

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the matter of:)
)
Charter Communications, on behalf of its affiliates) **CSR Nos.: 6417-E and 6418-E**
)
For Opposition to Effective Competition in:)

City of Carson City, NV NV0004)
City of Reno, NV NV0006, NV0049)
City of Sparks, NV NV0007)
Washoe County, NV NV0050, NV0086)
NV0020)

To: The Chief, Media Bureau:

**OPPOSITION TO PETITION FOR
DETERMINATION OF EFFECTIVE COMPETITION**

The cities of Carson City, Reno and Sparks, Nevada and Washoe County, Nevada (collectively the local franchising authorities “LFAs”), by its attorneys, and pursuant to Section 76.7 of the Commission’s Rules, hereby *oppose* Charter Communications’ (“Charter”) request for a finding of effective competition in the LFAs.

BACKGROUND

In Charter’s Petition for Determination of Effective Competition (“Petition”) Charter accurately cites to 47 U.S.C. § 543 and Section 76.905(b)(2) of the Commission’s rules with respect to the “Competing Provider Test” to determine if a cable system is subject to effective competition. This test finds effective competition to exist when the franchise area is:

- (a) served by at least two unaffiliated multi-channel video programming distributors 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 multi-channel video programming distributors other than the largest multi-channel

video programming distributor exceeds fifteen percent of the households *in the franchise area*.¹

In its Petition, Charter asserts that this test has been met with the entry of two (2) Direct Broadcast Satellite (“DBS”) providers (DirecTV, Inc. and EchoStar Communications Corporation) into the LFAs’ marketplace. While DBS providers have been determined by the Commission to be qualified multi-channel video programming distributors (MVPDs) for purposes of an effective competition analysis, their presence alone does not demonstrate the existence of effective competition. Charter has failed to show that there is a sufficiently high level of DBS penetration within the franchise area to overcome the strong presumption against effective competition.

DBS DOES NOT ENJOY 15% PENETRATION IN THE LFAs

Because of the possible adverse impact on consumers, particularly senior citizens and other individuals living on fixed incomes, flowing from the elimination of rate regulation, there is a congressionally created presumption against the existence of effective competition. In order to escape basic rate regulation as prescribed by Congress, Charter must demonstrate that effective competition exists. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition. The cable operator bears the burden of the rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.² Based upon the DBS providers’ nationwide footprint and prior FCC determinations, the LFAs accept (without conceding) that the DBS providers satisfy the first prong of the Competing Provider Test – comparable programming is being made available to at least 50 percent of the households in the franchise

¹ Telecommunications Act, § 623(l)(1)(B), 47 U.S.C. § 543(l)(1)(B); *See also* 47 C.F.R. § 76.905(b)(2). Emphasis added.

² 47 C.F.R. § 76.905 and 47 C.F.R. § 76.906.

area and these potential consumers are reasonably aware of this service availability. The LFAs, however, do not believe that Charter has satisfied the second prong of the Competing Provider Test.³ Specifically, Charter has not met its burden of demonstrating that the number of DBS subscribers *within the LFAs* exceed 15 percent of the households in the Charter franchise area for each LFA. Charter relies upon flawed data to project the number of DBS subscribers within the LFAs and therefore its Petition cannot be sustained.

In an attempt to demonstrate that greater than 15 percent of the households in the LFAs subscribe to DBS, Charter cites to reports provided by Satellite Broadcasting and Communications Association (“SBCA”) that identify the number of DBS subscribers associated with a five-digit zip code. Charter acknowledges “that some of the reported DBS subscribers may be located in zip code areas outside the actual franchise boundary.”⁴ Charter then references the number of households (based on 2000 census calculations) within the franchise area and extrapolates a variety of numbers to conclude that the DBS providers have achieved a higher than 15 percent penetration rate within the LFAs. What Charter fails to consider in its analysis, however, is the fact that many of the reported DBS subscribers reside outside the LFAs’ jurisdictional limits yet still are covered by the SBCA five-digit zip code data. The more rural areas outside of the LFAs tend to have a heavier percentage of DBS subscribership because the lower residential density of those areas does not trigger Charter’s line extension obligations. In certain cases, Charter admits that either it does not have authorization to serve those areas or simply does not serve these rural subscribers.⁵

As a result, DBS is in many instances the only viable MVPD option available in certain areas outside of the LFAs’ franchise areas. The data relied upon by Charter in its petition is not

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

⁴ Charter’s Petition at p.6.

⁵ Charter’s Petition at Exhibit 7.

sufficiently precise to determine whether the DBS subscribers that Charter attributes to the LFAs actually live outside of the LFAs but share the same zip code as residents within the LFAs. Given the strong congressional presumption against a finding of effective competition, Charter should not be able to meet this heavy burden on the basis of questionable and overly broad extrapolations.

This is particularly the case in light of the availability of more accurate zip code information from SBCA through the purchase of “Zip +4 reports.” Zip +4 information is far more accurate and readily available to Charter for a relatively nominal price. The burden is on Charter to provide such information for the Commission’s consideration to support its contention that more than 50 percent of the households in the LFAs subscribe to DBS.

Close analysis of Charter’s calculations also reveal a myriad of mathematical errors and false assumptions. First, using Charter’s own ZIPFIND Search Results the number of residential addresses associated with the identified zip codes for three (3) of the four (4) LFAs are mathematically incorrect. In the City of Reno the appropriate number of residential addresses should be 102,996⁶ as opposed to 106,109 used by Charter. In the City of Sparks Charter identified 43,318 when the appropriate number should have been 42,897. In Washoe County Charter identified 74,421 when the appropriate number should have been 72,389. Even if the Commission accepts the convoluted allocation formula set forth by Charter, Charter’s mathematical errors reverberate through the entire formula and result in an alternative penetration rate.

Second, Charter’s allocation formula relies on year 2000 census information to identify the total number of households in each of the LFAs. Charter then relies on its ZIPFIND Search

⁶ These calculations were derived by adding the residential addresses for each zip code as set forth in Charter’s Petition at Exhibit 5.

Results which presumably represent 2004 household totals for each of the LFAs. Since neither Charter's filing nor Exhibit 5 attached thereto identifies any specific date for the ZIPFIND Search Results it is impossible to determine exactly what point in time these numbers refer to. We assume that they represent the most current residential household data available to Charter. As a result Charter is making an apples and oranges comparison when it divides year 2000 household census data by zip code residential data from 2004 to arrive at an allocation percentage. Assuming the Commission finds that Charter's convoluted allocation formula is acceptable, the Commission must insist upon an accurate comparison of household data. Either Charter must utilize updated 2004 census data for each of the LFAs and compare that to the ZIPFIND Search Results to arrive at an allocation percentage or Charter must utilize ZIPFIND Search Results from the same time period during which the 2000 census was created. Given the rapid growth in the number of households in the LFAs over the past four years, there is no consistency in Charter's equation and no way for the Commission to ascertain whether the DBS penetration rate has exceeded fifteen percent.

CONCLUSION

There are no other MVPDs available in the LFAs other than Charter and the DBS providers. Charter has failed to meet its burden that the DBS providers collectively serve 15 percent or more of the households in the LFAs' limits. The formula which Charter used to arrive at the higher than 15 percent DBS penetration level is based purely on assumptions and approximations and is riddled with mathematical errors. Charter's formula does not take into account any of the unique features which exist in the region or the fact that the penetration of DBS outside of the LFAs' jurisdictional limits is significantly greater than within the LFAs' jurisdictional limits. While the Commission may have accepted Charter's method for

determining DBS subscribership in other jurisdictions, the fact remains that the demographics in and around the LFAs simply do not justify Charter's mathematical calculations.

Accordingly, the LFAs submit that Charter has failed to meet its burden under the Competing Provider Test and has not demonstrated that DBS subscribership within the LFAs' limits exceeds the 15 percent threshold required under 47 U.S.C. § 543(1)(1)(B) of the Cable Act. The LFAs respectfully requests that the Media Services Bureau reject Charter's Petition for Determination of Effective Competition.

Respectfully submitted,

**On behalf of Carson City, Reno, Sparks, Nevada
and Washoe County, Nevada**

By: _____

Brian T. Grogan

Moss & Barnett

A Professional Association

90 South Seventh Street, 4800 Wells Fargo Center

Minneapolis, MN 55402

(612) 347-0340

Its Attorneys

November 24, 2004

CERTIFICATE OF SERVICE

I, Marjie Carr-Oxley, a legal assistant at Moss & Barnett, hereby certify that copies of the foregoing Opposition to Petition for Determination of Effective Competition were served this 24th day of November, 2004, via first-class mail, postage prepaid thereon to the following:

Steven J. Horvitz
Frederick Giroux
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue NW, Suite 200
Washington, D.C. 20006
Counsel for Charter Communications

Mark Forsberg
Chief Civil Deputy DA
City of Carson City
885 East Musser Street, Suite 2030
Carson City, N 89701

Jonathan D. Shipman
Deputy City Attorney
City of Reno
P.O. Box 1900
Reno, NV 89505

David Creekman
City Attorney's Office
City of Sparks
431 Prater Way
Sparks, NV 89431

Peter Simeoni
District Attorney's Office
County of Washoe
P.O. Box 30083
Reno, NV 89520

Marjie Carr-Oxley
Legal Assistant