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March 23, 2012

**VIA ELECTRONIC FILING**

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

**RE: Time Warner Cable’s Petitions for Special Relief  
MB Docket No. 12-8 (CSR-8562-E) and MB Docket No. 12-16 (CSR-8579-E)**

Dear Ms. Dortch:

The State of Hawaii (the “State”), by its attorneys, provides this letter to respond to the new data presented by Time Warner Cable Inc. (“Time Warner Cable”) in its Reply regarding its Petitions for Special Relief (“Petitions”) seeking determinations that it faces effective competition in two franchise areas on the Island of Hawaii. Pursuant to Section 76.7(d) of the Federal Communications Commission’s (“Commission’s”) rules, the State requests that the Commission accept this filing due to the extraordinary circumstances of Time Warner Cable submitting new data in its Reply regarding Direct Broadcast Satellite (“DBS”) penetration on which the State otherwise would not have an opportunity to comment.<sup>1</sup>

As the State explained previously, Time Warner Cable’s original Petition for Special Relief was defective because it aggregated into a single petition requests for findings of effective competition in two different franchise areas. Because Time Warner Cable’s Reply provided separate DBS penetration data for the two franchise areas, the Commission should accept this letter providing the State’s response to this new data in order to have a full record in analyzing and assessing Time Warner Cable’s claims. Another extraordinary circumstance is the need to clarify the State’s position regarding seasonal DBS subscribers because Time Warner Cable’s Reply misconstrued the State’s argument.

The new DBS penetration data in Time Warner Cable’s Reply is flawed in a number of respects. First, the data used by Time Warner Cable does not adjust for seasonal homes, and when it is adjusted to remove seasonal DBS subscribers, the DBS penetration rate decreases significantly,

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<sup>1</sup> See 47 C.F.R. 76.7(d).

falling below 15 percent in the West Hawaii franchise area. Second, Time Warner Cable double counted the DBS subscribers in a zip code that overlaps the two franchise areas, which results in overstated DBS penetration rates. Third, the DBS subscribers in areas not served by Time Warner Cable should be removed from the DBS penetration calculations because there is no competition in those areas.

### **Seasonal Homes**

Commission precedent directs that subscribership data in effective competition cases should be adjusted for seasonal homes. There are a large number of vacation homes in the franchise areas because Hawaii is a popular location for people to own vacation homes. In this regard, the State acknowledges that Section 76.905(c) states that households do not include seasonal dwellings. If the denominator in the DBS penetration calculation (i.e., households) cannot include seasonal homes, then the numerator (DBS subscribers) likewise should not include seasonal homes. Otherwise the DBS penetration rate would be overstated and skewed.<sup>2</sup>

In several effective competition cases, the Commission has reduced the number of DBS subscribers to remove seasonal homes subscribing to DBS service.<sup>3</sup> In *Charter*, the Commission removed the DBS subscribers in seasonal homes from the total number of DBS subscribers by reducing the total number of DBS subscribers by the percentage of seasonal homes in the franchise area.<sup>4</sup> Contrary to Time Warner Cable's assertion that the Commission has never "discounted DBS penetration rates to account for vacation or seasonal homes," the Commission has in fact discounted DBS penetration rates in several cases, as noted in footnote 2 of this letter.<sup>5</sup>

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<sup>2</sup> See Comcast Cable Communications, LLC, *Memorandum Opinion and Order*, 22 FCC Rcd 1691, 1697-98 ¶ 16 (2007) ("*Comcast*") (noting "we believe that the number of DBS households reported by SBCA may be inflated by seasonal and recreational DBS households and so skew the ultimate percentage.").

<sup>3</sup> See e.g., Charter Communications, *Memorandum Opinion and Order*, 25 FCC Rcd 2289, 2294 ¶ 15 (2010) ("*Charter*") (subtracting DBS subscribers in seasonal homes using the percentage of seasonal homes in the county); see also *Comcast* 22 FCC Rcd at 1698 ¶ 16 (doing a "proportionate reduction in the SBCA DBS figures for the percentage of seasonal, recreational, or occasional use properties"); see also Bright House Networks, LLC, *Memorandum Opinion and Order*, 22 FCC Rcd 4057, 4060 n.28, 4062 ¶ 10 (2007) (accepting Plant City's downward adjustment to the number of DBS subscribers to account for seasonal homes); see also Bright House Networks, LLC, *Memorandum Opinion and Order*, 22 FCC Rcd 4390, 4394 ¶ 11, 4395 ¶ 13 (2007) (adjusting DBS subscriber numbers by excluding seasonal homes).

<sup>4</sup> See *Charter*, 25 FCC Rcd at 2294 ¶ 15 ("Third, as noted by Charter in its Reply, its number of DBS subscribers, based on homes passed, appears to include DBS subscribers in seasonal homes. Seasonal homes, however, are not counted in effective competition decisions. We subtract DBS subscribers in seasonal homes, using the 6.11 percent asserted by the County as the percent of seasonal homes in New Hanover County. This subtraction reduces the number of DBS subscribers in Charter's actual service area to 1,628.").

<sup>5</sup> Time Warner Cable, Reply, MB Docket Nos. 12-8 and 12-16, at 6 (filed Feb. 23, 2012) ("Reply").

The DBS subscriber numbers presented by Time Warner Cable include DBS subscribers in seasonal homes. As a result, the numerator includes seasonal homes, but the denominator does not, which inflates and skews the percentage of DBS subscribers.

The DBS subscriber numbers in the Reply need to be adjusted to remove the seasonal DBS subscribers. The adjustment should reduce the number of DBS subscribers by the percentage of seasonal homes in the franchise areas. The Island of Hawaii has 82,324 total households, of which 7,135 housing units fall in the Census Bureau category of “Vacant: for seasonal/recreational/occasional use.”<sup>6</sup> Thus, 8.67 percent of the housing units on the Island of Hawaii are seasonal homes. Reducing the DBS subscriber numbers in the Reply by 8.67 percent to account for seasonal homes results in the following DBS numbers:

Table 1

Franchise Area	A	B	C	D	E	F	G	H
West Hawaii	26,257	4,304.24	16.39%	8.67%	373.05	3,931.19	14.97%	-1.42%
East Hawaii	40,839	8,010.42	19.61%	8.67%	694.26	7,316.16	17.91%	-1.70%

A = Total occupied households (from 2010 Census)

B = DBS subscribers allocated to franchise area (from Reply)

C = DBS penetration in franchise area (from Reply)

D = Percentage of seasonal homes

E = DBS subscribers in seasonal homes (BxD)

F = DBS subscribers in franchise area adjusted to remove seasonal homes (B-E)

G = DBS penetration in franchise area adjusted to remove seasonal homes (G/A)

H = Change in DBS penetration when seasonal homes are removed (G-C)

When the DBS subscriber numbers are adjusted to remove seasonal homes as shown in column G of Table 1, the DBS penetration in the West Hawaii franchise area is 14.97 percent, which falls below the 15 percent threshold. The DBS penetration in the East Hawaii franchise area is 17.91 percent, which is a 1.7 percent decrease from the numbers in the Reply.

### **Overlapping Zip Code**

After noting that zip code 96743 overlaps the two franchise areas on the Island of Hawaii, Time Warner Cable included the 816 DBS subscribers for that zip code in *both* franchise areas in its calculations.<sup>7</sup> This double-counting results in overstated DBS penetration rates.

The proper approach is to allocate a portion of the DBS subscribers in the overlapping zip code to each franchise area. The boundaries of the East Hawaii (Hilo) and the West Hawaii (Kona) franchise areas are determined by census tracts. Zip code 96743 has portions located in three

<sup>6</sup> See U.S. Census Bureau, 2010 Demographic Profile for Hawaii County, available at <http://www.census.gov>.

<sup>7</sup> See Reply at 5, Exhibit D, and Exhibit G.

census tracts in the West (census tracts 217.02, 217.04, and 218) and two census tracts in the East (census tracts 219.02 and 220). Zip code 96743 has 5,668 total households and 4,339 occupied households.<sup>8</sup> Of the 5,668 total households, 5,617 are in the census tracts in the West franchise area.<sup>9</sup> This represents 99.1 percent of the total households in zip code 96743. The census tracts in the East franchise area have 51 households, which equals 0.9 percent.<sup>10</sup> Adjusting the occupied households in zip code 96743 based on these percentages results in the following numbers:

Table 2

<b>Franchise Area</b>	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>
West Hawaii	28,049	4,339	99.10%	4,299.96	28,009.96
East Hawaii	43,386	4,339	0.90%	39.04	39,086.04

A = Total Five-Digit Zip Code Households (from 2010 Census)

B = Occupied households in Zip Code 96743

C = Percentage of households in Zip Code 96743 in each franchise area

D = Occupied households in Zip Code 96743 allocated to franchise area (CxD)

E = Total Five-Digit Zip Code Households allocated to franchise area (B-C+E)

The next step is to allocate the 816 DBS subscribers in zip code 96743 between the East and West franchise areas. Using the foregoing percentages, the number of DBS subscribers for each franchise area is as follows:

Table 3

<b>Franchise Area</b>	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>
West Hawaii	4,598	816	99.10%	808.66	4,590.66
East Hawaii	8,510	816	0.90%	7.34	7,701.34

A = Total Five-Digit Zip Code DBS subscribers

B = DBS subscribers in Zip Code 96743

C = Percentage of households in Zip Code 96743 in each franchise area

D = DBS subscribers in Zip Code 96743 allocated to franchise area (BxC)

E = Total Five-Digit Zip Code DBS subscribers allocated to franchise area (A-B+E)

Using these revised numbers, the revised DBS penetration rates for the franchise areas are as follows:

<sup>8</sup> See Reply at Exhibit C.

<sup>9</sup> 5,617 total households = 3,610 in census tract 217.02 + 1,463 in census tract 217.04 + 544 in census tract 218. The number of households in zip code 96743 in each census tract was obtained from <http://mcddl.missouri.edu/MableGeocorr/geocorr2010.html> (last visited Mar. 5, 2012).

<sup>10</sup> 51 total households = 40 in census tract 219.02 + 11 in census tract 220.

Table 4

Franchise Area	A	B	C	D	E	F	G	H
West Hawaii	26,257	28,009.96	93.74%	4,590.66	4303.359	16.39%	16.39%	0.00%
East Hawaii	40,839	39,086.04	n/a	7,701.34	7,701.34	18.86%	19.61%	-0.76%

A = Total occupied households (from 2010 Census)

B = Total Five-Digit Zip Code Households allocated to franchise area

C = Allocation % (A/B)

D = Total Five-Digit Zip Code DBS subscribers allocated to franchise area (column E from Table 3)

E = DBS Subscribers adjusted for allocation to franchise area (CxD)

F = DBS penetration in franchise area (E/A)

G = DBS penetration in franchise area (from Reply)

H = Change in DBS penetration (F-G)

The adjusted DBS penetration rates are in column F of Table 4.

### Adjusted Calculations

After the DBS subscriber numbers presented by Time Warner Cable are adjusted to allocate 99.1 percent to the West and 0.9 percent to the East and reduced by 8.67 percent to account for seasonal homes, the following DBS numbers result.

Table 5

Franchise Area	A	B	C	D	E	F	G	H
West Hawaii	26,257	4,303.36	8.67%	372.97	3,930.39	14.97%	16.39%	-1.42%
East Hawaii	40,839	7,701.34	8.67%	667.47	7,033.87	17.22%	19.61%	-2.39%

A = Total occupied households (from 2010 Census)

B = DBS Subscribers adjusted for allocation to franchise area (column E from Table 4)

C = Percentage of seasonal homes

D = DBS subscribers in seasonal homes (BxC)

E = DBS subscribers in franchise area adjusted to remove seasonal homes (B-D)

F = DBS penetration in franchise area adjusted to remove seasonal homes (E/A)

G = DBS penetration in franchise area (from Reply)

H = Change in DBS penetration (F-G)

With the adjusted DBS numbers in column F of Table 5, the DBS penetration in the West Hawaii franchise area is 14.97 percent, which is below the 15 percent threshold required to meet the test for effective competition. The DBS penetration in the East Hawaii franchise area is 17.22 percent, which is a 2.39 percent decrease from the numbers in the Reply.

**Households Not Served By Cable**

As noted in the State's Opposition, there are a significant number of households in the franchise areas that Time Warner Cable does not pass and to which it does not make available its cable service. There are 5,324 households in the franchise areas that are not passed by Time Warner Cable.<sup>11</sup> The State submitted in the Opposition that these households are not subject to competition and therefore should be subtracted from the numbers used to calculate the DBS penetration under the competing provider test.

Time Warner Cable's response on this subject misses the point. The State is not arguing that the service areas should be redefined in the franchise areas because Time Warner Cable does not pass these homes.<sup>12</sup> Instead, the State contends that Time Warner Cable should not be able to include these unserved homes in its DBS penetration calculations.

Because these households are not able to get Time Warner Cable's cable service, there is no competition between Time Warner Cable and the DBS providers as DBS is the only video programming service available to these households. They do not have a choice of video programming providers and do not reap the benefits that would come from effective competition. It therefore is more likely that these households subscribe to a DBS provider, and the DBS penetration rate is higher in these areas not served by Time Warner Cable. It is inconsistent with the principles of effective competition for Time Warner Cable to include DBS subscribers in areas it does not serve in its numbers used to argue that effective competition is present. There is no competition between Time Warner Cable and DBS for these households. Accordingly, the State submits that DBS subscribers in areas not served by Time Warner Cable should be removed from the calculations.

Assuming that 16.34 percent of the 5,324 households not passed by Time Warner Cable receive DBS service (and the actual number is likely much higher), there are 870 DBS subscribers in the areas not served by Time Warner Cable.<sup>13</sup> Adjusting the DBS numbers to remove these 870 DBS subscribers, allocated to each franchise area, results in the following numbers:

Table 6

<b>Franchise Area</b>	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>	<b>G</b>	<b>H</b>	<b>I</b>
West Hawaii	26,257	3,930.39	35.85%	870	311.87	3,618.52	13.78%	16.39%	-2.61%
East Hawaii	40,839	7,033.87	64.15%	870	558.13	6,475.74	15.86%	19.61%	-3.76%

A = Total occupied households (from 2010 Census)

B = DBS subscribers in franchise area adjusted to remove seasonal homes (column E from Table 5)

<sup>11</sup> See State of Hawaii, Opposition, MB Docket Nos. 12-8 and 12-16, at 17 (filed Feb. 13, 2012).

<sup>12</sup> See Reply at 6-7, n.17.

<sup>13</sup> Based on the adjusted numbers in Table 5, the cumulative DBS penetration rate for both franchise areas combined is 16.34 percent (10,964.26 DBS subscribers / 67,096 households = 16.34 percent).

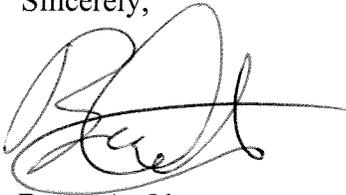
C = Percentage of total DBS subscribers in franchise area  
D = DBS subscribers in the areas not served by Time Warner Cable  
E = DBS subscribers in the areas not served by Time Warner Cable in each franchise area (CxD)  
F = DBS subscribers in franchise area adjusted (B-E)  
G = DBS penetration in franchise area adjusted (F/A)  
H = DBS penetration in franchise area (from Reply)  
I = Change in DBS penetration (G-H)

With the adjusted DBS numbers in column G of Table 6, the DBS penetration in the West Hawaii franchise area is 13.78 percent, which is well below the 15 percent threshold. The DBS penetration in the East Hawaii franchise area is 15.86 percent, which is a 3.76 percent decrease from the numbers in the Reply.

Even with the new numbers in its Reply, Time Warner Cable has not met its burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the franchise areas. There are flaws in the calculations provided by Time Warner Cable that, as detailed above, call into question the reliability of the DBS penetration rates it alleges in the Reply. In the West Hawaii franchise area, the DBS penetration rate, as adjusted by the calculations in this letter, is below the required 15 percent threshold. Time Warner Cable has therefore failed to show that there is a sufficiently high level of DBS penetration in the West Hawaii franchise area to overcome the strong presumption against effective competition.

The State therefore urges the Media Bureau to deny Time Warner Cable's Petitions for Special Relief.

Sincerely,



Bruce A. Olcott  
Counsel to the State of Hawaii

## CERTIFICATE OF SERVICE

I, Judith Hallett, an Executive Legal Secretary at Squire Sanders (US) LLP, hereby certify that, unless indicated otherwise below, copies of the foregoing Letter were served this 23rd day of March, 2012, via first-class mail, postage prepaid thereon to the following:

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