



COMMONWEALTH OF MASSACHUSETTS

Department of Telecommunications and Cable

1000 Washington Street, Suite 820, Boston, MA 02118

(617) 305-3580

www.mass.gov/dtc

CHARLES D. BAKER
GOVERNOR

KARYN E. POLITO
LIEUTENANT GOVERNOR

JAY ASH
SECRETARY OF HOUSING AND
ECONOMIC DEVELOPMENT

JOHN C. CHAPMAN
UNDERSECRETARY

KAREN CHARLES PETERSON
COMMISSIONER

December 20, 2018

Ex Parte Letter -- Filed Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

In re Charter Communications, Inc. Petition for Determination of Effective Competition, MB
Docket No. 18-283

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Federal Communications Commission's ("Commission") rules, the Massachusetts Department of Telecommunications and Cable ("MDTC") respectfully submits this *ex parte* letter to clarify the record with respect to the term "channel."¹

The Commission applies a uniform definition to a word if the subject matter to which the word refers does not change.² Here, the subject matter of the statutory definition of channel is the same as that of the LEC Test, leaving the Commission no discretion to apply a new, different meaning of channel to the LEC Test's comparable-programming requirement.³ Further, there

¹ See 47 U.S.C. § 522(4). Throughout its Reply, Charter improperly attempts to invoke colloquial usages of terms such as "channel" that have been defined by Congress or the Commission. See *In re Sky Angel U.S., LLC*, 25 FCC Rcd. 3879, 3883, *Order* (2010) (calling for interpretations of terms as they are defined by Congress and the Commission, and tentatively finding that the term channel, specifically, is a technical term that includes a transmission path under federal law and the Commission's rules); Charter Reply at 7-8, 10, 12, 14-15, 18.

² See *US W. Commc'ns, Inc. v. FCC*, 177 F.3d 1057, 1059 (D.C. Cir. 1999) (stating that absent a difference in subject matter, "the same word appearing in different portions of a single provision or act is taken to have the same meaning in each appearance"); *In re Implementation of Cable Act Reform Provisions of the Telecomms. Act of 1996*, 14 FCC Rcd. 5296, 5305, *Report & Order* (1999) ("[A] term used repeatedly in the same connection should be given the same meaning unless different meanings are required to make the statute consistent.").

³ See 47 U.S.C. §§ 522(4), 543(l)(1)(D); 47 C.F.R. § 76.905(b)(4), (g). Charter's attempt to import a "non-technical" definition of channel fails because the regulation Charter references resides in Part 79 of the

simply is no indication in the legislative history or in Commission precedent that the comparable-programming requirement includes some new definition of channel.⁴

Congress adopted the LEC Test in the Telecommunications Act of 1996 (“Act”).⁵ Also in the Act, Congress amended the Cable Act of 1984, changing definitions in the very statute that defines the term channel.⁶ In adopting the Act, Congress was not only therefore aware of, but in fact discussed and approved of the Commission’s definition of comparable programming, which included the term channel.⁷ If Congress had intended a new and different use of the word channel in the context of the LEC Test’s comparable-programming requirement, it would have amended the statutory definition of the term, adopted a new, “as-used-in-this-section” definition of the word, or, at the very least, directed the Commission to consider promulgating an alternative definition. But Congress, of course, did none of this. To the contrary, Congress used the term explicitly and applied it to the LEC Test without any contemplation that some new definition of channel or comparable programming might apply.⁸

Under the Commission’s rules, the LEC Test requires the LEC or its affiliate to offer at least 12 channels of video programming, as the term channel is defined under federal law.⁹ As Charter has not carried its burden of demonstrating that AT&T’s DIRECTV NOW offers channels,

Commission’s rules, which does not invoke 47 U.S.C. § 522 as statutory authority. *See* 47 C.F.R. § 79.1; Charter Reply at 7 n.20. To the contrary, the Commission’s comparable-programming definition resides in Part 76, which does invoke 47 U.S.C. § 522 as statutory authority. *See* 47 C.F.R. § 76.905(g); *cf. id.* § 76.5(r)-(u) (mirroring Congress’s inclusion of a transmission path as an element of a channel).

⁴ Charter’s reliance on the Commission’s discussion of switched networks is inapposite. *See* Charter Reply at 6 & n.18. In the referenced Order, the Commission did not add an interpretation of the word channel. *See In re Implementation of Section of the Cable Television Consumer Prot. & Competition Act of 1992 Rate Regulation*, 8 FCC Rcd. 5631, 5666-67, *Report & Order & Further Notice of Proposed Rulemaking* (1993). At most, the Commission crafted a variance to the definition of comparable programming specifically for switched networks. *See id.* at 5667 n.130. As this variance removed the term channel altogether from the Commission’s analysis of a switched network’s programming, it has no bearing on how the Commission should interpret or use the word. The Commission has created no such variance for its analysis of the programming of an online video distributor such as DirecTV.

⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(b)(3), 110 Stat. 115 (1996).

⁶ *Id.* § 301(a) (amending 47 U.S.C. § 522).

⁷ S. Rep. No. 104-230, at 170 (1996) (Conf. Rep.) (“The conferees intend that ‘comparable’ requires that the video programming services should include access to at least 12 channels of programming, at least some of which are television broadcasting signals.” (citing 47 C.F.R. § 76.905(g))).

⁸ *See id.* Indeed, the Commission has acknowledged Congress’s intent with respect to the comparable-programming requirement without mentioning any other interpretation of channel: “The legislative history reveals Congress’s intent that video programming be deemed ‘comparable’ for purposes of [the LEC] test if the competing service ‘includes access to at least 12 channels of programming.’” *In re Implementation of Cable Act Reform Provisions of the Telecomms. Act of 1996*, 11 FCC Rcd. 5937, 5942, *Order & Notice of Proposed Rulemaking* (1996).

⁹ This requirement of a physical transmission path makes perfect sense against the backdrop of the LEC Test’s other facilities-related requirements. *See, e.g.,* MDTC Opposition at 19-21; Hawaii Opposition at 2.

among the other reasons discussed in the MDTC's Opposition, the Commission should deny Charter's petition.

Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically via ECFS with your office. Please do not hesitate to contact me should you have any questions.

Respectfully,

/s/ Sean M. Carroll

Sean M. Carroll

Deputy General Counsel

Massachusetts Department of
Telecommunications and Cable
1000 Washington Street, Suite 820
Boston, MA 02118-6500

cc: Howard J. Symons
Bruce A. Olcott
Timothy J. Reppucci