

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

In the Matter of
Charter Communications
Petition for Determination of Effective
Competition in Three Communities in
Massachusetts
MB Docket No. 13-20, CSR 8763-E

MEMORANDUM OPINION AND ORDER

Adopted: November 15, 2013

Released: November 15, 2013

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. Charter Communications, hereinafter referred to as "Charter" or "Petitioner," has filed with the Commission a petition pursuant to Sections 76.7, 76.905(b)(2) and 76.907 of the Commission's rules for a determination that Petitioner is subject to effective competition in the communities listed on Attachment A and hereinafter referred to as the "Communities." Petitioner alleges that its cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) of the Communications Act of 1934, as amended ("Communications Act"), and the Commission's implementing rules, and is therefore exempt from cable rate regulation in the Communities because of the competing service provided by two direct broadcast satellite ("DBS") providers, DIRECTV, Inc. ("DIRECTV"), and DISH Network ("DISH").

2. The Massachusetts Department of Telecommunications and Cable ("MDTC") filed an opposition to the petition, to which Petitioner filed a reply. In its reply, Petitioner withdraws its request for a finding of effective competition in the communities of Paxton (MA0304) and Spencer (MA0043). We accept the withdrawal without prejudice.

3. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition, as that term is defined by Section 623(l) of the Communications Act and

1 See 47 U.S.C. § 543(l)(1)(B).

2 47 C.F.R. § 76.905(b)(2).

3 The MDTC is the franchise authority for rate regulation of cable services throughout the Commonwealth of Massachusetts. Massachusetts Department of Telecommunications and Cable Opposition to Charter's Petition for Special Relief at 1-2 n.2 ("MDTC Opposition"). MDTC's Opposition was filed pursuant to an extension of time granted by the Bureau.

4 Charter Communications Reply to Opposition of Massachusetts Department of Telecommunications and Cable ("Reply"). Petitioner filed a motion asking for an extension of time in which to file the Reply. Finding no prejudice to the parties, we will consider Petitioner's request granted.

5 Reply at 1-2 n.2; id. at 4 n.9.

6 Petitioner may refile a petition for effective competition in the communities of Paxton (MA0304) and Spencer (MA0043) without prejudice.

7 47 C.F.R. § 76.906.

Section 76.905 of the Commission's rules.⁸ 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.⁹ For the reasons set forth below, we grant the petition based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachment A.

II. DISCUSSION

4. 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 multichannel video programming distributors ("MVPDs"), 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 15 percent of the households in the franchise area.¹⁰ This test is referred to as the "competing provider" test.

A. The First Prong of the Competing Provider Test

5. The first prong of this test has three elements: the franchise area must be "served by" at least two unaffiliated MVPDs who offer "comparable programming" to at least "50 percent" of the households in the franchise area.¹¹ It is undisputed that the Communities are "served by" both DBS providers, DIRECTV and DISH, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered "served by" an MVPD if that MVPD's service is both technically and actually available in the 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 the franchise area are made reasonably aware of the service's availability.¹² The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.¹³ We further find that Petitioner has provided sufficient evidence to support its assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.¹⁴ The "comparable programming" element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming,¹⁵ and is supported in this petition with copies of channel lineups for both DIRECTV and DISH.¹⁶ Also undisputed is Petitioner's assertion that both DIRECTV and DISH offer service to at least "50 percent" of the households in the Communities because of their national satellite footprint.¹⁷ Accordingly, we find that the first prong of the competing provider test is satisfied.

⁸ See 47 U.S.C. § 543(l)(1); 47 C.F.R. § 76.905(b).

⁹ See 47 C.F.R. §§ 76.906-907(b).

¹⁰ 47 U.S.C. § 543(l)(1)(B); 47 C.F.R. § 76.905(b)(2).

¹¹ 47 U.S.C. § 543(l)(1)(B)(i); 47 C.F.R. § 76.905(b)(2)(i).

¹² See Petition at 3-4.

¹³ *Mediacom Illinois LLC*, 21 FCC Rcd 1175, 1176, ¶ 3 (2006).

¹⁴ 47 C.F.R. § 76.905(e)(2).

¹⁵ See 47 C.F.R. § 76.905(g); see also Petition at 5.

¹⁶ See Petition at Exh. 1.

¹⁷ See *id.* at 3-5.

B. The Second Prong of the Competing Provider Test

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in the Communities, an assertion that MDTC does not dispute.¹⁸ We see no reason to doubt Petitioner's assertion, and so we accept it. The second prong of the competing provider test thus requires Petitioner to calculate DBS subscribership. The numerator of this statutory ratio is the number of DBS subscribers in each Community and the denominator is the number of households there.

a. Charter's Evidence

7. Petitioner first obtained from SNL Kagan (formerly known as Media Business Corporation) a list of zip codes that corresponds with the political boundaries of the Communities. SNL Kagan's process uses enhanced mapping software to identify zip plus four codes that lie within the Communities.¹⁹ Petitioner then gave SNL Kagan's list of zip codes to the Satellite Broadcasting and Communications Association ("SBCA"), which reported to Petitioner the number of DBS subscribers in each zip code.²⁰ To determine whether the competing provider penetration exceeds 15 percent of the households in a franchise area, Petitioner compared the DBS subscribership to the 2010 U.S. Census household numbers for each of the Communities. Petitioner asserts that the resulting ratios show that the number of households subscribing to MVPDs, other than the largest MVPD, exceeds 15 percent of the households for each of the Communities.²¹

b. MDTC's Objections

8. MDTC argues Petitioner has failed to meet the second prong of the competing provider test.²² MDTC objects to Petitioner's DBS subscribership numbers. Specifically, MDTC asserts that SBCA likely included in its reports DBS subscribers living in seasonal homes, vacation homes, temporary homes, and multiple dwelling units such as college dormitories, nursing homes, and assisted living facilities.²³ Relying on the 2010 U.S. Census, MDTC states there are 13 seasonal homes in Boylston, 39 in Leicester, and 28 in Northbridge.²⁴ None of these housing units qualify as households.²⁵ MDTC also states that Petitioner likely included these DBS subscribership numbers in its numerators, but did not include those subscribers' housing units in its denominators. As a result, MDTC argues these calculations inflate the DBS provider penetration rates in the Communities.²⁶ MDTC also notes that even a minor

¹⁸ *See id.* at 7.

¹⁹ *Id.* at 6, Exh. 3. A zip code plus four 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. In instances where the entire five digit zip code is located within a particular franchise area, SNL Kagan uses the five digit zip code, instead of the zip plus four codes. *Id.* at 6 n.20.

²⁰ *Id.* at 6-7.

²¹ *Id.* at 7.

²² MDTC's Opposition also raises objections concerning the communities of Paxton (MA0304) and Spencer (MA0043). MDTC Opposition at 3-4, 6-8. However, we have accepted Petitioner's withdrawal of these two communities from the petition. *See supra* ¶ 2.

²³ MDTC Opposition at 5-6.

²⁴ *Id.* at 7, Exh. 3.

²⁵ *Id.* at 6.

reporting error could have a material impact on the presence of effective competition, particularly because the competing provider penetration rates are close to the 15 percent threshold.²⁷ MDTC states the Commission should closely evaluate Petitioner's calculations.

c. Charter's Reply

9. In reply, Petitioner argues that MDTC fails to provide any community-specific evidence to overcome its prima facie showing of effective competition. First, Petitioner refutes MDTC's allegation that SBCA likely includes in its reports DBS subscribers living in college dormitories, nursing homes, and similar group housing. Petitioner asserts that SBCA does not include these types of accounts in its reported DBS subscribership.²⁸ Petitioner also refutes MDTC's allegation that SBCA's DBS subscribership numbers include seasonal households. MDTC fails to provide any evidence that SBCA includes these types of accounts in its reported DBS subscribership.²⁹ However, even if seasonal households subscribe to DBS service at the same rate as the overall population, Petitioner argues the DBS penetration rates would still exceed 15 percent of the households for each of the Communities.³⁰ Petitioner further argues that using MDTC's mathematical formula for seasonal households confirms the existence of effective competition in the Communities.³¹

d. Conclusion

10. Effective competition decisions are made based on "households,"³² which are occupied full-time housing units.³³ This excludes unoccupied housing units, college and university dormitories,³⁴

(...continued from previous page)

²⁶ *Id.* at 6. MDTC acknowledges that it is unlikely that all the seasonal homes in the Communities are DBS subscribers. Using the Community of Spencer (MA0043) as an example in its calculations, MDTC assumes seasonal residents subscribe to DBS providers at the same rate as the overall population of the Community. MDTC then adds these additional subscribers to the number of housing units in the denominator to determine the adjusted penetration rate. *Id.* at 7 n.29.

²⁷ *Id.* at 7-8.

²⁸ Reply at 3 and attached Declaration of Steven Hill, Deputy Executive Director for the Satellite Broadcasting and Communications Association (May 31, 2012).

²⁹ Reply at 3.

³⁰ Applying MDTC's formula, Charter's DBS penetration rates multiplied by the number of seasonal housing units in each Community would result in 2 seasonal DBS subscribers in Boylston (0.1584*13), 6 seasonal DBS subscribers in Leicester (0.1537*39), and 4 seasonal DBS subscribers in Northbridge (0.1526*28). Adding these additional subscribers to the number of housing units in the denominator would result in the approximate adjusted penetration rates of 15.82 percent in Boylston, 15.35 percent in Leicester, and 15.25 percent in Northbridge. *Id.* at 3-4, Exh. B.

³¹ *Id.* at 3-4.

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

³³ *Comcast Cable Commc'ns, LLC*, 23 FCC Rcd 8564, 8567, ¶ 10 (2008); *Bright House Networks, LLC*, 22 FCC Rcd 4161, 4165, ¶ 11 (2007); *MCC Iowa LLC*, 20 FCC Rcd 15267, 15270, ¶ 7 (2005); *Mediacom Minnesota LLC*, 18 FCC Rcd 12768, 12770-71 ¶ 8 (2003); *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation: Buy-Through Prohibition*, 9 FCC Rcd 4316, 4324, ¶ 17 (1994); U.S. Census Bureau, *State & County QuickFacts* ("A household includes all the persons who occupy a housing unit as their usual place of residence") <http://quickfacts.census.gov/qfd/states/00000.html> (visited Oct. 30, 2013).

³⁴ *Charter Commc'ns Entm't I LLC*, 26 FCC Rcd 5975, 5980-81 ¶¶ 18-19 (2011); *Marcus Cable Assocs.*, 25 FCC Rcd 4369, 4372, ¶ 9 (2010); *CoxCom, Inc.*, 22 FCC Rcd 4533, 4538, ¶ 13 (2007).

seasonal and vacation homes,³⁵ and nursing homes and similar assisted living facilities.³⁶ Concerning college dormitories, nursing homes, and similar group housing, Petitioner has provided evidence that SBCA does not include these types of accounts in its reported DBS subscribership.³⁷ Concerning seasonal homes, because the 2010 U.S. Census household numbers exclude seasonal, recreational, or occasional use housing, we believe that the number of DBS households reported by SBCA may be inflated by seasonal DBS households and so skew the ultimate percentage. We note, however, that a proportionate reduction in SBCA's DBS figures for the percentage of seasonal properties in these Communities does not cause the overall DBS penetration rates to fall below 15 percent.³⁸ Additionally, we note that applying MDTC's mathematical formula for seasonal households also does not cause the overall DBS penetration rates to fall below 15 percent in these Communities.³⁹ We have repeatedly accepted SBCA's subscribership reports on behalf of DBS providers in satisfaction of Section 76.907(c) of the Commission's rules.⁴⁰ Accordingly, we will accept SBCA's DBS subscribership numbers included in the petition.

11. Despite MDTC's objections, the second prong of the competing provider test is satisfied for each of the Communities. It requires that Petitioner show that the competing providers' market shares exceed 15 percent in each Community, and Petitioner has made that showing. Therefore, based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2010 household data,⁴¹ as reflected in Attachment A, we find that Petitioner 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 the Communities. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

³⁵ 47 C.F.R. § 76.905(c) ("households' shall not include those dwellings that are used solely for seasonal, occasional, or recreational use").

³⁶ *Charter Commc'ns Entm't I LLC*, 26 FCC Rcd at 5981, ¶ 19 (2011); *CoxCom, Inc.*, 22 FCC Rcd at 4538, ¶ 13.

³⁷ Reply at 3 and attached Declaration of Steven Hill, Deputy Executive Director for the Satellite Broadcasting and Communications Association (May 31, 2012).

³⁸ The 2010 U.S. Census reports 13 seasonal, recreational, or occasional use homes in Boylston, 39 in Leicester, and 28 in Northbridge. In Boylston, 13 units represent approximately 0.73 percent of the total housing units (1,778). A 0.73 percent reduction of the allocated DBS subscribers for Boylston results in a DBS penetration rate of approximately 15.72 percent. In Leicester, 39 units represent approximately 0.91 percent of the total housing units (4,270). A 0.91 percent reduction of the allocated DBS subscribers for Leicester results in a DBS penetration rate of approximately 15.22 percent. In Northbridge, 28 units represent approximately 0.45 percent of the total housing units (6,172). A 0.45 percent reduction of the allocated DBS subscribers for Northbridge results in a DBS penetration rate of approximately 15.20 percent. See, e.g., *Comcast Cable Commc'ns, LLC*, 22 FCC Rcd 1691, 1698, ¶ 16 n.61, *reconsideration granted on other grounds*, 22 FCC Rcd 5320 (2007) (applying similar formula to determine proportionate reduction in SBCA's DBS figures for percentage of seasonal, recreational, or occasional use properties).

³⁹ Reply at 3-4, Exh. B. See also *supra* note 30.

⁴⁰ See, e.g., *MCC Iowa LLC*, 25 FCC Rcd 2101, 2103-04, ¶ 9 (2010); *Bright House Networks, LLC*, 22 FCC Rcd 4169, 4172, ¶ 7 (2007); *CoxCom Inc.*, 22 FCC Rcd 4522, 4526, ¶ 12 (2007); *Comcast of Dallas, L.P.*, 20 FCC Rcd 17968, 17970-71, ¶ 7 (2005).

⁴¹ Petition at 6-7, Exhs. 5, 6.

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the petition for a determination of effective competition filed in the captioned proceeding by Charter Communications **IS GRANTED** for the Communities of Boylston, Leicester, and Northbridge.

13. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A **IS REVOKED**.

14. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.⁴²

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Senior Deputy Chief, Policy Division, Media Bureau

⁴² 47 C.F.R. § 0.283.

ATTACHMENT A

MB Docket No. 13-20, CSR 8763-E

COMMUNITIES SERVED BY CHARTER COMMUNICATIONS

Communities	CUID	CPR*	2010 Census Households	Estimated DBS Subscribers
Boylston	MA0260	15.84%	1,698	269
Leicester	MA0044	15.37%	4,021	618
Northbridge	MA0180	15.26%	5,896	900

*CPR = Percent of competitive DBS penetration rate.