charter then reduces the estimated DBS subscriber count by 10 percent to reflect the possibility that some households have subscribed to both cable and DBS service and to take

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

⁶ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁷ Petition at 4 and Exhibit 1.

⁸ *See* 47 C.F.R. § 76.905(g). *See also* Petition at 4-5 and Exhibits 2-3. Exhibit 2 contains the nationwide channel lineups of DirectTV and EchoStar and Exhibit 3 includes channel lineups for Charter's cable systems serving the Communities.

⁹ Charter Petition at 6 and Exhibit 6.

¹⁰ *Id.* at 5-6.

¹¹ *Id.* at 6.

¹² *Id.* at 6 and Exhibits 7-8.

into account commercial or test accounts.¹³ The Commission believes that Charter's methodology is sound since it seeks to accurately quantify subscribers using the best available DBS subscriber data.

6. Charter asserts that it is the largest MVPD in thirteen of the fourteen Communities because Charter's subscribership exceeds both the SMATV and the aggregate DBS subscribership for those Communities.¹⁴ Based upon the combined levels of DBS and SMATV subscriber penetration as reflected in Appendix A, we find that Charter has 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 each of these Communities.

7. Because it is unable to determine the largest MVPD in the City of Southlake, Charter asserts that it can establish effective competition by demonstrating that its own penetration level also exceeds 15 percent.¹⁵ The Southlake franchise has 3,718 DBS subscribers out of 6,414 households, resulting in a 58 percent penetration level.¹⁶ Thus, assuming that Charter is the largest MVPD in the franchise area, the aggregate DBS subscribership surpasses the 15 percent penetration threshold. Conversely, assuming that one of the DBS providers is the largest MVPD, Charter's own penetration rate (56 percent) surpasses the 15 percent threshold of the second prong of the competing provider test.¹⁷ Based on this record, we find that Charter has 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 its Southlake franchise.

8. Charter has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in the Communities, that there exists no regulatory, technical, or other impediments to households within the Communities taking the services of the DBS providers, and that potential subscribers in the Communities have been made reasonably aware of the MVPD services of DirecTV and EchoStar.¹⁸ Therefore, the second prong of the competing provider test is satisfied.

9. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable systems serving the fourteen Communities identified in Appendix A, are subject to effective competition.

¹³ *Id.* at 7. According to documentation provided by SkyTRENDS, its zip code subscriber numbers are inflated by roughly ten percent "due to dual receivers, and limited commercial and test accounts." *See id.* at Exhibit 5.

¹⁴ *Id.* at 5 and Exhibits 4, 6.

¹⁵ *Id.* at 7.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 3-4.

III. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Charter Communications d/b/a Marcus Cable Associates, LLC **IS GRANTED**.

11. **IT IS FURTHER ORDERED** that the certifications to regulate basic cable service in the cities listed on Attachment A **ARE REVOKED**.

12. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.¹⁹

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

¹⁹47 C.F.R. §0.283.

ATTACHMENT A

CSR-5915-E

COMMUNITIES SERVED BY CHARTER COMMUNICATIONS D/B/A
MARCUS CABLE ASSOCIATES, LLC

Communities	CUIDS	CPR*	2000 Census Households ⁺	Estimated DBS [‡] and SMATV Subscribers ⁺	Charter Subscribers ⁺
City of Azle	TX1340 TX1341	37.1	3,716	1,377	1,601
City of Benbrook	TX0647	22.6	8,599	1,940	3,942
City of Cleburne	TX0589	25.2	9,355	2,352	4,688
City of Ennis	TX0626	26.7	5,335	1,426	2,440
City of Fort Worth	TX0805	24.8	195,078	48,454	65,329
City of Granbury	TX1038	29.0	2,391	695	1,772
Haltom City	TX0576	29.1	14,922	4,348	4,798
City of Hurst	TX0555	25.9	14,076	3,648	5,656
City of Lake Worth	TX0761	26.8	1,660	445	708
City of Red Oak	TX2065	39.3	1,570	617	1,013
City of Richland Hills	TX0591	31.2	3,197	997	1,240
City of Southlake	TX1338 TX2192	58.0	6,414	3,718	3,590
City of Waxahachie	TX0552	37.4	7,325	2,737	3,225
City of Weatherford	TX0654	41.8	7,442	3,107	3,899

*CPR = Percent of competitive DBS + SMATV penetration rate.

⁺See Petition at Exhibits 6, 7 & 8.

[‡]DBS subscriber estimate includes 10% reduction.