

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

In the Matter of:
Charter Communications
Petition for Determination of Effective Competition
in Two Local Franchise Areas in Wisconsin
CSR-7106-E

MEMORANDUM OPINION AND ORDER

Adopted: May 31, 2007

Released: June 1, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. This Order considers a petition filed with the Commission by Charter Communications ("Charter") pursuant to Sections 76.7, 76.905(b)(1) & (2) and 76.907 of the Commission's rules for a determination that Charter's cable systems serving Beloit and Janesville, Wisconsin are subject to effective competition pursuant to Section 623(a)(1) of the Communications Act of 1934, as amended ("Communications Act") and are therefore exempt from cable rate regulation. The City of Janesville ("Janesville") opposes the petition with respect to that franchise area. We grant the petition, finding that the Charter systems are subject to effective competition in both communities.

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as the term is defined by Section 623(l) of the Communications Act of 1934, as amended, and Section 76.905 of the Commission's rules. 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. Section 623(l) of the Act provides that a cable operator is subject to effective competition if any one of the four tests for effective competition set forth therein is met.

II. DISCUSSION

3. Section 623 (l)(1)(B) of the Communications Act provides that a cable operator is subject

1 47 C.F.R. §§ 76.7, 76.905(b)(1) & (2), 76.907; 47 U.S.C. § 543(a)(1).

2 47 C.F.R. § 76.906.

3 See 47 U.S.C. § 543 (l); 47 C.F.R. § 76.905.

4 See 47 C.F.R. §§ 76.906 & 907.

5 See 47 U.S.C. § 543(l)(1)(A)-(D).

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 the programming services offered by the MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the franchise area.⁶ Turning to the first prong of this test, we find that the DBS service of DirecTV Inc. (“DirecTV”) and DISH Network (“Dish”) 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.⁷ 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 was the second largest, and DISH the third largest, MVPD provider during that period.⁸ In view of this DBS growth data, and the data discussed below showing that more than 15 percent of the households in each of the communities listed on Attachment A are DBS subscribers, we conclude that the population of the communities at issue here may be deemed reasonably aware of the availability of DBS services for purposes of the first prong of the competing provider test. With respect to the issue of program comparability, we find that the programming of the DBS providers satisfies the Commission’s program comparability criterion because the DBS providers offer substantially more than 12 channels of video programming, including more than one non-broadcast channel.⁹ We further find that Charter has demonstrated that the 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. Janesville does not contest Charter’s assertion that in Janesville, Charter satisfies the first of the competing provider test by virtue of the presence of DirecTV and DISH and their offering of comparable programming.¹⁰

4. The second prong of the competing provider test requires that the number of households subscribing to the MVPDs, not including the largest MVPD, exceed 15 percent of the households in a franchise area. The information provided by Charter illustrates that its subscribership in both franchise areas exceeded DBS subscribership in each of the franchise areas, thus establishing it as the largest MVPD provider in the franchise areas.

5. In an effort to prove the second prong of the competing provider test, which requires the DBS providers to penetrate at least 15 percent of the market in the franchise area, Charter purchased a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SCBA”). This report identified the number of subscribers attributable to the DBS providers within the communities on a five-digit zip code basis.¹¹ Charter states by comparing Census household figures for the franchise areas with the postal service household figures for the zip code area, Charter is able to derive an allocation figure to apply to the DBS count provided by SBCA, and the resulting product represents the actual DBS subscribers within each of the franchise areas.¹² It further notes that to determine whether the resulting

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

⁷ *See MediaOne of Georgia*, 12 FCC Rcd 19406 (1997).

⁸ *Twelfth Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, FCC 06-11 at ¶¶ 6, 13, 72-73, 21 FCC Rcd 2503 (rel. March 3, 2006).

⁹ *See* 47 C.F.R. § 76.905(g).

¹⁰ Janesville Opposition at 2.

¹¹ Charter Petition at 6.

¹² *Id.* at 6-7.

subscriber figure exceeds the mandated 15 percent threshold in the franchise areas, Charter compared the subscribers to Census household figures in each community, yielding the penetration rate.¹³ After comparing subscriber information to the 2000 U.S. Census household data for each community, Charter calculated a DBS penetration rate of 18.2 percent for Beloit and 17.2 percent for Janesville.¹⁴

6. Janesville challenges Charter's figures and calculations arguing that Charter has not met its burden of demonstrating that the number of households subscribing to DBS exceeds 15 percent of the households in the Janesville franchise area.¹⁵ It states that rather than using SBCA-provided DBS subscriber figures, Charter's methodology attempts to adjust numbers by extracting DBS subscribers located in zip code areas outside the actual franchise boundary by comparing the 2000 Census household figures for the Janesville franchise area with postal service household figures for the zip code areas.¹⁶ Janesville asserts that Charter fails to consider in its analysis that many DBS subscribers which Charter attributes to the City of Janesville likely reside outside the City limits yet are still included in the SCBA-provided DBS figures, despite Charter's attempt at adjustment.¹⁷ It argues that the DBS penetration may be higher outside of the City limits because Charter may not have extended service to certain residences, and therefore such non-franchise residences may have no choice but to subscribe to DBS.¹⁸ Janesville also argues that many DBS subscribers likely reside in residential developments outside the Janesville franchise area yet within the same zip codes, located adjacent to and directly around the city of Janesville which is continuously expanding.¹⁹ Janesville states that the result is that the DBS penetration level within the franchise area actually falls below the 15 percent threshold.²⁰ According to Janesville, the calculations and data Charter provides are not precise enough to verify that DBS subscribers reside in the City as opposed to outlying areas.²¹ Moreover, it argues that Charter's calculations are too speculative, and thus fail to satisfy or establish the basis for the second prong of the effective competition test.²² In reply, Charter asserts that the local DBS penetration exceeds the 15 percent threshold and Janesville has failed to offer any credible basis to reject the figures presented by Charter.²³

7. As discussed, Charter has satisfied the first prong of the competing provider test, by demonstrating that the DBS providers offer comparable programming to at least 50 percent of the franchise areas. In addition, we find that Charter has satisfied the second prong of the competing provider test by establishing that the DBS providers serve at least 15 percent of households in the franchise areas. The methodology used by Charter has been accepted by the Commission in previous cases as it seeks to accurately quantify subscribers.²⁴ Based on the foregoing, we conclude that Charter has submitted

¹³ *Id.* at 7.

¹⁴ *Id.* See also Exhibit 7.

¹⁵ Janesville Opposition at 2.

¹⁶ *Id.* at 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 4.

²⁰ *Id.* at 3.

²¹ *Id.* at 4.

²² *Id.* at 5.

²³ Charter Reply at 1-2.

²⁴ See *Time Warner-Advance/Newhouse Partnership, d/b/a Time Warner*, 20 FCC Rcd 5225, 5227 (MB 2005); (continued...)

sufficient evidence demonstrating that its cable systems serving the franchise areas of Beloit and Janesville, Wisconsin are subject to effective competition under the “competing provider” test.

III. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED** that the petition filed by Charter Communications for a determination of effective competition in Beloit and Janesville, Wisconsin **IS GRANTED**.

9. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates of Beloit and Janesville, Wisconsin **IS REVOKED**.

10. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission’s rules.²⁵

FEDERAL COMMUNICATIONS COMMISSION

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Charter Communications Properties, LLC, Petition for Determination of Effective Competition in San Luis Obispo County, California, 17 FCC Rcd 4617, 4619 (CSB 2002).

²⁵ 47 C.F.R. § 0.283.

Attachment A

Cable Operator Subject to Competing Provider Effective Competition

CHARTER COMMUNICATIONS: CSR 7106-E

Communities	CUIDS	CPR*	2000 Census Households⁺	DBS Subscribers⁺
Beloit	WI0001	18.2%	13,370	2,439
Janesville	WI0043	17.2%	23,894	4,108

*CPR = Percentage of DBS penetration

+ = See Cable Operator Petitions