

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

Petition of Charter Communications, Inc.,)	MB Docket No. 18-283
On behalf of its subsidiaries and affiliates)	
)	CSR No. 8965-E
For a Determination of Effective)	
Competition in:)	PSID Nos. 003051
)	003621
Massachusetts Communities and)	007064
Kauai, Hawaii)	002573

To: Chief, Media Bureau

**OPPOSITION OF
THE STATE OF HAWAII**

The State of Hawaii (the “State”),¹ by its attorneys and pursuant to Section 76.7 of the Commission’s rules, hereby opposes the Petition for Determination of Effective Competition (“Petition”) of Charter Communications, Inc. (“Charter”) addressing the absence of competitive conditions on the island of Kauai.

Charter, through its subsidiary Oceanic Time Warner Cable, LLC, is the only cable television franchisee in the State providing cable television service to consumers on the island of Kauai. Charter’s Petition makes no attempt to claim that it faces real competition from other facilities-based providers of multichannel video programming distribution (“MVPD”) services in Kauai. Consumers in Kauai continue to have no choice in their selection of facilities-based programming services.

¹ These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs (“DCCA”). The DCCA is the cable franchise authority for the State of Hawaii.

Instead, Charter's Petition relies on an interpretation of the effective competition language in the Communications Act of 1934, as amended (the "Communications Act") that was unintended by Congress and is facially unreasonable. Specifically, the Communications Act includes four tests for when effective competition for video programming services exists in a community. The first three tests focus on actual competitive conditions, *i.e.*, the percentage of households subscribing to the incumbent's cable television service as compared to the percent of households subscribing to the services of a competitor.² In each of these three tests, the threshold for finding effective competition is exceedingly low (in one test as low as 15 percent) and yet Charter makes no attempt to claim that such competitive conditions exist in Kauai.

Instead, Charter relies entirely on the fourth test, which focuses on whether a local exchange carrier ("LEC") or its affiliate is offering comparable video programming services directly to subscribers in the community.³ In adopting the LEC Test, Congress recognized that LECs control extensive telecommunications facilities and distribution networks and have access to poles and other rights of way, providing them with a unique ability to introduce competition for multichannel video programming services in the communities that they serve.

The LEC Test is therefore explicit in its application to LECs as *facilities-based* providers of video programming services. For example, the Communications Act states that the LEC Test applies to both LECs and any MVPD "using the *facilities* of such carrier or its affiliate."⁴

² See 47 U.S.C. § 543(l)(1)(A), (B) and (C). Finding that effective competition exists if: (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of the incumbent, (B) at least two unaffiliated multichannel video programming distributors ("MVPDs") offer services to most of a community and the smaller provider serves at least 15 percent of the households, or (C) the franchising authority operates as an MVPD and serves at least 50 percent of the households.

³ See 47 U.S.C. § 543(l)(1)(D).

⁴ *Id.* (*emphasis added*).

The incumbent LEC in Hawaii is Hawaiian Telcom, Inc. (“Hawaiian Telcom”). Although Hawaiian Telcom is providing video programming services to consumers on Oahu, it has not expanded its video programming services to any other island in the State. Despite this fact, Charter argues that the LEC Test is satisfied and effective competition exists in Kauai because an online video distribution (“OVD”) service, DIRECTV Now, which is offered by DIRECTV LLC an affiliate of AT&T, is available to Kauai residents over the Internet.⁵

To reach this baseless conclusion, Charter relies on language in the LEC Test that states that it is applicable to LECs or their affiliates that “offer video programming services directly to subscribers *by any means* (other than direct-to-home satellite services) in the franchise area.”⁶ Charter claims that the phrase “by any means” should be interpreted to include OVD distribution using the Internet.⁷

Charter’s interpretation directly conflicts with the legislative history of the LEC Test, which Congress added to the definition of effective competition as a part of the Telecommunications Act of 1996 (“Telecommunications Act”). The Senate version of the Telecommunications Act specified that the LEC Test applied only to LECs that provide video programming services “either over a common carrier video platform or as a cable operator.”⁸

⁵ See *Charter Communications, Inc., Petition for Determination of Effective Competition*, CSR-8965-E (Sept. 14, 2018) (“Charter Petition”).

⁶ See 47 U.S.C. § 543(l)(1)(D) (*emphasis added*).

⁷ See Charter Petition at 4.

⁸ S.652 as passed by the Senate, June 15, 1995, § 203(b)(2) (104th Congress).

The House version of the Telecommunications Act was also limited to LECs that provide a “video dialtone service” or secure a franchise for a cable television system.⁹ In harmonizing these two versions of the LEC Test, the Conference Committee changed the language to “by any means” to cover other distribution technologies, all of which were facilities-based, explaining that “by any means” includes “MMDS, LMDS, an open video system, or a cable system.”¹⁰ This should not be misconstrued to include non-facilities-based OVD services.

Charter’s interpretation of the LEC Test also fails because OVD providers of video programming services do not provide their services *directly* to subscribers and such services are not *comparable* to the cable programming service of the incumbent.¹¹ Instead, as the Commission has recognized, OVD providers cannot reach consumers absent “sufficient Internet capacity to provide customers with a high-quality OVD viewing experience.”¹² This means that consumers on Kauai cannot subscribe to OVD programming unless they first subscribe to a “high-speed Internet access service”¹³ from a broadband Internet service provider (“ISP”) such as Charter, which is the largest wireline broadband ISP on Kauai.

⁹ S.652 as passed by the House of Representatives, with Amendments, October 12, 1995, § 202(h) (104th Congress).

¹⁰ Senate Report No. 104-230, Conference Report to accompany S. 652, at 170, February 1, 1996 (104th Congress).

¹¹ See 47 U.S.C. § 543(l)(1)(D) (“*emphasis added*”).

¹² *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 16-247, Eighteenth Report, DA 17-71, ¶ 143 (Chief, Media Bur. Jan. 17, 2017).

¹³ *Id.*, ¶ 148.

“Wireline ISPs typically charge consumers higher prices for higher Internet speeds.”¹⁴ Further, as has been reported to the Commission, entities such as Charter offering both cable television and Internet access services “may have incentives to use data allowances or exempt affiliated services from these data limits in order to benefit their co-owned MVPD service.”¹⁵ Therefore, ISPs such as Charter effectively serve as gating intermediaries between OVD providers and subscribers in Kauai. OVD services are therefore not *comparable* to cable television programming services and they are not available *directly* to subscribers in Kauai. Instead, Charter’s dominant role in the provision of broadband and video programming services in Kauai precludes a finding of effective competition by the Commission.

A finding by the Commission that effective competition does not yet exist in Kauai would not only be consistent with the statute and legislative intent, but it would also best serve the public interest. Regulation of rates for the basic cable service tier was established by Congress because of the absence of competition that exists in the provision of multichannel video programming services. Although true competition has since been introduced in many communities, some, such as Kauai, remain entirely dependent on a single facilities-based provider. Therefore, the public interest justifications that prompted Congress to adopt rate regulation for the basic programming tier still exist today in Kauai and the public interest would

¹⁴ *Id.*, ¶ 150.


¹⁵ *Id.*, ¶ 151.

therefore be served by leaving rate regulation in place until the effective competitive conditions in Kauai change for the better.

Based on the forgoing, Charter's Petition should be denied.

Respectfully submitted,

THE STATE OF HAWAII

By: 

Catherine P. Awakuni Colón
Director
Department of Commerce and Consumer Affairs
State of Hawaii
335 Merchant Street
Honolulu, Hawaii 96813
(808) 586-2850

Bruce A. Olcott
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
(202) 879-3630
Its Attorneys

October 25, 2018

AFFIDAVIT

I, Ji Sook Kim, affirm the truth of the following representations based upon my personal knowledge:

1. I am the Cable Television Administrator of the Cable Television Division for the Department of Commerce and Consumer Affairs of the State of Hawaii.
2. I have read the foregoing Opposition to the Petition for Determination of Effective Competition. With respect to the Opposition, to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact, is warranted by existing law, and is not interposed for any improper purpose.

I affirm under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 10th day of October 2018.


Ji Sook Kim

CERTIFICATE OF SERVICE

I, Bruce A. Olcott, hereby certify that copies of the foregoing Opposition to the Petition for Determination of Effective Competition were served this 25th day of October 2018, via first-class mail, postage prepaid thereon to the following:

Michelle M. Carey
Chief, Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Sarah Whitesell
Deputy Chief
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Martha Heller
Chief
Policy Division
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Steven Broeckaert
Senior Deputy Division Chief
Policy Division
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Maureen O'Connell
Vice President, Regulatory Affairs
Charter Communications, Inc.
601 Massachusetts Avenue, N.W.
Suite 400W
Washington D.C. 20001

Howard J. Symons
Jenner & Block LLP
1099 New York Avenue, N.W.
Suite 900 Washington, D.C. 20001

Karen Charles Peterson
Commissioner
MA Dept. of Telecom and Cable
1000 Washington Street
Suite 820
Boston, MA 02118

Deb Gremo
Town Clerk
Town of Auburn
Auburn, MA 01501

Colleen Toothill-Berte
Town Clerk
Town of Belchertown
2 Jabish Street, Room 201
P.O. Box 629
Belchertown, MA 01007

Robert Sullivan
Town Clerk
Town of Brimfield
21 Main Street
P.O. Box 508
Brimfield, MA 01010

Michael P. Seery
Town Clerk
Town of Brookfield
6 Central Street
Brookfield, MA 01506

Karen LaCroix
Town Clerk
Town of Charlton
37 Main Street
Charlton, MA 01507

Keith W. Rattell
City Clerk
City of Chicopee
17 Springfield Street
Chicopee, MA 01013

Deborah J. Merry
Town Clerk
Town of Dalton
462 Main Street
Dalton, MA 01226

Ora E. Finn
Town Clerk
Town of Dudley
71 W. Main Street
Dudley, MA 01571

Virginia Allen
Town Clerk
Town of East Brookfield
122 Connie Mack Drive
East Brookfield, MA 01515

Thomas Florence, Clerk
Town of East Longmeadow
60 Center Square
East Longmeadow, MA 01028

Barbara LaBombard
City Clerk
City of Easthampton
50 Payson Avenue
Easthampton, MA 01027

Jessica Spanknebel
Town Clerk
Town of Hadley
100 Middle Street
Hadley, MA 01035

Eva Wiseman
Town Clerk
Town of Hampden
625 Main Street
Hampden, MA 01036

Marlene Kenney
Town Clerk
Town of Harvard
12 Ayer Road
Harvard, MA 01451

Dale Hickey
Town Clerk
Town of Holden
1196 Main Street
Holden, MA 01520

Brandi Page
Town Clerk, Town of Lee
32 Main Street
Memorial Hall Lee, MA 01238

Kerry L. Sullivan
Town Clerk
Town of Lenox
6 Walker Street
Lenox, MA 01240

Kim M. Batista
Town Clerk
Town of Ludlow
488 Chapin Street
Ludlow, MA 01056

Susan Stone
Town Clerk
Town of Paxton
697 Pleasant Street
Paxton, MA 01612

Jeanne M. Survell
Town Clerk
Town of Pepperell
1 Main Street
Pepperell, MA 01463

Jody Phillips
City Clerk
City of Pittsfield
70 Allen Street
Pittsfield, MA 01201

Marie Y. Ryan
Town Clerk
Town of Richmond
1529 State Road
P.O. Box 124
Richmond, MA 01254

Laura J. Torti
Town Clerk
Town of Spencer
157 Main Street
Spencer, MA 01562

Janine Domina
Town Clerk
Town of Southampton
210 College Highway
Suite 2
Southampton, MA 01073

Terri Iemolini
Town Clerk
Town of Stockbridge
50 Main Street
P.O. Box 417
Stockbridge, MA 01262

Lynne Girouard
Town Clerk
Town of Sturbridge
308 Main Street
Sturbridge, MA 01566

Kelly A. McElreath
Town Clerk
Town of Upton
One Main Street
Upton, MA 01568

Kelly J. Dumas
Town Clerk
Town of Uxbridge
21 South Main Street
Uxbridge, MA 01569

Elaine S. Novia
Town Clerk
Town of West Boylston
140 Worcester Street
West Boylston, MA 01583

Town Clerk
Town of West Brookfield
2 East Main Street
P.O. Box 372
West Brookfield, MA 01585

Carol J. Tardif
Town Clerk
Town of Wilbraham
240 Springfield St.
Wilbraham, MA 01095

Susan M. Ledoux
City Clerk
City of Worcester
455 Main Street
City Hall Room 206
Worcester, MA 01608

Jade K. Fountain-Tanigawa
County Clerk
County of Kauai
4396 Rice Street
Suite 209
Lihue, HI 96766


Bruce A. Olcott