Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Mauna Kea Broadcasting Company	)	CSR-8682-M
	)	
Must-Carry Complaint Regarding	)	MB Docket No. 12-197
Television Station KLEI(DT),	)	
Kailua-Kona, Hawaii	)	

OPPOSITION OF HAWAIIAN TELCOM SERVICES COMPANY, INC.

Pursuant to Section 76.7 of the Commission's rules,[1] Hawaiian Telcom Services Company, Inc. ("HTSC") hereby opposes the must carry complaint of Mauna Kea Broadcasting Company ("Mauna Kea") for the carriage of station KLEI(DT). KLEI(DT) operates at relatively low output power, and is only broadcast over the air in and surrounding the community of Kailua-Kona, HI on the island of Hawaii. KLEI(DT) is not entitled to carriage on HTSC's IPTV multi-channel video programming distribution ("MVPD") system under the Commission's must carry rules.

HTSC is a new entrant into the video marketplace, having become a MVPD when it received a franchise solely for the island of Oahu in the State of Hawaii from the Hawaii Department of Commerce and Consumer Affairs in June 2011. HTSC faces the dominant Time Warner Cable through its division Oceanic Time Warner Cable, which provides MVPD service throughout the State of Hawaii, and currently has approximately 94 percent of the households on Oahu and over 90 percent of the households in the State

[1] 47 C.F.R. § 76.7.

of Hawaii overall as MVPD customers. KLEI(DT)'s must carry complaint should be denied for five reasons.

First, Mauna Kea does not provide a good quality signal in accordance with the technical parameters of Section 76.55(c)(3) of the Commission's rules.[2] In fact, even though the Honolulu Designated Market Area ("DMA") technically includes part of the island of Hawaii, that island is separated from the island of Oahu over ocean waters by approximately 208 miles. Due to the fact that KLEI(DT)'s signal is carried at extraordinarily low power and is a great distance from the island of Oahu, it is not viewable over the air on the island of Oahu where HTSC provides video services.

Second, because of this limited broadcast area, the programming of KLEI(DT) is generally not of interest to the residents of the island of Oahu because there is no local programming that applies to Oahu and the programming can be found on other stations and is not currently viewed by them. The geography of the region with vast stretches of ocean between KLEI' s community of license (Kailua-Kona) and Oahu further weakens ties between these communities. KLEI primarily offers re-runs of entertainment programs and infomercials and any programming that is local is almost entirely focused on the island of Hawaii. Oceanic Time Warner has filed a Petition for Special Relief pursuant to Section 614(c) of the Communications Act that requests that KLEI(DT) be excluded from the Honolulu DMA for purposes of the must carry rules for cable TV stations operating in Oahu, as well as other Hawaiian islands.[3] HTSC plans to file comments in support of

[2] 47 C.F.R. § 76.55(c)(3). Although KLEI(DT) vaguely offers to deliver its system by "alternative means", it does not identify whether the delivery mechanism is consistent with the Commission's rules.

[3] Petition of Time Warner Entertainment Company, L.P. For Modification of DMA Station KLEI-TV Mauna Kea Broadcasting Co., Kailua-Kona, Hawaii, MB Docket No.

that Petition and will ask that the market exclusion be made applicable to HTSC's MVPD system for the same reasons stated in the OTW petition to the extent that the must carry rules are applicable to HTSC.

Third, Mauna Kea requests that KLEI(DT) be placed on (virtual) channel 6 in accordance with the must carry rules because it broadcasts on channel 6 over the air in Kailua-Kona. HTSC cannot grant this request because it already carries KBFD on channel 6, which broadcasts over the air on channel 6 in Honolulu on the island of Oahu. KLEI(DT) cannot demand that its station be carried on its over-the-air broadcast channel by displacing another station that is already carried on a particular channel based on that station's over-the-air channel.[4]

Fourth, Mauna Kea filed and served its complaint on Hawaiian Telcom, Inc. ("HTI"), an affiliate of HTSC. The complaint should be dismissed because HTI is not a proper party.[5]

Fifth, it would be unconstitutional for the Commission to require HTSC to carry KLEI(DT) on its MVPD system because HTSC is not a cable TV operator within the meaning of Section 614 of the Communications Act[6] or the Commission's must carry rules. Congress enacted the must carry statute in order to protect over-the-air broadcasters from unfair competition by dominant cable TV operators, and prevent them

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12-208, CSR-8686-A (filed Jul. 13, 2012); Public Notice, Special Relief and Show Cause Petitions, Report No. 0379 (Jul. 27, 2012).

[4] 47 U.S.C. § 76.57(f).

[5] Because the complaint was misfiled and misserved, HTSC is filing this opposition within 20 days after the date of public notice of the complaint. Public Notice, Special Relief and Show Cause Petitions, Report No. 0378 (Jul. 16, 2012).

[6] 47 U.S.C. § 534.

from being substantially jeopardized in their ability to continue to provide free over-the-air TV to their customers. The Supreme Court has recognized that cable TV operators (presumably including MVPDs as well) have first amendment rights that cannot be abridged by the government absent an important government interest.[7] The must-carry rules were upheld as against traditional dominant cable TV operators based on the government's premise that over-the-air broadcasters would be substantially jeopardized if cable TV operators were not required to carry them due to their increasing market power.[8] Because HTSC is a new entrant in the marketplace, failure to carry any over-the-air broadcaster on its MVPD system cannot have a detrimental impact on any broadcaster. What is more, HTSC's customers, which are only located on the island of Oahu, could not view KLEI(DT)'s over-the-air signal in any event. Thus, mandating carriage of KLEI(DT) on HTSC'S Oahu system is not narrowly tailored to achieve the government's interest promoted by the must carry statute. Because the must carry statute is unconstitutional as applied to HTSC, KLEI(DT) is required to proceed under the retransmission consent rules, rather than the must carry statute.[9]

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[7] *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997).

[8] *Id*., at 187-88.

[9] 47 C.F.R. § 76.64. Indeed, the retransmission consent rules are written specifically to include MVPDs such as HTSC, while the must carry rules are not.

For all these reasons, HTSC urges the Commission to dismiss the Mauna Kea must carry complaint because it is not entitled to must carry status under the statute or the Commission's rules.

Respectfully submitted,

By: *_/s/ Gregory J. Vogt_*

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August 2, 2012

Certificate of Service

I, Gregory J. Vogt, do hereby certify that I have on this 2d day of August 2012 caused a copy of the foregoing "Opposition of Hawaiian Services Telecom Company, Inc." to be served by U.S. mail upon the following:

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