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BY ELECTRONIC DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20054

Re: Notice of Ex Parte Presentation

Petition of Charter Communications, Inc., for a Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI

MB Docket No. 18-283; CSR No. 8965-E

Dear Ms. Dortch:

Charter Communications, Inc. ("Charter"), by its attorneys and on behalf of its subsidiaries and affiliates, hereby files this written *ex parte* letter to respond to the *ex parte* letters of the State of Hawaii ("Hawaii"), the Massachusetts Department of Telecommunications and Cable ("MDTC"), and Worcester Community Cable Access, Inc. ("WCCA").

The LEC Test is triggered when comparable video programming is offered—"by any means"—by "a local exchange carrier or its affiliate (*or* any multichannel video programming distributor using the facilities of such carrier or its affiliate)."[1] In its *ex parte* letter, Hawaii contends that the single reference to "facilities" within that parenthetical phrase imposes a facilities requirement on the LEC Test as a whole.[2] Hawaii's interpretation is wrong for several reasons.[3]

[1] 47 U.S.C. § 543(*l*)(1)(D) (emphasis added).

[2] Letter from Bruce A. Olcott, Counsel to the State of Hawaii, to Marlene H. Dortch, FCC, MB Docket No. 18-283, CSR-8965-E (Nov. 27, 2018), 1-2 ("Hawaii *Ex Parte* Letter").

[3] In a similar vein, MDTC argued in its opposition that "[t]he parenthetical's reference to the facilities of a LEC or its affiliate makes clear that the services offered by a 'LEC' or 'LEC affiliate' must be offered using the facilities of that LEC or its affiliate," relying on the canon of *noscitur a sociis*. Massachusetts Department of Telecommunications and Cable Opposition to Charter Communications, Inc.'s Petition for Special Relief, MB Docket No. 18-283, CSR-8965-E (Oct. 25, 2018), 19-20 ("MDTC Opposition"). But *noscitur a sociis*, the principle that "a word is known by the company it keeps," simply does not apply here. *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006); *see also United States v. Williams*, 553 U.S. 285, 294 (2008). The canon typically applies "when a string of statutory terms raises the implication that the 'words grouped in a list should be given related meeting.'" *S.D. Warren*

First, Hawaii's proffered interpretation ignores basic rules of grammar and statutory interpretation. On its face, the limiting phrase "using the facilities of such carrier or its affiliate" applies only to MVPDs and not to LECs or LEC affiliates. As a matter of basic grammar, parentheses are ordinarily used to cordon off particular text from the remainder of a sentence. The parenthetical phrase here is no different, separating MVPDs that use LEC or LEC affiliate facilities from LECs and LEC affiliates themselves. That plain reading is reinforced by the last antecedent rule, under which "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or noun phrase that it immediately follows."[4] Here, the phrase "using the facilities of such carrier or its affiliate" clearly modifies the noun phrase "multichannel video programming distributor." By setting off the entire phrase in parentheses, Congress reinforced the linkage between the modifier and its immediate antecedent. In short, there is simply no reason to conclude that the "using the facilities" language *also* modifies "local exchange carrier" or "affiliate." That the parenthetical phrase begins with the word "or" makes it even clearer that the MVPDs Congress had in mind are entities *other than* "a local exchange carrier or its affiliate."[5]

Although the last antecedent rule can be "overcome by other indicia of meaning,"[6] there are no other indicia here that support Hawaii's interpretation. In fact, the other indicia of meaning relevant here all point in favor of Charter's reading of the LEC Test. As a matter of basic grammar, Congress would not have buried the reference to facilities in a parenthetical phrase (one that includes both the modifying phrase and the noun it clearly modifies) if it had wanted to apply a

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Co., 547 U.S. at 378 (quoting *Dole v. Steelworkers*, 494 U.S. 26, 36 (1990)). That is not the situation here. Rather, the language at issue is a self-contained phrase set off by parentheses. There is no indication in the text that Congress intended the parenthetical phrase to apply to the rest of the LEC Test. Moreover, the point of *noscitur a sociis* is to shed light on terms that are otherwise ambiguous. Here, the terms "local exchange carrier," "affiliate," and "multichannel video programming distributor" are all statutorily defined. And Congress plainly intended for the phrase "by any means" to apply broadly, as evidenced by Congress's decision to exclude *only* direct-to-home satellite as a means for delivering comparable programming. *See* Charter Communications, Inc. Reply to Oppositions, MB Docket No. 18-283, CSR-8965-E (Nov. 19, 2018), 3, 6, 11-12 ("Charter Reply").

[4] *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003); *see also* 2A Sutherland, *Statutes & Statutory Construction* § 47:33 (7th ed. 2007 & 2018 supp.).

[5] Even if the parenthetical phrase also includes LECs and LEC affiliates that are MVPDs—as opposed to just unaffiliated MVPDs that are using LEC-affiliated facilities—it does not preclude LECs and LEC affiliates from satisfying the LEC Test by providing "video programming services" through alternative means. To the contrary, the statutory language *outside* the parenthetical expressly provides that they may do so "by any means" other than satellite. A LEC or LEC affiliate that provides service as an MVPD, like any MVPD, would by definition make available physical channels, *see* Letter from Rick Chessen, Counsel to NCTA: The Internet & Television Association, to Marlene H. Dortch, FCC, MB Docket No. 18-283, CSR-8965-E (Nov. 30, 2018), 2-3 ("NCTA *Ex Parte* Letter"), but the plain language and structure of the LEC Test makes clear that LECs and LEC affiliates need not be MVPDs in order to satisfy the test. *See* Charter Reply at 2, 8-9.

[6] *Barnhart*, 540 U.S. at 26.

facilities requirement to the provision of video programming by LECs and LEC affiliates.[7] And more generally, Congress would not have used the expansive phrase "by any means" to describe the ways that LECs and LEC affiliated entities might deliver comparable video programming if it meant to impose a blanket facilities requirement.[8]

Second, applying the last antecedent rule also makes sense here in light of the overall purpose of the LEC Test. As Charter has previously explained, the LEC Test recognizes that LECs and their affiliates are powerful competitors in the marketplace for video programming.[9] Accordingly, Congress recognized that the offering of comparable video programming services directly to subscribers by a LEC or LEC affiliate automatically satisfies the effective competition test, without the need for a specific availability or penetration test, regardless of the means used by the LEC affiliate to offer those services.[10]

That rationale generally does not apply to MVPDs that are not using LEC facilities because these MVPDs would not gain any competitive advantage from LEC market power. Accordingly, MVPDs that are not using LEC facilities must meet one of the other effective competition tests.[11] But Congress recognized that MVPDs that *do* use the facilities of a LEC or LEC affiliate enjoy unique competitive benefits from using LEC infrastructure where it is available—even if the MVPD in question is not affiliated with a LEC. The phrase "using the facilities" therefore serves to identify a distinct group of MVPDs that are not affiliated with a LEC but which still should fall within the scope of the LEC Test and whose service would therefore constitute effective competition without regard to the numerical requirements applicable to the other MVPD effective competition tests. But even if the facilities requirement applies to LECs and LEC affiliates, it applies to them only to the extent they are acting as MVPDs. The parenthetical does not negate the express statutory language providing that LECs and LEC affiliates may otherwise satisfy the LEC Test "by any means" other than through direct-to-home satellite services. Congress recognized that the marketplace advantages that LECs and LEC affiliates enjoy does not necessarily turn on whether they are using their own facilities to deliver video programming

[7] *See id.*; 2A Sutherland § 21:1 ("Words and phrases contained in statutes are given their plain, ordinary meaning and are construed according to the rules of grammar and common usage.").

[8] *See* Charter Reply at 6.

[9] 141 Cong. Rec. S8243 (daily ed. June 13, 1995) (statement of Sen. Pressler) (noting the "competitive threat" posed by LECs in the video marketplace because of, *inter alia*, "their specific identities" and "their financial strength and staying power"); *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296, 5301 ¶ 9 & n.38 (1999) ("*1999 Implementation Order*") (explaining that Congress expected LECs to be "robust competitors of cable operators because of their financial and technical ability").

[10] *See* Charter Reply at 15.

[11] *See* 47 U.S.C. § 543(*l*)(1)(B), (C).

services.[12] For these entities, offering comparable video programming services by any means suffices to establish effective competition.

Thus, Hawaii is simply wrong when it says that "[i]t would be nonsensical to apply this facilities requirement [to MVPDs] unless the facilities requirement applied as well to the LEC."[13] Given the rationale underlying the LEC Test, it was perfectly logical for Congress to apply the LEC Test's facilities requirement only to MVPDs that are not LEC affiliated, to qualify the exception to the numerical requirements otherwise applicable to MVPDs under the other effective competition tests, while more broadly recognizing the impact of entry by LECs and LEC affiliates into the video marketplace.[14] And as noted above, even if the facilities requirement were read to apply to LECs and LEC affiliated MVPDs, the statute expressly provides avenues for LECs and LEC affiliates by means other than as an MVPD.

In its *ex parte* letter,[15] MDTC rehashes its argument that the word "channel" in the Commission's rule defining comparable service must refer to a physical transmission path because "the *subject matter* of the statutory definition of channel is the same as that of the LEC Test."[16] For the reasons Charter has already explained,[17] there is no merit to this argument.

To begin with, it is telling that MDTC largely ignores the Commission's own interpretation of the word "channels" as referring to programming sources.[18] While MDTC suggests that this was a "variance" to accommodate switched networks,[19] there is nothing in the Commission's discussion to suggest such a narrow application of this interpretation. To the contrary, it is clear that for the purposes of assessing comparability, the Commission's focus is on programming rather

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[12] *See* n.10, *supra*.

[13] Hawaii *Ex Parte* Letter at 1-2.

[14] Hawaii also reiterates its strained reading of the legislative history of the LEC Test, according to which the House-Senate Conference Committee on the Telecommunications Act of 1996 rejected the specific facilities requirements in the original House and Senate versions of the bill but nevertheless imposed a blanket facilities requirement using the broad phrase "by any means." Hawaii *Ex Parte* Letter at 2. In fact, in rejecting the restrictive House and Senate versions of the LEC Test in favor of the expansive "by any means" standard, the conferees explained that they intended to include "any medium" other than direct-to-home satellite. *See* S. Rep. No. 104-230 at 170. As Charter has already explained, the far more plausible inference to draw from this history is that Congress decided not to limit the means that LECs and LEC affiliates might use to deliver comparable programming other than that single exception. *See* Charter Reply at 12 n.40.

[15] Letter from Sean M. Carroll, Counsel to the Massachusetts Department of Telecommunications and Cable, to Marlene H. Dortch, FCC, MB Docket No. 18-283, CSR-8965-E (Dec. 20, 2018) ("MDTC *Ex Parte* Letter").

[16] *Id.* at 1 (emphasis added).

[17] Charter Reply at 5-9.

[18] *In re Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5667 ¶ 38 n.130 ("*1993 Cable Order*").

[19] *Id.* at 2 n.4.

than the particular physical platform over which that programming is delivered. As the Commission recognized then, the comparability test "should ensure alternate service is competitively comparable to a minimum basic tier service that an incumbent cable operator could offer."[20] In other words, what matters is that consumers can access enough programming through these services that they can be said to have a genuine alternative to their local cable service. In this context, it makes no sense to say that a service categorically cannot provide comparable programming—despite the availability of comparable programming—because it does not use physical transmission paths to deliver that programming.

MDTC's argument suffers from several other flaws as well. For one, its reliance on the presumption of consistent usage of *statutory* terms is inapposite.[21] This argument conspicuously ignores the fact that the word "channel" does not even appear in the statutory text of the LEC Test.[22] To the extent that there is a debatable question about the meaning of the word "channels" in the Commission's comparability test, that issue concerns the proper interpretation of the Commission's own rules, not the meaning of a federal statute. MDTC is therefore plainly mistaken when it says that the Commission has "no discretion" to construe the word "channels" as referring to programming sources.[23]

Moreover, in making this argument, MDTC ignores the well-established principle that the Commission has the authority to interpret the same term differently in different statutory contexts.[24] That is especially true when the term at issue does not even appear in the relevant statutory provisions but in the Commission's own rules.[25] It is also well-established that, when Congress enacts broadly worded statutes, agencies have the flexibility to tailor the application of that language "as industry technology evolves."[26] In short, MDTC is simply incorrect to suggest that the Commission has no discretion in how to apply its own comparability test. Most importantly, the Commission has *already* recognized that—for the purposes of applying the comparability test—the word "channels" can refer to programming sources.[27]

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[20] *1993 Cable Order*, 8 FCC Rcd at 5667 ¶ 38.

[21] *See* MDTC *Ex Parte* Letter at 1 n.2.

[22] *See* NCTA *Ex Parte* Letter at 3.

[23] *Id.* at 1.

[24] *See* Charter Reply at 7 & n.21.

[25] *See, e.g., Am. Council on Educ. v. FCC*, 451 F.3d 226, 232-33 (D.C. Cir. 2006); *U.S. West Commc'ns, Inc. v. FCC*, 177 F.3d 1058, 1059-60 (D.C. Cir. 1999); *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 59 (2011); *Auer v. Robbins*, 519 U.S. 452, 261 (1997).

[26] *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 707 (D.C. Cir. 2011).

[27] *See* Charter Reply at 6-8.

MDTC is correct that Congress "discussed and approved"[28] of the Commission's comparability test, which includes the word "channels." However, MDTC overlooks that the Commission *had already recognized* that "channels" in the comparability test can refer to programming sources by the time Congress "discussed and approved" of the Commission's test.[29] The legislative history argument therefore cuts against MDTC.[30] If Congress had disapproved of the Commission's more flexible interpretation of the word "channels," it could have amended the text of the LEC Test or enacted a narrower definition of "comparable programming." But as MDTC itself notes, "Congress, of course, did none of this."[31] Against this backdrop, there is simply no basis for MDTC's insistence that "channels" in the Commission's comparability test must refer to channels "as the term channel is defined under federal law."[32]

Finally, in its *ex parte* letter, Worcester Community Cable Access ("WCCA") expresses concern that the allegedly "high cost of DIRECTTV NOW . . . combined with the lack of broadband in many affected households in the area result in a de facto lack of effective competition."[33] Not only does WCCA fail to quantify what they mean by "many" households, these concerns are misplaced. As an initial matter, as Charter has noted, more than 80 percent of households in Massachusetts (specifically, 85.5%) subscribed to broadband in 2016, a number that has likely risen since then, and nearly all households in Massachusetts have access to broadband with downstream speeds of at least 25 Mbps available from at least three providers.[34] Thus, for more than 85% of households in Massachusetts, there is no additional expense to purchasing

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[28] MDTC *Ex Parte* Letter at 2.

[29] *Compare 1993 Cable Order*, 8 FCC Rcd. at 5667 ¶ 38 n.130 *with* S. Rep. No. 104-230, at 170 (1996) (Conf. Rep.). *See also* Letter from Cathy Carpino, Assistant Vice President and Senior Legal Counsel to AT&T Services, Inc., to Marlene H. Dortch, FCC, MB Docket No. 18-283, CSR-8965-E (Dec. 7, 2018).

[30] Even if the Commission were to leave aside its own prior understanding that "channels" can refer to programming sources, the fact that Congress did not amend the definition of "channel" would be irrelevant. It would hardly be surprising that Congress did not adopt a new definition of "channel" in 1996 to address the scope of the LEC Test, since the LEC Test does not include the term at all.

[31] MDTC *Ex Parte* Letter at 2. In a footnote, MDTC quotes from the Commission's own recognition of Congress's approval of the comparability test but suggests that this is evidence that Congress "used the term ['channel'] explicitly and applied it to the LEC Test . . . ." *Id.* at 2 & n.8 (quoting *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 5937, 5942 (1996)). That is just not true. The LEC Test does not include the term "channel" at all, and the fact that Congress quoted the comparability test with approval in legislative history does not amount to a mandate that the Commission adopt MDTC's narrow interpretation of the scope of the LEC Test. MDTC's citation to the Commission's decision is also a *non-sequitur*. The Commission recognized Congress's approval of its comparability test, but it said nothing at all about the meaning of "channel" in the passage that MDTC quotes.

[32] MDTC *Ex Parte* Letter at 2.

[33] *See* Letter from Mauro DePasquale, Worcester Community Cable Access, Inc., Marlene H. Dortch, FCC, MB Docket No. 18-283, CSR-8965-E (Nov. 14, 2018), at 2 ("WCCA *Ex Parte* Letter").

[34] Charter Reply at 18, 19 n.70.

DIRECTV NOW other than the actual cost of the service. Moreover, nearly two million customers subscribe to DIRECTV NOW nationwide.[35] These facts document the widespread and easy availability of DIRECTV NOW as a competitive alternative to Charter's cable service. While some consumers may choose not to subscribe to DIRECTV NOW, Congress explicitly chose to omit any penetration requirement from the LEC Test.

Moreover, WCCA ignores DIRECTV NOW's impact on the rates for cable service, which benefits all consumers. Congress determined that competition from a LEC or LEC affiliate would impose a competitive check on the rates that cable services charge because it recognized that "[o]nce consumers have a choice among cable offerors, the need for regulation diminishes."[36] Worcester's concern that low-income consumers would have to buy both broadband and DIRECTV NOW to benefit from LEC competition is therefore mistaken. First, Charter's Internet Assist program offers broadband service with 30 Mbps download speed to qualified low income households for only $14.99 per month.[37] And even if low-income consumers in the franchise areas do not subscribe to DIRECTV NOW, they will still be able to purchase video services from cable operators, and these cable operators will set their rates mindful of the reality that DIRECTV NOW offers a robust alternative to the vast majority of their subscribers. The fact that low-income consumers may not adopt DIRECTV NOW's alternative service does not mean that they will not benefit from DIRECTV NOW's presence in the market.

Please contact the undersigned if you have any questions about this matter.

Sincerely,

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[35] *Id.* at 18.

[36] S. Rep. No. 23, 104th Cong., 1st Sess. 152 (1995) (additional Views of Sen. Hollings at 152); *see also 1999 Implementation Order*, 14 FCC Rcd at 5301-02 ¶ 9 ("The thrust of the 1996 Act is Congress' expectation that LECs will be robust competitors of cable operators because of their financial and technical ability and . . . their ubiquitous presence in the market."); *id.* ¶ 11 ("Congress sought to restrain cable rates and stimulate quality cable services. Once the LEC's competitive presence is sufficient to achieve these goals, even if the LEC's buildout or roll out is not complete, the intent of the effective competition test has been met.").

[37] *See* Charter Communications, *Charter Sets Industry Standard With New Low Cost, High-Speed Broadband for U.S. Families, Seniors* (Nov. 14, 2016), https://newsroom.charter.com/press-releases/charter-industry-standard-low-cost-broadband-families-seniors.