

# JONES DAY

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November 27, 2018

## BY ELECTRONIC DELIVERY

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street S.W.  
Washington D.C. 20554

**Re: Permitted Written *Ex Parte* Letter  
Petition of Charter Communications, Inc.,  
For a Determination of Effective Competition in:  
Massachusetts Communities and Kauai, Hawaii  
MB Docket No. 18-283; CSR No. 8965-E**

Dear Ms. Dortch:

The State of Hawaii (the “State”),<sup>1</sup> by its attorneys, hereby files this written *ex parte* letter to supplement the record in the above-referenced proceeding. A core issue before the Commission in this matter is whether Congress created its LEC Test for effective competition because local exchange carriers (“LECs”) are *facilities-based* providers of telecommunications services and therefore they can rapidly and effectively introduce competition in the provision of multichannel video programming. Charter repeatedly dismisses the relevance of the facilities-based component of the LEC Test, asserting that Hawaii and a group of Massachusetts communities created the facilities-based requirement “from whole cloth.”<sup>2</sup>

Charter’s contention completely disregards the fact that the statutory provision that created the LEC Test specifically references LEC “facilities,” explaining that the LEC Test applies to both LECs and any multichannel video programming distributor (“MVPD”) “using the *facilities* of such carrier or its affiliate.”<sup>3</sup> It would be nonsensical to apply this facilities requirement to an MVPD

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<sup>1</sup> This letter is being submitted on behalf of the State of Hawaii through its Department of Commerce and Consumer Affairs, which is the cable franchise authority for the State.

<sup>2</sup> *Charter Communications, Inc., Reply to Opposition*, MB Docket No. 18-283; CSR-8965-E, at 3 (Nov. 19, 2018).

<sup>3</sup> 47 U.S.C. § 543(l)(1)(D) (*emphasis added*).

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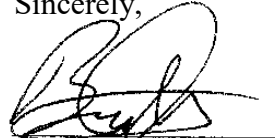
using a LEC's facilities unless the facilities requirement applied as well to the LEC. Charter made no attempt to address in its reply comments the express use by Congress of a facilities requirement in its LEC Test. The existence of this reference clearly establishes that Congress intended to apply the LEC Test solely to LECs that use their facilities to provide video programming in direct competition with cable television operators.

This reading of the statute is also consistent with its statutory history. As Charter acknowledges,<sup>4</sup> the statutory LEC Test resulted from a compromise between the House version<sup>5</sup> and the Senate version<sup>6</sup> of the Telecommunications Act of 1996. Both versions sought to apply the test solely to LECs that distribute video programming using their own facilities either as a cable operator or using an open video system. The Conference Committee, however, harmonized the relevant language to "by any means" to cover other facilities-based distribution technologies, including "MMDS, LMDS, an open video system, or a cable system."<sup>7</sup> No suggestion exists in either the text of the statute or its legislative history that "by any means" should be interpreted to include non-facilities based distribution methods and the Commission should not impute such an intent to Congress where none existed.

Instead, the most logical and reasonable interpretation of the statutory LEC Test is that it applies solely to LECs that use their own facilities to provide multichannel video programming in competition with an incumbent cable television operator. Any other interpretation of the statute would create an unwarranted exception to the effective competition requirement and would remove the protections of rate regulation from those remaining communities where effective competition does not yet exist in the distribution of multichannel video programming services.

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

Sincerely,

  
Bruce A. Olcott

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<sup>4</sup> See *id.* at 12 n.40.

<sup>5</sup> S.652 as passed by the House of Representatives, with Amendments, October 12, 1995, § 202(h) (104<sup>th</sup> Congress).

<sup>6</sup> S.652 as passed by the Senate, June 15, 1995, § 203(b)(2) (104<sup>th</sup> Congress).

<sup>7</sup> Senate Report No. 104-230, Conference Report to accompany S. 652, at 170, February 1, 1996 (104<sup>th</sup> Congress).

## CERTIFICATE OF SERVICE

I, Bruce A. Olcott, hereby certify that copies of the foregoing *Ex Parte* Letter was served this 27th day of November 2018, via first-class mail, postage prepaid thereon to the following:

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