

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

In the Matter of:)	
)	
Charter Video Electronics, Inc. d/b/a)	
Charter Communications)	CSR-5893-E
)	
Petition for Determination of Effective)	
Competition in Hayward, Wisconsin (WI0665))	
)	

MEMORANDUM OPINION AND ORDER

Adopted: September 12, 2002

Released: September 18, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Charter Video Electronics, Inc. d/b/a Charter Communications (“Charter”) has filed with the Commission a petition pursuant to Section 76.7 of the Commission's rules for a determination of effective competition in Hayward, Wisconsin.¹ Charter alleges that its cable system serving Hayward is subject to effective competition pursuant to Section 623(a) of the Communications Act of 1934, as amended (“Communications Act”), and Section 76.905(b)(2) of the Commission's rules, and seeks revocation of the certification of the local franchising authority in Hayward to regulate basic service rates.² Charter claims the presence of effective competition in Hayward stems from the competing services provided by two direct broadcast satellite (“DBS”) providers, DirecTV, Inc. and EchoStar Communications Corporation (“EchoStar”), and a local exchange company (“LEC”) overbuilder, Chequamegon Telephone Cooperative (“Chequamegon”). 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 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

¹ 47 C.F.R. § 76.7.

² 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(2).

³ 47 C.F.R. § 76.906.

⁴ 47 C.F.R. § 76.905.

in this proceeding, Charter has met this burden.

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the 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 (15%) of the households in the franchise area.⁵

4. Turning to the first prong of the competing provider 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 news media serving Hayward.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 Hayward is 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. Charter has also demonstrated that the two DBS providers are physically able to offer MVPD service to subscribers in Hayward, that there exists no regulatory, technical, or other impediments to households within Hayward taking the services of the DBS providers, and that potential subscribers in Hayward have been made reasonably aware of the MVPD services of DirecTV and EchoStar.⁹ 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. Charter has obtained subscriber numbers for Chequamegon, a LEC overbuilder operating in Hayward.¹⁰ Charter asserts that it is the largest MVPD in Hayward because Charter's subscribership exceeds the Chequamegon subscribership for that community.¹¹ Based upon the 19.1 percent Chequamegon competitive subscriber penetration level, calculated using 2000 Census household data,¹² 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

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 3 and Exhibit 1.

⁸ *See* 47 C.F.R. § 76.905(g). *See also* Petition at 3-4 and Exhibits 2, 3. Exhibit 2 includes the channel line-up for Charter's cable system serving Hayward and Exhibit 3 contains the nationwide channel lineups of DirecTV and EchoStar.

⁹ Petition at 2-4.

¹⁰ *Id.* at 5 and Exhibit 5.

¹¹ *Id.* at 4-5 and Exhibit 5. Charter does not provide evidence demonstrating that its subscribership exceeds that of the DBS providers. However, assuming that one of the DBS providers was the largest MVPD in Hayward, Charter's own subscribership penetration (739 Charter subscribers ÷ 960 Hayward 2000 Census households = 76.9%) or that of Chequamegon (183 Chequamegon subscribers ÷ 960 Hayward 2000 Census households = 19.1%) would exceed the 15 percent level required for a finding of effective competition. *Id.* at Exhibits 4, 5.

¹² *See id.* at Exhibit 4.

Hayward. Therefore, the second prong of the competing provider test is satisfied. Based on the foregoing, we conclude that Charter has submitted sufficient evidence demonstrating that its cable system serving Hayward is subject to effective competition.

III. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed by Charter Video Electronics, Inc. d/b/a Charter Communications **IS GRANTED**.

7. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service in Hayward, Wisconsin **IS REVOKED**.

8. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.¹³

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

¹³ 47 C.F.R. § 0.283.