ORAL ARGUMENT NOT YET SCHEDULED

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

NO. 19-2282

MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND CABLE,

PETITIONER,

V.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

MAKAN DELRAHIM
ASSISTANT ATTORNEY GENERAL

MICHAEL F. MURRAY
DEPUTY ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
STEVEN J. MINTZ
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

ASHLEY S. BOIZELLE
ACTING GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

JAMES M. CARR
ADAM G. CREWS
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

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Respondents believe that oral argument would assist the Court in addressing the issues presented by this case.

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BRIEF FOR RESPONDENTS

INTRODUCTION

In Section 623 of the Communications Act of 1934, as amended, 47 U.S.C. § 543, Congress made explicit its preference that rates for cable television service be determined via competition rather than federal, state, or local rate regulation. It did so by prohibiting such rate regulation wherever the Federal Communications Commission (FCC or Commission) "finds that a cable system is subject to effective competition." *Id.* § 543(a)(2).

Since Section 623's enactment in 1996, competition in the market for multichannel video programming has grown dramatically. In 2015, the FCC

adopted a rebuttable presumption that "effective competition" existed—and cable rate regulation was thus prohibited—in every local franchise area in the United States. As a result of that presumption, as of 2016, only cable systems in Massachusetts and Hawaii remained subject to rate regulation.

In October 2019, in response to a petition by Charter Communications, Inc. (Charter), the FCC concluded that cable systems operated by Charter in Massachusetts and Kauai, Hawaii are subject to effective competition under Section 623(*l*)(1)(D), a provision known as the "LEC Test." *Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011)*, 34 FCC Rcd 10229 (2019) (RA306) (*Order*).[1]

The LEC Test provides that "effective competition" exists when "a local exchange carrier [or LEC, *i.e.*, a local telephone company] or its affiliate … offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator," so long as those services "are comparable to the video programming services provided by the unaffiliated cable operator in that area." 47 U.S.C. § 543(*l*)(1)(D). In the *Order* on review, the FCC found that DIRECTV (an affiliate of AT&T and its local exchange carriers) offers a

[1] Citations to (RA*x*) are to page *x* in the Record Appendix.

video programming service called DIRECTV NOW "directly to subscribers" in Charter's franchise areas by means "other than direct-to-home satellite services," and that DIRECTV NOW is "comparable" to the video programming service provided by Charter in Massachusetts and Kauai. *Order* ¶¶ 5-13 (RA308-15). In reaching this conclusion, the FCC rejected arguments by the Massachusetts Department of Telecommunications and Cable (MDTC) that DIRECTV's offering of DIRECTV NOW did not satisfy the statutory definition of "effective competition." *Id*. ¶¶ 14-21 (RA315-21).

The FCC reasonably interpreted Section 623 and its own rules when it found that Charter is subject to "effective competition" in Massachusetts and Kauai. MDTC's challenges to the *Order* are predicated on a cramped reading of the statutory and regulatory text that would so circumscribe the LEC Test as to render only facilities-based cable operators effective competitors. That unduly narrow reading of the LEC Test is not only atextual but is inconsistent with Congress's explicit preference that cable rates be set by competition rather than regulation. MDTC's petition for review should be denied.

JURISDICTION

The FCC issued the *Order* on October 25, 2019. MDTC filed a timely petition for review of the *Order* on December 23, 2019, within 60 days of the *Order*'s release. *See* 28 U.S.C. § 2344; 47 C.F.R. § 1.4(b)(2). This Court has

jurisdiction to review the *Order* under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

QUESTION PRESENTED

Whether the FCC reasonably determined that DIRECTV's offering of DIRECTV NOW in Charter's franchise areas in Massachusetts and Kauai satisfies the LEC Test for effective competition, 47 U.S.C. § 543(*l*)(1)(D).

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum bound with this brief.

COUNTERSTATEMENT

A. Statutory And Regulatory Background

1. The 1984 Cable Act

Thirty-six years ago, in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984 Cable Act), Congress created a national framework for regulating cable television by adding Title VI to the Communications Act of 1934. One provision of Title VI—Section 623, 47 U.S.C. § 543—governs cable rate regulation. As originally enacted, Section 623 directed the FCC, within 180 days of the statute's enactment, to "prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective

competition." 1984 Cable Act, § 2; 47 U.S.C. § 543(b)(1) (1984). The statute further provided that such regulations "shall define the circumstances in which a cable system is not subject to effective competition," 47 U.S.C. § 543(b)(2)(A) (1984), and hence subject to rate regulation.

When the FCC in 1985 adopted rules implementing the 1984 Cable Act, it concluded that, for purposes of Section 623, "a cable system will be considered to face effective competition whenever the franchise market receives three or more unduplicated broadcast signals."[2] Under this standard, "cable systems in approximately 96 percent of all communities were not rate regulated." H.R. Rep. No. 102-628, at 31 (1992).

2. The 1992 Cable Act

After the FCC promulgated its rules implementing the 1984 Cable Act, cable rates soared. Between 1986 and 1992, the "average monthly cable rate … increased almost 3 times as much as the Consumer Price Index." Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(a)(1) (1992 Cable Act). Congress became "greatly concerned that subscribers, in a deregulated marketplace," were "at

[2] *Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, 58 Rad. Reg. 2d (P&F) 1, 27 ¶ 100 (1985).

the mercy of cable operators' market power." S. Rep. No. 102-92, at 8 (1992). Congress found evidence that some cable operators had "abused their deregulated status and their market power" by "unreasonably rais[ing] the rates they charge subscribers." H.R. Rep. No. 102-628, at 33. To address this problem, Congress passed the 1992 Cable Act.

Congress "strongly prefer[red] competition and the development of a competitive marketplace to [rate] regulation" as the most effective means of ensuring reasonable cable rates. H.R. Rep. No. 102-628, at 30. When the 1992 Cable Act was enacted, however, there was "no certainty" that "competition to cable operators with market power [would] appear any time soon." S. Rep. No. 102-92, at 18. Congress concluded that "until true competition develop[ed], some tough yet fair and flexible regulatory measures [were] needed" to protect consumers from unreasonable cable rates. H.R. Rep. No.102-628, at 30. At the same time, Congress continued to believe that "competition ultimately will provide the best safeguard for consumers in the video marketplace." *Ibid.* In Congress's view, any "governmental oversight" of cable rates "should end as soon as cable is subject to effective competition." S. Rep. No. 102-92, at 18.

Thus, while Congress preferred competition to cable rate regulation, it understood that rate regulation was necessary until effective competition

materialized. The 1992 Cable Act amended Section 623 of the Communications Act to reflect this duality. As amended, Section 623 includes a new paragraph entitled "PREFERENCE FOR COMPETITION," which states: "If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section." 47 U.S.C. § 543(a)(2). The amended statute authorizes cable rate regulation *only* if "the Commission finds that a cable system is *not* subject to effective competition." *Ibid.* (emphasis added).

The 1992 Cable Act also added a definition of "effective competition" to Section 623. *See* 47 U.S.C. § 543(*l*)(1). That definition prescribed three separate tests for determining when "effective competition" exists in a cable system's local franchise area:

> (1) when "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system," *id*. § 543(*l*)(1)(A) (the "Low Penetration Test");
>
> (2) when the franchise area is "served by at least two unaffiliated multichannel video programming distributors" (or MVPDs) [3]

[3] The statute defines the term "multichannel video programming distributor" as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 U.S.C. § 522(13).

> "each of which offers comparable video programming to at least 50 percent of the households in the franchise area," *id.* § 543(*l*)(1)(B)(i), and "the number of households subscribing to programming services offered by [MVPDs] other than the largest [MVPD] exceeds 15 percent of the households in the franchise area," *id.* § 543(*l*)(1)(B)(ii) (the "Competing Provider Test"); and
>
> (3) when an MVPD "operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area," *id.* § 543(*l*)(1)(C) (the "Municipal Provider Test").

Under the amended Section 623, a franchising authority that seeks to regulate cable rates must "file with the Commission a written certification" that it "has the legal authority" to do so. 47 U.S.C. § 543(a)(3)(B). The FCC must disapprove any such certification if it finds that the franchising authority lacks the legal authority to regulate cable rates because effective competition exists in the franchise area. *See id.* § 543(a)(4).

3. The 1996 Act And The LEC Test For Effective Competition

In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act), Congress substantially revised the Communications Act "to provide for a pro-competitive, de-regulatory national policy framework." S. Conf. Rep. No. 104-230, at 1 (1996). The 1996 Act was "designed to promote competition" in multiple communications markets, including "the multichannel video market." *Reno v. ACLU*, 521 U.S. 844, 857 (1997).

To advance its pro-competitive, deregulatory policy objectives, the 1996 Act "expand[ed] the effective competition test for deregulating" cable rates under Section 623 by adding a fourth test for identifying franchise areas where "effective competition" exists. S. Conf. Rep. No. 104-230, at 170; *see* 1996 Act, § 301(b)(3), 110 Stat. 115. This new test, known as the "LEC Test," *Order* ¶ 2 (RA307), was adopted in anticipation that local exchange carriers (LECs)—providers of local telephone service—would begin offering video programming service in competition with cable operators.[4] Under the LEC Test, "effective competition" is present—and cable rate regulation is prohibited—when

> a local exchange carrier or its affiliate (or any [MVPD] using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

47 U.S.C. § 543(*l*)(1)(D).

[4] Previously, Congress had barred telephone companies from offering video programming service in their telephone service areas. *See* 47 U.S.C. § 533(b) (1984) (enacted as part of the 1984 Cable Act). The 1996 Act repealed that restriction. *See* 1996 Act, § 302(b)(1), 110 Stat. 124.

Congress intended for the LEC Test to have broad application. The conference report on the 1996 Act stated that the phrase "by any means" in Section 623(*l*)(1)(D) "includes *any medium* (other than direct-to-home satellite service) for the delivery of comparable programming." S. Conf. Rep. No. 104-230, at 170 (emphasis added).

4. FCC Rules Concerning Cable Rate Regulation And Effective Competition

In accordance with Section 623, the FCC's rules provide that "[o]nly the rates of cable systems that are not subject to effective competition may be regulated." 47 C.F.R. § 76.905(a). The rules incorporate the four statutory tests for evaluating whether "effective competition" exists. *See id*. § 76.905(b)(1)-(4).

The FCC's rules also implement the certification requirement imposed by Section 623(a)(3). Before a franchising authority may regulate cable rates within its jurisdiction, it must file with the FCC a written certification that (among other things) the cable system it seeks to regulate "is not subject to effective competition" as defined by Section 623(*l*)(1). 47 C.F.R. § 76.910(b)(4). "Unless the Commission notifies the franchising authority otherwise, the certification will become effective 30 days after the date filed." *Id*. § 76.910(e). However, if the Commission finds effective competition in the franchise area, it must disapprove the certification. *See* 47 U.S.C.

§ 543(a)(4)(B) (the FCC must disapprove a certification if "the franchising authority does not have the legal authority" to regulate cable rates).

When the 1992 Cable Act was passed, "the vast majority of cable systems" were "not subject to effective competition." *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5670 ¶ 43 (1993) (*1993 Order*), *aff'd in part and rev'd in part, Time Warner Entm't Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995). Acknowledging this reality, the Commission in 1993 adopted a rebuttable presumption that "the cable operator" serving a franchise area "is not subject to effective competition." *Id*. at 5669 ¶ 42; *see* 47 C.F.R. § 76.906 (1993) ("In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition."). "Franchising authorities [could] rely on this presumption when filing certifications with the Commission, unless they [had] actual knowledge to the contrary." *1993 Order*, 8 FCC Rcd at 5669 ¶ 42. Cable operators bore the burden of rebutting this presumption "with evidence of effective competition" in specific franchise areas. *Id*. at 5670 ¶ 42.

Over time, competitive conditions in the market for multichannel video programming fundamentally changed. By 2015, cable systems throughout the nation faced competition from Direct Broadcast Satellite (DBS) service.

The emergence of DBS providers DIRECTV and DISH Network as nationwide competitors to cable prompted the FCC to revise its presumption regarding effective competition. In June 2015, the agency amended its rules to adopt a new rebuttable presumption that "Competing Provider Effective Competition" exists in each franchise area under 47 U.S.C. § 543(*l*)(1)(B). *Amendment of the Commission's Rules Concerning Effective Competition*, 30 FCC Rcd 6574, 6577-82 ¶¶ 6-9 (2015) (*2015 Order*), *aff'd, Nat'l Ass'n of Telecomms. Officers & Advisors v. FCC*, 862 F.3d 18 (D.C. Cir. 2017).[5]

The *2015 Order* stated that any certified franchising authorities that wished to remain certified had to file revised certifications, including attachments "rebutting the presumption of Competing Provider Effective Competition, within 90 days of the effective date of the new rules." *2015 Order*, 30 FCC Rcd at 6592 ¶ 27. Unless a franchising authority timely filed a revised certification or was a party to certain pending proceedings involving effective competition, its existing certification would expire on December 8,

[5] The new presumption was limited to Competing Provider Effective Competition. The FCC found insufficient evidence to support a presumption that any of the other statutory tests for effective competition was satisfied. *See* 47 U.S.C. § 543(*l*)(1)(A) (Low Penetration Test); *id*. § 543(*l*)(1)(C) (Municipal Provider Test); *id*. § 543(*l*)(1)(D) (LEC Test). "Absent a demonstration to the contrary," the Commission "continue[s] to presume that cable systems are not subject to Low Penetration, Municipal Provider, or LEC Effective Competition." *2015 Order*, 30 FCC Rcd at 6582 ¶ 10.

2015 (90 days after the new rules took effect). *See Notice of Effective Date of Revised Effective Competition Rules*, 30 FCC Rcd 10124 (Med. Bur. 2015).

Most franchising authorities did not attempt to rebut the presumption of Competing Provider Effective Competition. *See Findings of Competing Provider Effective Competition Following December 8, 2015 Filing Deadline for Existing Franchise Authority Recertification*, 30 FCC Rcd 14293 (Med. Bur. 2015). Consequently, after December 8, 2015, cable rate regulation ceased in almost all communities throughout the nation. The sole exceptions were certain franchise areas in Massachusetts and Hawaii, where franchising authorities had successfully rebutted the presumption of Competing Provider Effective Competition and therefore continued to regulate cable rates. *Order* ¶ 2 (RA307).

With respect to the few communities where cable rate regulation continued, a cable operator could "file a petition for a determination of effective competition with the Commission." 47 C.F.R. § 76.907(a). To obtain a determination of effective competition under the LEC Test, a cable operator "bears the burden of demonstrating the presence of such effective competition" in its franchise area. *Id.* § 76.907(b).

For purposes of applying the LEC Test, the Commission's rules define two key statutory terms. A competing service is deemed "offered" if (1) the

distributor is "physically able to deliver the service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service," and (2) "no regulatory, technical or other impediments to households taking service exist, and potential subscribers are reasonably aware that they may purchase the [competing service]." 47 C.F.R. § 76.905(e)(1)-(2); *see Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5300-06 ¶¶ 7-15 (1999) (*1999 Order*). A competing video programming service is "comparable" to cable service if it offers "at least 12 channels of video programming, including at least one channel of nonbroadcast service programming." 47 C.F.R. § 76.905(g); *see 1999 Order*, 14 FCC Rcd at 5306-09 ¶¶ 16-22.

B. The Order On Review

Charter is a cable operator that serves subscribers in 41 states. *See* https://corporate.charter.com/about-charter. Pursuant to 47 C.F.R. § 76.907, Charter filed a petition with the FCC on September 14, 2018, seeking a determination that it faces "effective competition" in its franchise areas in Massachusetts and Kauai, Hawaii (collectively, "the Franchise Areas"). Charter Petition (RA7-117). Charter asserted that effective competition exists in those communities under the LEC Test, 47 U.S.C. § 543(*l*)(1)(D),

because "a LEC affiliate offers a comparable video programming service" in the Franchise Areas by means other than direct-to-home satellite service. Charter Petition at 1 (RA10).

Charter based its petition on the availability of a video programming service called DIRECTV NOW. It argued that DIRECTV's offering of DIRECTV NOW in the Franchise Areas satisfies the requirements of the LEC Test. Charter Petition at 3-12 (RA12-21).[6]

In particular, Charter explained that DIRECTV is a "LEC affiliate" because it is a subsidiary of AT&T and is therefore affiliated with the LECs owned by AT&T. Charter Petition at 5-6 (RA14-15). DIRECTV offers "a streaming service" called DIRECTV NOW that is "wholly separate from DIRECTV's direct-to-home satellite service." *Id*. at 7 (RA16). DIRECTV NOW "provides access to live television, in addition to on-demand products, to any customer with an [internet] connection." *Ibid*.

Noting that broadband internet access service is "available to virtually 100 percent of Charter's customers in the Franchise Areas," Charter asserted that DIRECTV "is physically able to deliver" DIRECTV NOW "to any

[6] After Charter filed its petition, DIRECTV NOW was "rebranded as AT&T TV NOW." *Order* n.3 (RA306). Because the *Order* refers to the service as DIRECTV NOW, this brief will do the same.

current Charter-serviced household that wishes to subscribe." Charter Petition at 9 (RA18). Charter also maintained that consumers in those areas are reasonably aware of the availability of DIRECTV NOW, which has been marketed through television and digital advertising as well as AT&T's and DIRECTV's websites. *Id*. at 9-11 (RA18-20). Finally, Charter argued that DIRECTV NOW is "comparable" to Charter's cable service because, "in the vast majority of zip codes" in the Franchise Areas, DIRECTV NOW "offers subscribers a minimum of 65 channels (most of which are non-broadcast channels)." *Id*. at 12 (RA21). The channel lineup for DIRECTV NOW includes not only the basic broadcast channels, but also popular nonbroadcast channels featuring news (*e.g.*, CNN, Fox News Channel), sports (*e.g.*, ESPN), movies (*e.g.*, TCM), and children's programming (*e.g.*, Disney Channel). *See id*., Attachment C (RA45).

The Commission received oppositions to Charter's petition from MDTC, the Office of the Massachusetts Attorney General, and the State of Hawaii. *See* MDTC Opposition (RA122-56); Massachusetts Attorney General Comments (RA157-65); Hawaii Opposition (RA166-75). Charter submitted a reply to these oppositions. Charter Reply (RA178-206).

After reviewing the record, the FCC concluded that Charter had "demonstrated that it is subject to effective competition" in the Franchise

Areas "under the LEC Test." *Order* ¶ 5 (RA308). In granting Charter's petition, *id.* ¶ 1 (RA306), the FCC found that DIRECTV's offering of DIRECTV NOW satisfied each element of the LEC Test. Specifically, it determined that (1) DIRECTV NOW is provided by a "LEC affiliate" (DIRECTV, which is affiliated with AT&T's LECs), *id.* ¶ 6 (RA309); (2) DIRECTV "offers" DIRECTV NOW "directly to subscribers" in the Franchise Areas by means other than direct-to-home satellite service, *id.* ¶¶ 7-12 (RA309-14); and (3) the service offered by DIRECTV NOW is "comparable" to the video programming service provided by Charter in the Franchise Areas, *id.* ¶ 13 (RA314-15).

First, the Commission found—and MDTC does not dispute—that "DIRECTV NOW is provided by a LEC affiliate in the Franchise Areas." *Order* ¶ 6 (RA309). The Commission explained that DIRECTV is a "LEC affiliate" under the Act "because DIRECTV is affiliated with AT&T's LECs through their common ownership by AT&T." *Ibid.*[7]

Second, the Commission determined that DIRECTV's video streaming service, DIRECTV NOW, is offered directly to subscribers in the Franchise

[7] The Communications Act defines "affiliate" as "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person." 47 U.S.C. § 153(2).

Areas by means other than direct-to-home satellite service. The Commission explained that DIRECTV NOW is "deemed offered" under the FCC's rules because (1) "DIRECTV is 'physically able' to deliver DIRECTV NOW to subscribers via existing broadband facilities in the Franchise Areas," *Order* ¶ 8 (RA310) (quoting 47 C.F.R. § 76.905(e)(1)), and (2) there are "no regulatory, technical or other impediments to households taking" DIRECTV NOW in the Franchise Areas, *id*. ¶ 9 (RA311) (quoting 47 C.F.R. § 76.905(e)(2)).

Specifically, the Commission found that the cost of obtaining broadband internet access service was "not an impediment" to "finding that DIRECTV NOW is being 'offered'" in the Franchise Areas. *Order* ¶ 9 (RA312). While the Commission recognized that "some consumers may not want or be able to" purchase the broadband service needed to receive DIRECTV NOW, *ibid.*, it found record evidence that "the vast majority of households in Massachusetts and Hawaii already have broadband [i]nternet access subscriptions." *Ibid.*[8] Based on "the high percentage of broadband subscribership that already exists in the Franchise Areas," the Commission

[8] *See* Charter Reply at 18 (RA197) (U.S. Census Bureau data show than more than 80 percent of households in Massachusetts and Hawaii subscribed to broadband in 2016).

concluded that "most residents in [those areas] could subscribe to DIRECTV NOW immediately." *Id.* ¶ 21 (RA321). The Commission therefore rejected MDTC's argument that DIRECTV NOW is not offered "to consumers in the Franchise Areas because a broadband connection is required to receive the service." *Id.* ¶ 21 (RA321).[9]

The Commission also found that DIRECTV NOW is offered "directly to subscribers" because DIRECTV has "an unmediated relationship" with its customers. *Order* ¶ 11 (RA314). The record showed that DIRECTV "markets DIRECTV NOW directly to customers, customers subscribe to DIRECTV NOW (not a third party service), DIRECTV bills subscribers for this service, and customers remit payment directly to DIRECTV." *Id.* ¶ 12 (RA314) (quoting Charter Reply at 14-15 (RA 193-94)).

[9] Just before the public comment period in this proceeding closed, MDTC filed a letter asserting that the percentage of households with broadband is lower in Charter's franchise areas than in other parts of Massachusetts. *See* MDTC Letter, Oct. 18, 2019, at 3 (RA293). Broadband subscription data, however, were redacted from MDTC's letter. An unredacted version of the letter was not available for review by FCC staff "until the day before the Commission meeting" at which the FCC commissioners voted on Charter's petition. *Order* n.33 (RA310). Because the FCC did not receive "timely access to the unredacted filing," and because MDTC never "disclosed the redacted data to Charter," the Commission "did not consider the redacted information in MDTC's filing." *Ibid.*

The Commission rejected arguments that "the LEC Test requires the competitive provider of video programming to be facilities based." *Order* ¶ 14 (RA315). MDTC based this contention on Section 623, which provides that a competing service under the LEC Test must be offered by "a local exchange carrier or its affiliate (or any [MVPD] *using the facilities of such carrier or its affiliate*)." 47 U.S.C. § 543(*l*)(1)(D) (emphasis added). The Commission concluded that the statute's parenthetical reference to LEC facilities "only applies to MVPDs using such facilities and not to LECs or LEC affiliates themselves." *Order* ¶ 16 (RA316).

The Commission noted that a LEC or its affiliate can provide effective competition under Section 623(*l*)(1)(D) by offering video programming services "by any means" other than direct-to-home satellite services. *Order* ¶ 17 (RA318). Because "the very broad language 'by any means'" is modified only by "a very narrow carve-out" for direct-to-home satellite services, the Commission reasoned that Congress did not intend for the LEC Test to impose a facilities-based restriction on LECs or their affiliates. *Ibid*.

Third, the Commission found that DIRECTV NOW is "comparable" to the video programming service provided by Charter in the Franchise Areas. *Order* ¶ 13 (RA314-15). For purposes of assessing whether effective competition exists, the FCC's rules define "comparable programming" as "at

least 12 channels of video programming, including at least one channel of nonbroadcast service programming." 47 C.F.R. § 76.905(g). DIRECTV NOW falls comfortably within that definition. It "provides packages starting with access to 45 channels," and "those packages include both local broadcast channels and nonbroadcast channels." *Order* ¶ 13 (RA315). DIRECTV NOW's channel lineup includes both the local affiliates of the major broadcast networks (ABC, CBS, NBC, and Fox) and popular nonbroadcast channels like CNN and ESPN. *See* Charter Petition, Attachment C (RA45).

The Commission rejected MDTC's contention that DIRECTV NOW does not satisfy the LEC Test because DIRECTV does not use "electromagnetic channels" to deliver the service. *Order* ¶ 20 (RA319). In making this claim, MDTC invoked the definition of "channel" in Title VI of the Act: "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation)." MDTC Opposition at 5 (RA128) (quoting 47 U.S.C. § 522(4)). As the Commission observed, however, the LEC Test simply "requires a LEC or its affiliate to offer 'video programming services' that are 'comparable' to those offered by the cable operator." *Order* ¶ 20 (RA319). That test "does not require the offer of 'channels' as that term is defined in the Act." *Ibid*. Section

623(*l*)(1)(D), which specifies the requirements of the LEC Test, "does not" even use "the term channel." *Ibid*.

While the FCC's effective competition rules define "comparable programming" in terms of the number of "channels" offered, *see* 47 C.F.R. § 76.905(g), the Commission made clear that it "did not intend this definition to incorporate the Act's definition of 'channel.'" *Order* ¶ 20 (RA320). When the FCC adopted its definition of "comparable programming," it "indicated that the term 'channels'" in the definition "can refer to 'programming sources' rather than physical channels." *Ibid*.[10] In assessing whether DIRECTV NOW offers "comparable programming" under the LEC Test, the Commission decided to interpret the term "channel" in accordance with its "colloquial meaning" (*i.e.*, "a source of prescheduled video programming"). *Ibid*. Applying that definition, the Commission determined that DIRECTV NOW satisfies the LEC Test's "comparable programming" requirement. *Id*. ¶ 13 (RA315).

[10] See *1993 Order*, 8 FCC Rcd at 5667 n.130 ("With respect to switched networks, we construe comparability to mean at least twelve different programming sources.").

SUMMARY OF ARGUMENT

Section 623(a)(2) of the Communications Act—entitled "PREFERENCE FOR COMPETITION"—prohibits rate regulation for cable service if the FCC finds that the cable system "is subject to effective competition" according to specified criteria. 47 U.S.C. § 543(a)(2). The statute prescribes four distinct tests that the FCC must apply to assess whether a cable system faces effective competition. 47 U.S.C. § 543(*l*)(1)(A)-(D). If any one of those tests is satisfied, cable rate regulation is prohibited, and rates are determined by the market.

In the *Order*, the FCC properly applied the LEC Test for effective competition, 47 U.S.C. § 543(*l*)(1)(D), when it determined that Charter is subject to effective competition in Massachusetts and Hawaii. The Commission's decision was fully consistent with the statute's language and Congress's deregulatory intent.

I. The Commission reasonably found that DIRECTV need not use its own facilities to offer a competing service to satisfy the LEC Test. *Order* ¶¶ 16-19 (RA316-19). Contrary to MDTC's assertion (Br. 21), the LEC Test does not require that a competing service be "delivered directly to customers … via facilities owned or controlled by a LEC or LEC affiliate." Rather, the statute provides that a competing service must be "*offer[ed]* directly to

subscribers." 47 U.S.C. § 543(*l*)(1)(D) (emphasis added). The Commission reasonably found that DIRECTV NOW is offered directly to subscribers because DIRECTV has an "unmediated" marketing and billing relationship with DIRECTV NOW subscribers. *Order* ¶¶ 11-12 (RA314).

The statutory text and legislative history further support the Commission's conclusion that the LEC Test does not impose a facilities-based restriction on LECs and their affiliates. The statute's sole reference to "facilities" applies only to MVPDs that are *not* LECs or LEC affiliates. Moreover, the statute plainly states that under the LEC Test, a LEC or its affiliate may provide effective competition if it "offers" competing "video programming services directly to subscribers *by any means* (other than direct-to-home satellite services)." 47 U.S.C. § 543(*l*)(1)(D) (emphasis added). As the legislative history of this provision underscores, the broad language "by any means" "includes *any medium* (other than direct-to-home satellite service) for the delivery of comparable programming." S. Conf. Rep. No. 104-230, at 170 (emphasis added). Thus, apart from direct-to-home satellite service, a LEC affiliate such as DIRECTV may use "any means"—including third-party broadband facilities—to offer competing service under the LEC Test.

II. The Commission reasonably determined that the cost of broadband internet access service is not an "impediment" to households subscribing to DIRECTV NOW in the Franchise Areas. *Order* ¶ 9 (RA311-13) (citing 47 C.F.R. § 76.905(e)(2)). The record showed that "the vast majority of households in Massachusetts and Hawaii already have broadband [i]nternet access subscriptions." *Ibid*. (RA312). Given the "high percentage of broadband subscribership that already exists in the Franchise Areas," the Commission concluded that the cost of broadband is not an impediment to the offering of DIRECTV NOW because "most residents" in the Franchise Areas "could subscribe to DIRECTV NOW immediately." *Id*. ¶ 21 (RA321).

III. The FCC reasonably found that DIRECTV NOW offers "video programming services" in the Franchise Areas that are "comparable" to those offered by Charter. *Order* ¶ 13 (RA314-15) (quoting 47 U.S.C. § 543(*l*)(1)(D)). All parties agree that Congress vested the FCC with discretion to determine when services are "comparable." Br. 53. The FCC exercised that discretion by adopting a generally applicable rule requiring "at least 12 channels of video programming, including at least one channel of nonbroadcast service programming." 47 C.F.R. § 76.905(g). Consistent with the presumption that undefined terms assume their "ordinary" and "common meaning," *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2362

(2019), the FCC reasonably read its comparability rule to focus on the types of "channels" that consumers consider when deciding whether to subscribe to multichannel video programming services—*i.e.*, sources of prescheduled video programming like CNN or ESPN. Not only is that the most natural reading of the text, but the Commission also concluded that it best serves Congress's explicit preference for deregulation and competition. DIRECTV NOW satisfies the FCC's comparability rule because it offers "packages starting with access to 45 channels," including "both local broadcast channels and nonbroadcast channels." *Order* ¶ 13 (RA315).

STANDARDS OF REVIEW

MDTC's challenge to the FCC's interpretation of the Communications Act is reviewed under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). If "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question" for the Court is whether the Commission has adopted "a permissible construction of the statute." *Id.* at 843. In that circumstance, "the agency's construction is accorded substantial deference, and courts are not to substitute their own judgment for that of the agency." *Flock v. U.S. Dep't of Transp.*, 840 F.3d

49, 55 (1st Cir. 2016); *see also Garcia v. Sessions*, 856 F.3d 27, 35 (1st Cir. 2017) (if a statute is ambiguous, and "if the implementing agency's construction is reasonable, *Chevron* requires a federal court to accept the agency's construction of the statute") (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (*Brand X*)).

Under the Administrative Procedure Act (APA), the Court "may only overturn" the FCC's *Order* if it finds that the agency's decision "was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *City of Taunton v. U.S. EPA*, 895 F.3d 120, 126 (1st Cir. 2018) (quoting 5 U.S.C. § 706(2)(A)). This standard of review "affords great deference to agency decisionmaking," and "the [agency's] action is presumed valid." *Int'l Jr. College of Business & Tech. v. Duncan*, 802 F.3d 99, 106 (1st Cir. 2015) (internal quotation marks omitted). The Court "is not to ask whether [the challenged] regulatory decision is the best one possible or even whether it is better than the alternatives." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 782 (2016). "Rather, the [Court] must uphold [the decision] if the agency has 'examine[d] the relevant [considerations] and articulate[d] a satisfactory explanation for its action[,] including a rational connection between the facts found and the choice made.'" *Ibid*. (quoting *Motor Vehicle*

Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983)); *see also Int'l Jr. College*, 802 F.3d at 106-07.

ARGUMENT

Section 623(*l*)(1)(D) of the Communications Act is broadly written to exempt cable service providers from rate regulation when they face effective competition in their service areas, and the Commission reasonably determined that Charter faces effective competition from DIRECTV NOW in the Franchise Areas. MDTC claims that DIRECTV NOW fails to satisfy the LEC Test for three reasons: (1) DIRECTV does not use its own facilities to offer DIRECTV NOW; (2) the cost of broadband internet access service is an impediment to the offering of DIRECTV NOW in the Franchise Areas; and (3) DIRECTV NOW is not delivered via electromagnetic channels. The Commission rightly rejected these arguments. This Court should do the same.

I. THE COMMISSION REASONABLY CONCLUDED THAT DIRECTV NEED NOT USE ITS OWN FACILITIES TO OFFER A COMPETING SERVICE THAT SATISFIES THE LEC TEST

The FCC reasonably found that DIRECTV was not required to use its own facilities to offer a competing service that satisfied the LEC Test. *Order* ¶¶ 16-19 (RA316-19). MDTC's claim to the contrary (Br. 22-41) lacks merit.

MDTC contends that the LEC Test requires that a competing video programming service be "delivered directly to customers, without the need for an intermediary such as a broadband internet provider, via facilities owned or controlled by a LEC or LEC affiliate that operates in the franchise area." Br. 21. "[T]he short answer" to this argument "is that Congress did not write the statute that way." *Corley v. United States*, 556 U.S. 303, 315 (2009) (internal quotation marks omitted).

A. Nothing In The Statutory Text Requires LECs Or Their Affiliates To Offer Competing Service Over Their Own Facilities.

MDTC hinges its facilities-based argument on two portions of Section 623(*l*)(1)(D). First, MDTC contends that a LEC affiliate must use its own facilities to offer service because it must offer service "directly to subscribers." Br. 22-24. Second, MDTC insists that the statute imposes a facilities-based restriction because it specifically refers to "facilities." Br. 30. Both of these arguments are belied by the statutory text.

MDTC's claim that the statute requires competitors to use their own facilities to offer their service "directly to subscribers" turns on a distortion of the term "offer." Essentially, MDTC's argument is that service must be "*deliver[ed]* 'directly to subscribers.'" Br. 23. "But this is not what the statute says." *United States v. Lewis*, 554 F.3d 208, 212 (1st Cir. 2009). The

word "deliver" appears nowhere in Section 623(*l*)(1)(D). Instead, the phrase "directly to subscribers" modifies the word "offers," and the LEC Test is satisfied if a LEC or its affiliate "*offers*" competing "video programing services *directly to subscribers* by any means (other than direct-to-home satellite services)." 47 U.S.C. § 543(*l*)(1)(D) (emphasis added).[11]

As the Supreme Court has recognized, statutory terms such as "offer" and "offering" are ambiguous because they "admit of two or more reasonable ordinary usages." *Brand X*, 545 U.S. at 989. Given this ambiguity, the FCC's reading of the term "offers" in Section 623(*l*)(1)(D) is entitled to deference. *See id*. at 986-1000; *Chevron*, 467 U.S. at 843.

One common definition of the verb "offer" is "to present for acceptance or rejection." *See* BLACK'S LAW DICTIONARY 1081 (6th ed. 1990); https://www.merriam-webster.com/dictionary/offer. The FCC

[11] To be sure, as MDTC points out (Br. 26-27), a Commission rule states that a competing provider must be "physically able to deliver service to potential subscribers" before a competing service will be "deemed offered" under the LEC Test. 47 C.F.R. § 76.905(e)(1). But the FCC explained that the rule "does not require the use of the LEC competitor's own facilities." *Order* ¶ 18 (RA318). A service can be "deemed offered" if the competing provider is "physically able to deliver" the service via third-party facilities. *See ibid*. (RA319) ("neither the statute" nor any FCC rule "prohibits the use of third-party facilities"). The FCC reasonably determined that "DIRECTV is 'physically able' to deliver DIRECTV NOW to subscribers via existing broadband facilities in the Franchise Areas." *Id*. ¶ 8 (RA310).

reasonably applied that definition here. It found that DIRECTV NOW is offered directly to subscribers because DIRECTV "markets" the service "directly to customers, customers subscribe to DIRECTV NOW (not a third party service), DIRECTV bills subscribers for this service, and customers remit payment directly to DIRECTV." *Order* ¶ 12 (RA314) (quoting Charter Reply at 14-15 (RA193-94)). In the Commission's reasoned judgment, the "unmediated relationship between" DIRECTV and its customers demonstrates that DIRECTV NOW is offered "directly to subscribers." *Id.* ¶¶ 11-12 (RA314). Therefore, the Commission rejected MDTC's claim that "DIRECTV NOW must utilize its own facilities in the Franchise Areas to offer its service 'directly to subscribers.'" *Id.* ¶ 19 (RA319).[12]

MDTC's attempt to rely on Section 623(*l*)(1)(D)'s reference to "facilities" is equally unavailing. That term appears only in a parenthetical addressing the circumstances under which MVPDs that are not LECs or LEC

[12] Contrary to MDTC's assertion (Br. 25-26), Congress had good reason to require that competing services be marketed "directly to subscribers" to satisfy the LEC Test. Some video programming services do not meet that requirement. For example, ESPN's services are sold to cable operators and MVPDs. Consumers can watch ESPN programming only if they subscribe to cable or MVPD systems that carry ESPN's networks. Because ESPN's services do not compete with cable, they are plainly distinguishable from video programming services that are marketed directly to subscribers as alternatives to cable.

affiliates may provide effective competition under the LEC Test. Specifically, the statute provides that "a [LEC] or its affiliate (or any [MVPD] using the facilities of such [LEC] or its affiliate)" may offer a competing service that satisfies the LEC Test. 47 U.S.C. § 543(*l*)(1)(D). MDTC suggests that the parenthetical reference to "facilities" should be read to modify "a [LEC] or its affiliate"—a phrase that is not included in the parenthetical. Br. 29-30. That gloss is inconsistent with the statutory text and structure.

The Commission reasonably concluded that because the statute's facilities-based requirement is set off by parentheses, it applies only to the providers specified in the parenthetical phrase—*i.e.*, MVPDs that are not LECs or LEC affiliates. *See Order* ¶ 16 & n.65 (RA316). That reading of the statute comports with the rule of the last antecedent, which provides that "a limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016) (internal quotation marks omitted); *see also United States v. Ven-Fuel, Inc.*, 758 F.2d 741, 751 (1st Cir. 1985).

The Commission's reading of the LEC Test is also supported by other statutory provisions that impose explicit facilities-based restrictions. Indeed, two provisions of the Communications Act, enacted at the same time as

Section 623(*l*)(1)(D), "show that when Congress intended to" require carriers to offer service over their own facilities, "it knew how to do so." *Jusino Mercado v. Commonwealth of Puerto Rico*, 214 F.3d 34, 42 (1st Cir. 2000). Under Section 214(e)(1), a carrier that is eligible to receive federal universal service support must offer supported services "using *its own facilities* or a combination of *its own facilities* and resale of another carrier's services." 47 U.S.C. § 214(e)(1) (emphasis added). And under Section 271(c)(1)(A), which is entitled "Presence of a facilities-based competitor," a Bell operating company seeking FCC authorization to offer long-distance telephone service must provide network access and interconnection to one or more competing carriers that offer telephone exchange service "either exclusively … or predominantly over *their own … facilities*." *Id*. § 271(c)(1)(A) (emphasis added); *see Order* n.72 (RA318).

If Congress had intended for the LEC Test to include a similar requirement, it presumably would have used the same language it employed in Sections 214(e)(1) and 271(c)(1)(A), expressly requiring LECs and their affiliates to offer service over their "own facilities." But the phrase "own facilities" appears nowhere in Section 623(*l*)(1)(D). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts

intentionally and purposely in the disparate inclusion or exclusion." *In re Larson*, 513 F.3d 325, 330 (1st Cir. 2008) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

The Commission's reasonable interpretation of the LEC Test finds additional support in other language in Section 623(*l*)(1)(D). Specifically, a LEC or its affiliate can provide effective competition if it "offers video programming services directly to subscribers *by any means* (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator." 47 U.S.C. § 543(*l*)(1)(D) (emphasis added).

"[T]he word 'any' naturally carries 'an expansive meaning.'" *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). This Court recognized the breadth of the word "any" in *United States v. Gelin*, 712 F.3d 612 (1st Cir. 2013). That case concerned a statute that defined "health care benefit program" as "*any* public or private plan or contract … under which *any* medical benefit, item, or service is provided." 18 U.S.C. § 24(b) (emphasis added). The Court found that the "common meaning of the adjective 'any' as used in this context is 'regardless of sort, quantity, or number.'" *Gelin*, 712 F.3d at 618 (quoting Webster's II New Riverside University Dictionary 115 (1984)). It therefore

refused to construe the broad definition of health care benefit program "to limit the scope of the statute to health insurance companies." *Ibid*.

Like this Court in *Gelin*, the FCC here properly declined to apply a limiting construction to a statutory provision that uses the word "any." Rejecting "the premise that the LEC Test requires" competing providers of video programming "to be facilities based," the Commission noted that Section 623(*l*)(1)(D) "explicitly provides" that a LEC or its affiliate "may use 'any means' to offer [competing video programming] service." *Order* ¶ 14 (RA315) (quoting 47 U.S.C. § 543(*l*)(1)(D)). The statute qualifies this very broad language with a single narrow exception: LECs and their affiliates cannot satisfy the LEC Test by offering "direct-to-home satellite services." 47 U.S.C. § 543(*l*)(1)(D). That "very narrow carve out" is "not applicable here." *Order* ¶ 17 (RA318). DIRECTV NOW "streams via the internet." Br. 14.

Congress expressly specified just one exception to the rule that a LEC or its affiliate may offer competing service "by any means" under the LEC Test. Consequently, "rules of statutory interpretation instruct that Congress intended to make no other exceptions." *Sony BMG Music Entm't v. Tenenbaum*, 660 F.3d 487, 499 (1st Cir. 2011) (citing *Tenn. Valley Auth. v.*

Hill, 437 U.S. 153, 188 (1978)).[13] Consistent with this basic tenet of statutory construction, the FCC rightly refused to read into the LEC Test a requirement that LECs and their affiliates must offer competing service over their own facilities. Instead, the Commission reasonably read the phrase "by any means (other than direct-to-home satellite services)" to permit a LEC affiliate such as DIRECTV to offer a competing service by means of third-party broadband facilities.

B. The Legislative History Does Not Support MDTC's Claim That The LEC Test Requires LECs And Their Affiliates To Use Their Own Facilities To Offer Competing Service

Lacking textual support for its position, MDTC asserts that the legislative history reflects Congress's intent that the LEC Test apply only when competing services are offered over LEC facilities. According to MDTC, Congress adopted the LEC Test in 1996 in response "to the unique competitive threat to cable television posed by LECs as they began offering video programming directly to customers over their telephone networks." Br. 21. Citing floor statements from the debate on the 1996 Act, MDTC

[13] *See also United States v. Councilman*, 418 F.3d 67, 75 (1st Cir. 2005) (en banc) (when a statute explicitly provides for certain exceptions, "additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent") (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001)).

maintains that Congress "assumed" when it enacted the LEC Test "that the competitive threat from LECs was the provision of video programming *over LEC network infrastructure*." Br. 32.

Even assuming *arguendo* that the primary factor motivating Congress to adopt the LEC Test was LECs' ability to use their existing networks to transmit video programming, MDTC cannot "prevail at *Chevron* step one" unless it establishes that Section 623(*l*)(1)(D) "is unambiguously limited to Congress's principal concern." *Nat'l Cable & Telecomms. Ass'n v. FCC*, 567 F.3d 659, 666 (D.C. Cir. 2009). Ultimately, "it is 'the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'" *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1744 (2020) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998)). "Only the written word is the law," *id*. at 1737, and Section 623(*l*)(1)(D) uses expansive language to describe the competing services that satisfy the LEC Test.

Under the statute, LECs and their affiliates may offer video programming services "directly to subscribers *by any means* (other than direct-to-home satellite services)." 47 U.S.C. § 543(*l*)(1)(D) (emphasis added). As explained above, the LEC Test places just one restriction on the means by which LECs and their affiliates can offer competing service. So

long as they do not offer direct-to-home satellite services, LECs and their affiliates are free to offer service over whatever facilities they choose, including third-party facilities.

It is well settled that "statutes written in broad, sweeping language should be given broad, sweeping application." *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003). "[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth." *N.H. Motor Transport Ass'n v. Rowe*, 448 F.3d 66, 77 (1st Cir. 2006) (quoting *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998)). Congress often uses "expansive language" in the Communications Act "to give the Commission sufficient flexibility 'to maintain … a grip on the dynamic aspects of [video programming' so that it [can] pursue the statute's objectives as industry technology evolves." *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 707 (D.C. Cir. 2011) (quoting *United States v. Sw. Cable Co.*, 392 U.S. 157, 172 (1968)); *see also Nat'l Broad. Co. v. United States*, 319 U.S. 190, 219-20 (1943). In crafting the LEC Test, Congress used the sort of broad language that affords the FCC flexibility to adapt to technological changes.

If it had wished to do so, Congress could have imposed a facilities-based restriction on the offering of competing service under the LEC Test.

Indeed, as the Commission observed, "the Senate and House versions" of the legislation that became the 1996 Act "specified that the LEC Test applied only to LECs that provided video programming services over certain facilities." *Order* ¶ 17 (RA317); *see* S.652 as passed by the House of Representatives, with Amendments, Oct. 12, 1995, § 202(h) (104th Cong.). "The statutory language that Congress ultimately codified, however, includes language different from the Senate or House drafts, and it contains no facilities-based test." *Order* ¶ 17 (RA318). The Commission reasonably concluded that Congress used the broad phrase "by any means" in Section 623(*l*)(1)(D) to accommodate "future developments in video distribution technology." *Ibid*. The conference report on the 1996 Act confirmed that the phrase "includes *any medium* (other than direct-to-home satellite service) for the delivery of comparable programming, including [multichannel multipoint distribution service], [local multipoint distribution service], an open video system, or a cable system." S. Conf. Rep. No. 104-230, at 170 (emphasis added).[14]

[14] MDTC makes much of the fact that the conference report's examples of delivery systems that satisfy the LEC Test are all "facilities-based." Br. 36; *see Order* ¶ 17 (RA317). But those examples are merely illustrative. They do not narrow the broad scope of the statutory phrase "by any means," which "includes any medium (other than direct-to-home satellite service) for the delivery of comparable programming." S. Conf. Rep. No. 104-230, at 170.

MDTC complains that the FCC's interpretation of the LEC Test will "render the other tests for effective competition virtually dead letters" because the LEC Test will "almost always be satisfied." Br. 20. This is so, MDTC asserts, because DIRECTV NOW is available nationwide. But nothing in Section 623 indicates that any such widely available service (other than direct-to-home satellite service) would not satisfy the LEC Test.

In any event, even before this proceeding, cable rates had already been deregulated in almost every community across the nation under the Competing Provider Test for effective competition. *See Order* ¶ 2 (RA307). Moreover, the elimination of cable rate regulation is contemplated by the statutory scheme. In addition to the statutory text itself, the legislative history of the 1992 Cable Act makes clear that Congress "strongly prefers competition and the development of a competitive marketplace to [cable rate] regulation." H.R. Rep. No. 102-628, at 30. When it passed the 1992 Cable Act, Congress anticipated that "competition ultimately [would] provide the best safeguard for consumers in the video marketplace." *Ibid*. The Senate report on the 1992 Cable Act declared that "governmental oversight" of cable

rates "should end as soon as cable is subject to effective competition." S. Rep. No. 102-92, at 18.[15]

Over the last quarter century, competition has substantially increased in the market for multichannel video programming. Consumers now "have a choice of multiple delivery systems to access video programming via means other than traditional cable television." *Order* ¶ 1 (RA306). Thus, it is hardly surprising that cable rates in most communities are no longer subject to regulation. Section 623 prohibits cable rate regulation in franchise areas where effective competition exists. *See* 47 U.S.C. § 543(a)(2). And in this case, the FCC properly applied the LEC Test when it concluded that Charter faces effective competition from DIRECTV NOW in the Franchise Areas.

[15] MDTC maintains that DIRECTV NOW is not providing "*effective* competition" to Charter because (according to MDTC) Charter "will raise its rates substantially in the affected communities" if the FCC's *Order* is affirmed. Br. 39. But the prospect that Charter's rates might increase after deregulation has no bearing on whether DIRECTV NOW satisfies the statutory definition of "effective competition." None of the statutory tests for "effective competition" provide that competition is not "effective" if deregulation would result in higher cable rates.

II. THE COMMISSION REASONABLY FOUND THAT THE COST OF BROADBAND INTERNET ACCESS SERVICE IS NOT AN IMPEDIMENT TO THE OFFERING OF DIRECTV NOW IN THE FRANCHISE AREAS

Under the FCC's effective competition rules, a competing video programming service will be "deemed offered" only if "no regulatory, technical or other impediments to households taking service exist." 47 C.F.R. § 76.905(e)(2). The Commission found no such impediments to households taking DIRECTV NOW in the Franchise Areas. *Order* ¶ 9 (RA311-13).

MDTC does not contest the FCC's findings that there are no regulatory or technical impediments to the offering of DIRECTV NOW. It contends, however, that DIRECTV NOW cannot be "deemed offered" because the cost of broadband internet access service is an "impediment" to households taking DIRECTV NOW in the Franchise Areas. Br. 41-50. The FCC rightly rejected that claim.

The Commission recognized that "consumers must pay for broadband [i]nternet access service if they wish to subscribe to DIRECTV NOW," and that "some consumers may not want or be able to" pay for broadband. *Order* ¶ 9 (RA312). But the record showed that "the vast majority of households in Massachusetts and Hawaii already have broadband." *Ibid*. As of 2016, 85.5 percent of Massachusetts households and 83.2 percent of Hawaii households subscribed to a broadband service. *Id*. ¶ 8 (RA311) (citing Charter Letter,

Dec. 21, 2018, at 1 (RA226)). The "high percentage of broadband subscribership that already exists in the Franchise Areas … demonstrates that most residents" in those areas "could subscribe to DIRECTV NOW immediately." *Id*. ¶ 21 (RA321). Based on that evidence, the Commission reasonably concluded that the cost of broadband is not an impediment to households taking DIRECTV NOW in the Franchise Areas.

The FCC explained that effective competition can be established under the LEC Test "in circumstances that require reasonable customer-provided additions" (such as a broadband connection) "to receive programming." *Order* ¶ 9 (RA313). In the FCC's view, consumers' expenditures on such "additions" are not an impediment to taking service. The Commission noted that for purposes of the Competing Provider test for effective competition, it had previously found that "requiring customers to purchase a satellite dish to receive satellite service" was not "an impediment to finding that the competing service was offered in the franchise areas." *Ibid*. (RA312) (citing *1993 Order*, 8 FCC Rcd at 5659-60 ¶ 31).

MDTC argues that the FCC's comparison of broadband service to satellite dishes is arbitrary "because the record reveals no 'facts' about the cost of a satellite dish." Br. 49. As a threshold matter, MDTC is barred from raising this claim because the issue was not first presented to the

Commission. *See* 47 U.S.C. § 405(a) (the "filing of a petition for [FCC] reconsideration" is "a condition precedent to judicial review" of a Commission order where the party seeking review "relies on questions of fact or law upon which the Commission … has been afforded no opportunity to pass"); *Presque Isle TV Co. v. United States*, 387 F.2d 502, 504-06 (1st Cir. 1967).[16]

In any event, the argument lacks merit. It incorrectly assumes that the Commission could make a finding of no impediment in this case only if it determined that the cost of broadband service was "comparable" to the cost of a satellite dish. Br. 45. That sort of price comparison, however, was not necessary for the Commission to conclude that broadband connections, like satellite dishes, are "reasonable customer-provided additions … to receive programming." *Order* ¶ 9 (RA313). Even assuming that broadband service costs more than a satellite dish, the record indicates that broadband is not prohibitively expensive. The "vast majority of households in Massachusetts and Hawaii already have broadband," *ibid*. (RA312), meaning that "most

[16] *See also In re Core Commc'ns, Inc.*, 455 F.3d 267, 276-77 (D.C. Cir. 2006) ("even when a petitioner has no reason to raise an argument until the FCC issues an order that makes the issue relevant, the petitioner must file 'a petition for reconsideration' with the Commission before it may seek judicial review") (quoting 47 U.S.C. § 405(a)).

residents" of those states "could subscribe to DIRECTV NOW immediately," *id*. ¶ 21 (RA321). This record evidence amply supported the FCC's determination that the cost of broadband is not an impediment to households taking DIRECTV NOW in the Franchise Areas.

This evidence also undermines MDTC's claim that "the FCC did not consider" the "affordability" of broadband. Br. 49. The best evidence of a service's affordability is its widespread adoption by consumers. The fact that "the vast majority of households in Massachusetts and Hawaii" subscribe to broadband, *Order* ¶ 9 (RA312), refutes MDTC's suggestion that broadband is unaffordable, *see* Br. 47.

MDTC asserts that the "statewide broadband subscription rates" differ from "the subscription rates in the 32 particular Massachusetts communities" served by Charter. Br. 43-44. As the Commission pointed out, however, "U.S. Census Bureau data" on broadband subscription in those areas were

"generally consistent" with the statewide subscription rate for Massachusetts. *Order* n.37 (RA311).[17]

On October 18, 2019—the last day of the public comment period in this proceeding—MDTC filed with the FCC a letter purporting to contain data on broadband subscription rates for Charter's franchise areas in Massachusetts. MDTC Letter, Oct. 18, 2019, at 1-4 (RA291-94). The data, however, were redacted. *See id*. at 3 (RA293). Because the FCC's staff did not obtain "timely access to the unredacted" version of MDTC's letter, and because MDTC never "disclosed the redacted data to Charter," the FCC declined to "consider the redacted information in MDTC's filing." *Order* n.33 (RA310).

MDTC maintains that the FCC acted improperly in refusing to consider the redacted broadband data. Br. 49-50. That argument is not properly before the Court because it was not first presented to the Commission. *See* 47

[17] According to the Census Bureau, 82.2 percent of households in Berkshire County, MA, 78.1 percent of households in Hampden County, MA, 90.4 percent of households in Hampshire County, MA, 89 percent of households in Middlesex County, MA, and 85.9 percent of households in Worcester County, MA subscribe to broadband. *See* US Census Bureau, 2017 American Communities Survey 1-Year Estimates, Table K202801: Presence of a Computer and Type of Internet Subscription in Household (cited in *Order* n.37 (RA311)).

U.S.C. § 405(a); *Presque Isle TV*, 387 F.2d at 504-06; *Core Commc'ns*, 455 F.3d at 276-77.

In any event, the claim lacks merit. The Communications Act grants the FCC broad discretion to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." 47 U.S.C. § 154(j). The Act not only empowers the FCC to promulgate generally applicable procedural rules; "it also delegates broad discretion" to the Commission "to make ad hoc procedural rulings in specific instances." *FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (citing *FCC v. Pottsville Broad. Co.*, 309 U.S. 134 (1940)). The FCC properly exercised that discretion here when it declined to consider the redacted data submitted by MDTC at the end of the public comment period in this proceeding.

As the Commission explained, MDTC's eleventh-hour submission of redacted data deprived Charter of a fair opportunity to comment on the data. MDTC never "disclosed the redacted data to Charter." *Order* n.33 (RA310). Charter argued that any reliance by the Commission "on redacted data that is not available to Charter" would raise "fundamental fairness concerns" and "run afoul of the [APA]." Charter Letter, Oct. 22, 2019, at 2 (RA298) (citing *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 236 (D.C. Cir. 2008)). In addition, "an unredacted version" of MDTC's letter "was not available for

staff review" at the FCC until October 24, 2019—six days after the public comment period closed, and just one day before the Commission meeting at which the *Order* was adopted. *Order* n.33 (RA310). The Commission was "not obliged to consider late-filed" data that "it had insufficient time to evaluate." *See Verizon v. FCC*, 770 F.3d 961, 968 (D.C. Cir. 2014). For all of these reasons, the Commission reasonably declined to consider the redacted data.

III. THE COMMISSION REASONABLY DETERMINED THAT DIRECTV NOW IS COMPARABLE TO THE VIDEO PROGRAMMING SERVICE PROVIDED BY CHARTER IN THE FRANCHISE AREAS

To satisfy the LEC Test, a competing video programming service must be "comparable to the video programming services provided by the unaffiliated cable operator" in a franchise area. 47 U.S.C. § 543(*l*)(1)(D). In this context, FCC rules define "comparable programming" as "at least 12 channels of video programming, including at least one channel of nonbroadcast service programming." 47 C.F.R. § 76.905(g). Applying this definition, the Commission reasonably concluded that DIRECTV NOW offers "comparable programming" to Charter. The record demonstrated that DIRECTV NOW "provides packages starting with access to 45 channels," and that "those packages include both local broadcast channels and nonbroadcast channels." *Order* ¶ 13 (RA315).

MDTC does not dispute that the programming content offered by DIRECTV NOW is similar—if not identical—to the programming available to cable subscribers. The record shows that DIRECTV NOW offers sports, news, and other programming through popular channels (*e.g.*, ESPN, CNN, and Disney Channel) that are also available on cable. *See* Charter Petition, Attachment C (RA45). Notwithstanding this uncontroverted record evidence, MDTC argues that DIRECTV NOW does not satisfy the FCC's definition of "comparable programming" because the service is not offered via "physical" or "electromagnetic" channels. Br. 50-56. That claim is unavailing.

According to MDTC, the Commission erred by reading the word "channel" in its effective competition rule as consumers would typically understand the term: "a source of prescheduled video programming." *See Order* ¶ 20 (RA320). Instead, MDTC insists that the FCC's rule must necessarily incorporate the highly technical definition of "channel" adopted by the 1984 Cable Act. Br. 51. That thirty-six-year-old statute—enacted long before the internet became a pervasive communications medium—defines "cable channel" or "channel" as "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel." 47 U.S.C. § 522(4). MDTC contends that internet streaming services like DIRECTV NOW, which do not deliver

programming via electromagnetic channels, do not offer "comparable" programming under the LEC Test. Br. 52.

MDTC's argument starts from a faulty premise. Undefined terms are normally given their "ordinary" and "common meaning," not a technical meaning. *Food Mktg. Inst.*, 139 S. Ct. at 2362. This rule applies to regulations as well as statutes. "[I]f the language of a … regulation has a plain and ordinary meaning, courts need look no further and should apply the regulation as it is written." *Textron Inc. v. Comm'r of Internal Revenue*, 336 F.3d 26, 31 (1st Cir. 2003); *see also Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2072 (2018) (a word used in a regulation should be given its ordinary meaning). Consistent with this interpretive principle, the Commission adopted "a straightforward definition" of "comparable programming" based on the number of channels offered. *Order* ¶ 13 (RA314). In applying this definition, the Commission appropriately gave the term "channel" its "colloquial meaning"—*i.e.*, "a source of prescheduled video programming." *Id.* ¶ 20 (RA320).

The FCC's reading of its "comparable programming" rule makes good sense. The LEC Test requires the FCC to assess whether consumers have a viable alternative to cable, with a focus on whether the "video programming services" offered to consumers are "comparable." 47 U.S.C. § 543(*l*)(1)(D).

From a consumer's perspective, the relevant "video programming" is the set of channels available for viewing. When ordinary consumers ask what channels are available from competing providers, they are asking about "source[s] of prescheduled video programming"—channels like ESPN—not about portions of the electromagnetic frequency spectrum. *Order* ¶ 20 (RA320). Thus, the common understanding of "channels" is especially apt in the effective competition context, which focuses on consumers' access to video programming *content* from competing providers. The Commission reasonably found that DIRECTV NOW's "full-service line-up" of 45 broadcast and nonbroadcast channels is "comparable" to the cable service provided by Charter in the Franchise Areas. *Id*. ¶ 13 (RA315).

The technical definition of "channel" favored by MDTC has no textual support in Section 623(*l*)(1)(D). Although Congress supplied a technical definition of "channel" in the 1984 Cable Act, the term "channel" does not appear in *any* of the statutory tests for effective competition—even though Congress freely used the word elsewhere in Section 623. *Compare* 47 U.S.C. § 543(*l*)(1) *with id.* § 543(b)(2)(C)(vi), (b)(4), (b)(8)(A)-(B), (c)(2)(D), (d), (*l*)(2). As this Court has recognized, "the affirmative use" of a "defined term" in one subsection "strongly implies that the definition does not apply *sub silentio*" to other subsections in which the term does not appear.

Alexander v. Brigham & Women's Physicians Org., Inc., 513 F.3d 37, 45 (1st Cir. 2008). Indeed, the omission of the word "channel" from the LEC Test reflects a deliberate choice. *See Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). For purposes of assessing effective competition, Congress never directed the FCC to consider channel availability at all, and it certainly did not direct the FCC to use the 1984 Cable Act's technical definition of "channel."

In the effective competition context, "channel" offerings are relevant only because the FCC elected to consider them as part of its comparability test. When implementing the 1992 Cable Act's "comparable video programming" requirement, 47 U.S.C. § 543(*l*)(1)(B)(i), the FCC looked to channel availability to "ensure that competing services individually offer significant competition" to cable operators. *1993 Order*, 8 FCC Rcd at 5666 ¶ 38. The Commission determined that "competitors must be able to offer an alternative number of channels in order to approach programming comparability." *Ibid.* In setting the number of channels necessary to establish comparability, the Commission made clear that its understanding of

"channels" was not confined to the narrow technical definition adopted by the 1984 Cable Act. The Commission said that "[w]ith respect to switched networks," it would "construe comparability to mean at least twelve different programming sources." *Id*. at 5667 n.130.

Moreover, when the FCC codified its rule defining comparable programming, it did not incorporate the 1984 Cable Act's definition of "channel." This, too, is significant evidence that the term carries its ordinary meaning. The FCC routinely incorporates statutory definitions into its rules by expressly providing that a term is used "as defined in" the statute.[18] The omission of this incorporation-by-reference language from the effective competition rule likewise confirms that the FCC did not adopt the 1984 Cable Act's technical definition of "channel."

The Commission did not use this technical definition for good reason. The 1984 definition of channel was not drafted with the current concept of effective competition in mind. The Commission's comparability rule

[18] *See, e.g.*, 47 C.F.R. §§ 1.915(a) (station license), 10.10(d) (commercial mobile service), 32.11(a) (incumbent local exchange carrier), 51.605(b) (exchange access services), 63.60(b)(5) (connecting carrier), 63.90(d) (State Commission), 64.601(a)(9) (common carrier), 64.1202(a)(1) (automatic telephone dialing system), 76.800(c) (multichannel video programming distributor), 76.1501 (effective competition), 76.1505(e) (institutional network).

implements "effective competition" tests that postdate the 1984 Cable Act. Those tests were adopted by the 1992 Cable Act and the 1996 Act. The Supreme Court has repeatedly cautioned against "assum[ing] that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them." *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 n.8 (2004) (internal quotation marks omitted). MDTC falls prey to this fallacy when it insists that the FCC's effective competition rule uses "channel" in precisely the same way as the 1984 Cable Act.

Lacking a textual basis for its claim, MDTC resorts to legislative history. Br. 51-52. But the scant history on which MDTC relies merely indicates that in 1996, certain legislators "intend[ed]" for the FCC to use its pre-existing comparability rule when applying the LEC Test. *See* S. Conf. Rep. No. 104-230, at 170 (citing 47 C.F.R. § 76.905(g)). And when the Commission adopted that rule in 1993, it made clear that the rule's reference to "channels" was not confined to electromagnetic channels but instead

included "programming sources." *1993 Order*, 8 FCC Rcd at 5667 n.130.[19] To the extent Congress expected the FCC to apply its pre-existing comparability rule, it presumably understood that the Commission defined "channels" to mean "programming sources."

In any event, "suppositions about intentions or guesswork about expectations" cannot override the words Congress enacted, *Bostock*, 140 S. Ct. at 1754, and Congress never mandated a specific comparability test by statute. As MDTC concedes (Br. 53), the statute gives the Commission discretion to decide how best to evaluate whether programming is "comparable." And when the FCC decided to assess comparability in terms of channels offered, it did not adopt the 1984 Cable Act's narrow definition of "channel."

The Commission had compelling policy reasons for refusing to use the statutory definition of "channel" when assessing the comparability of programming. It explained that "applying the statutory definition of channel

[19] MDTC's attempts to dismiss the significance of the *1993 Order* are unavailing. Br. 55-56. The FCC never "depart[ed] from statutory definitions," Br. 56, because Congress did not use the term "channel" in the statutory effective competition tests. Nor can MDTC limit the FCC's interpretation to services using "switched networks." *Ibid.* The FCC's comparability test is codified as a generally applicable rule, and the meaning of "channel" does not change depending on the specific technology at issue.

to the LEC Test would be irrational." *Order* ¶ 20 (RA319). Because the Act narrowly defines "channel" as "a portion of the electromagnetic frequency spectrum *which is used in a cable system*," 47 U.S.C. § 522(4) (emphasis added), "the LEC Test would be meaningless as a way of assessing effective competition *to cable operators*" if it required LECs or their affiliates "to carry 'channels' as the Act defines them." *Order* ¶ 20 (RA319). In that scenario, the only entities that could provide "effective competition" to cable operators would be *other cable operators*.

MDTC maintains that the statutory definition of "channel" should be read to apply to all MVPDs, not just cable operators. Br. 54. But even under that interpretation of "channel," applying the statutory definition to the FCC's comparability test would effectively require that providers of competing services be facilities-based MVPDs. *See* Br. 53-54. As explained in Part II above, the LEC Test imposes no facilities-based restriction on the provision of competing services by LECs or their affiliates. Any such artificial restriction is incompatible with Congress's goals and with the reality of today's video programming market. *See Order* ¶ 5 (RA308-09) ("Congress provided room for the LEC Test to cover innovative video services," including "competitive offerings that were not necessarily available" in

1996). The Commission's reading—not MDTC's—comports with Congress's deregulatory preference.

Although the Commission's reading of "channel" is correct under ordinary rules of interpretation, the Commission's reading of its own regulation is entitled to deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-18 (2019). The Commission's construction of the term "channel" is reasonable as a matter of common usage, is the Commission's "official position," directly implicates the Commission's "substantive expertise" in communications technology and competition, and reflects the Commission's "fair and considered judgment." *Id.* at 2415-17. Accordingly, even if the regulatory text were ambiguous, the Commission's reasonable construction would warrant deference. *Town of Weymouth v. Mass. Dep't of Envtl. Prot.*, 961 F.3d 34, 52 (1st Cir. 2020).

At the very least, the FCC's interpretation warrants *Skidmore* deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The Commission gave "thorough consideration" to relevant law and policy when it decided to evaluate comparability of programming in terms of available sources of programming. *Doe v. Leavitt*, 552 F.3d 75, 81-82 (1st Cir. 2009). The Commission's "expertise and consistency" likewise support deference. *Id*. at 82. Congress charged the FCC with assessing effective competition, 47

U.S.C. § 543(a)(2), and the Commission has applied a consistent interpretation of comparability since 1993, *see 1993 Order*, 8 FCC Rcd at 5666-67 ¶ 38 & n.130. This longstanding interpretation should carry even "more persuasive power" because it was "made near the time [the 1992 Cable Act] was enacted," when Congress first introduced the concept of "comparable video programming" in Section 623(*l*)(1)(B). *Mayburg v. Sec'y of Health & Human Servs.*, 740 F.2d 100, 106 (1st Cir. 1984). In these circumstances, *Skidmore* "requir[es] courts to defer" to the Commission's reasonable interpretation of "channel" in its regulation. *Doe*, 552 F.3d at 80.

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

MAKAN DELRAHIM
ASSISTANT ATTORNEY GENERAL

MICHAEL F. MURRAY
DEPUTY ASSISTANT ATTORNEY GENERAL

ROBERT B. NICHOLSON
STEVEN J. MINTZ
ATTORNEYS

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

ASHLEY S. BOIZELLE
ACTING GENERAL COUNSEL

RICHARD K. WELCH
DEPUTY ASSOCIATE GENERAL COUNSEL

/s/ James M. Carr

JAMES M. CARR
ADAM G. CREWS
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

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James M. Carr
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

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I, James M. Carr, hereby certify that on July 15, 2020, I filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the First Circuit using the electronic CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

s/ James M. Carr

James M. Carr
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

Statutory Addendum

47 U.S.C. § 405

§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken

under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.
(b)(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.
(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 522

§ 522. Definitions

For purposes of this subchapter—

* * *

(4) the term "cable channel" or "channel" means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation);

47 U.S.C. § 543

§ 543. Regulation of rates

(a) Competition preference; local and Federal regulation
(1) In general
No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. No Federal agency, State, or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction.
(2) Preference for competition

If the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section. If the Commission finds that a cable system is not subject to effective competition--

(A) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the regulations prescribed by the Commission under subsection (b); and

(B) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c).

(3) Qualification of franchising authority

A franchising authority that seeks to exercise the regulatory jurisdiction permitted under paragraph (2)(A) shall file with the Commission a written certification that--

(A) the franchising authority will adopt and administer regulations with respect to the rates subject to regulation under this section that are consistent with the regulations prescribed by the Commission under subsection (b);

(B) the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.

(4) Approval by Commission

A certification filed by a franchising authority under paragraph (3) shall be effective 30 days after the date on which it is filed unless the Commission finds, after notice to the authority and a reasonable opportunity for the authority to comment, that--

(A) the franchising authority has adopted or is administering regulations with respect to the rates subject to regulation under this section that are not consistent with the regulations prescribed by the Commission under subsection (b);

(B) the franchising authority does not have the legal authority to adopt, or the personnel to administer, such regulations; or

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority do not provide a reasonable opportunity for consideration of the views of interested parties.

If the Commission disapproves a franchising authority's certification, the Commission shall notify the franchising authority of any revisions or modifications necessary to obtain approval.

(5) Revocation of jurisdiction

Upon petition by a cable operator or other interested party, the Commission shall review the regulation of cable system rates by a franchising authority under this subsection. A copy of the petition shall be provided to the franchising authority by the person filing the petition. If the Commission finds that the franchising authority has acted inconsistently with the requirements of this subsection, the Commission shall grant appropriate relief. If the Commission, after the franchising authority has had a reasonable opportunity to comment, determines that the State and local laws and regulations are not in conformance with the regulations prescribed by the Commission under subsection (b), the Commission shall revoke the jurisdiction of such authority.

(6) Exercise of jurisdiction by Commission

If the Commission disapproves a franchising authority's certification under paragraph (4), or revokes such authority's jurisdiction under paragraph (5), the Commission shall exercise the franchising authority's regulatory jurisdiction under paragraph (2)(A) until the franchising authority has qualified to exercise that jurisdiction by filing a new certification that meets the requirements of paragraph (3). Such new certification shall be effective upon approval by the Commission. The Commission shall act to approve or disapprove any such new certification within 90 days after the date it is filed.

(7) Aggregation of equipment costs

(A) In general

The Commission shall allow cable operators, pursuant to any rules promulgated under subsection (b)(3), to aggregate, on a franchise, system, regional, or company level, their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category. Such aggregation shall not be permitted with respect to equipment used by subscribers who receive only a rate regulated basic service tier.

(B) Revision to Commission rules; forms

Within 120 days of February 8, 1996, the Commission shall issue revisions to the appropriate rules and forms necessary to implement subparagraph (A).

(b) Establishment of basic service tier rate regulations

(1) Commission obligation to subscribers

The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.

(2) Commission regulations

Within 180 days after October 5, 1992, the Commission shall prescribe, and periodically thereafter revise, regulations to carry out its obligations under paragraph (1). In prescribing such regulations, the Commission--
(A) shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission;
(B) may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and
(C) shall take into account the following factors:
(i) the rates for cable systems, if any, that are subject to effective competition;
(ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph (7)(B), and changes in such costs;
(iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;
(iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;
(v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;
(vi) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and
(vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).
(3) Equipment
The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for--
(A) installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access programming described in paragraph (8); and
(B) installation and monthly use of connections for additional television receivers.
(4) Costs of franchise requirements
The regulations prescribed by the Commission under this subsection shall include standards to identify costs attributable to satisfying franchise requirements to

support public, educational, and governmental channels or the use of such channels or any other services required under the franchise.
(5) Implementation and enforcement
The regulations prescribed by the Commission under this subsection shall include additional standards, guidelines, and procedures concerning the implementation and enforcement of such regulations, which shall include--
(A) procedures by which cable operators may implement and franchising authorities may enforce the regulations prescribed by the Commission under this subsection;
(B) procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations;
(C) standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation under this section, which standards shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method; and
(D) standards and procedures to assure that subscribers receive notice of the availability of the basic service tier required under this section.
(6) Notice
The procedures prescribed by the Commission pursuant to paragraph (5)(A) shall require a cable operator to provide 30 days' advance notice to a franchising authority of any increase proposed in the price to be charged for the basic service tier.
(7) Components of basic tier subject to rate regulation
(A) Minimum contents
Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:
(i) All signals carried in fulfillment of the requirements of sections 534 and 535 of this title.
(ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.
(iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.
(B) Permitted additions to basic tier
A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic

service tier shall be provided to subscribers at rates determined under the regulations prescribed by the Commission under this subsection.
(8) Buy-through of other tiers prohibited
(A) Prohibition
A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.
(B) Exception; limitation
The prohibition in subparagraph (A) shall not apply to a cable system that, by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel or per program basis in the same manner required by subparagraph (A). This subparagraph shall not be available to any cable operator after--
(i) the technology utilized by the cable system is modified or improved in a way that eliminates such technological limitation; or
(ii) 10 years after October 5, 1992, subject to subparagraph (C).
(C) Waiver
If, in any proceeding initiated at the request of any cable operator, the Commission determines that compliance with the requirements of subparagraph (A) would require the cable operator to increase its rates, the Commission may, to the extent consistent with the public interest, grant such cable operator a waiver from such requirements for such specified period as the Commission determines reasonable and appropriate.
(c) Regulation of unreasonable rates
(1) Commission regulations
Within 180 days after October 5, 1992, the Commission shall, by regulation, establish the following:
(A) criteria prescribed in accordance with paragraph (2) for identifying, in individual cases, rates for cable programming services that are unreasonable;
(B) fair and expeditious procedures for the receipt, consideration, and resolution of complaints from any franchising authority (in accordance with paragraph (3)) alleging that a rate for cable programming services charged by a cable operator violates the criteria prescribed under subparagraph (A), which procedures shall include the minimum showing that shall be required for a complaint to obtain Commission consideration and resolution of whether the rate in question is unreasonable; and

(C) the procedures to be used to reduce rates for cable programming services that are determined by the Commission to be unreasonable and to refund such portion of the rates or charges that were paid by subscribers after the filing of the first complaint filed with the franchising authority under paragraph (3) and that are determined to be unreasonable.

(2) Factors to be considered

In establishing the criteria for determining in individual cases whether rates for cable programming services are unreasonable under paragraph (1)(A), the Commission shall consider, among other factors--

(A) the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;

(B) the rates for cable systems, if any, that are subject to effective competition;

(C) the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;

(D) the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis;

(E) capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and

(F) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned.

(3) Review of rate changes

The Commission shall review any complaint submitted by a franchising authority after February 8, 1996, concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective it receives subscriber complaints.

(4) Sunset of upper tier rate regulation

This subsection shall not apply to cable programming services provided after March 31, 1999.

(d) Uniform rate structure required

A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system. This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are

subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

(e) Discrimination; services for the hearing impaired

Nothing in this subchapter shall be construed as prohibiting any Federal agency, State, or a franchising authority from--

(1) prohibiting discrimination among subscribers and potential subscribers to cable service, except that no Federal agency, State, or franchising authority may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts; or

(2) requiring and regulating the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals.

(f) Negative option billing prohibited

A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

(g) Collection of information

The Commission shall, by regulation, require cable operators to file with the Commission or a franchising authority, as appropriate, within one year after October 5, 1992, and annually thereafter, such financial information as may be needed for purposes of administering and enforcing this section.

(h) Prevention of evasions

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this section and shall, thereafter, periodically review and revise such standards, guidelines, and procedures.

(i) Small system burdens

In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers.

(j) Rate regulation agreements

During the term of an agreement made before July 1, 1990, by a franchising authority and a cable operator providing for the regulation of basic cable service

rates, where there was not effective competition under Commission rules in effect on that date, nothing in this section (or the regulations thereunder) shall abridge the ability of such franchising authority to regulate rates in accordance with such an agreement.

(k) Reports on average prices

(1) In general

The Commission shall publish with its report under section 163 of this title statistical reports on the average rates for basic cable service and other cable programming, and for converter boxes, remote control units, and other equipment of cable systems that the Commission has found are subject to effective competition under subsection (a)(2) compared with cable systems that the Commission has found are not subject to such effective competition.

(2) Inclusion in report

(A) In general

The Commission shall include in its report under paragraph (1) the aggregate average total amount paid by cable systems in compensation under section 325 of this title.

(B) Form

The Commission shall publish information under this paragraph in a manner substantially similar to the way other comparable information is published in such report.

(l) Definitions

As used in this section--

(1) The term “effective competition” means that--

(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

(B) the franchise area is--

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area;

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or

(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than

direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.
(2) The term "cable programming service" means any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.
(m) Special rules for small companies
(1) In general
Subsections (a), (b), and (c) do not apply to a small cable operator with respect to--
(A) cable programming services, or
(B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994,

in any franchise area in which that operator services 50,000 or fewer subscribers.
(2) "Small cable operator" defined
For purposes of this subsection, the term "small cable operator" means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.
(n) Treatment of prior year losses
Notwithstanding any other provision of this section or of section 532 of this title, losses associated with a cable system (including losses associated with the grant or award of a franchise) that were incurred prior to September 4, 1992, with respect to a cable system that is owned and operated by the original franchisee of such system shall not be disallowed, in whole or in part, in the determination of whether the rates for any tier of service or any type of equipment that is subject to regulation under this section are lawful.
(o) Streamlined petition process for small cable operators
(1) In general
Not later than 180 days after December 4, 2014, the Commission shall complete a rulemaking to establish a streamlined process for filing of an effective competition petition pursuant to this section for small cable operators, particularly those who serve primarily rural areas.
(2) Construction
Nothing in this subsection shall be construed to have any effect on the duty of a small cable operator to prove the existence of effective competition under this section.

(3) Definition of small cable operator
In this subsection, the term "small cable operator" has the meaning given the term in subsection (m)(2).

47 C.F.R. § 76.905

§ 76.905 Standards for identification of cable systems subject to effective competition.

(a) Only the rates of cable systems that are not subject to effective competition may be regulated.
(b) A cable system is subject to effective competition when any one of the following conditions is met:
(1) Fewer than 30 percent of the households in its franchise area subscribe to the cable service of a cable system.
(2) The franchise area is:
(i) Served by at least two unaffiliated multichannel video programming distributors each of which offers comparable programming to at least 50 percent of the households in the franchise area; and
(ii) the number of households subscribing to multichannel video programming other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area.
(3) A multichannel video programming distributor, operated by the franchising authority for that franchise area, offers video programming to at least 50 percent of the households in the franchise area.
(4) A local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.
(c) For purposes of paragraphs (b)(1) through (b)(3) of this section, each separately billed or billable customer will count as a household subscribing to or being offered video programming services, with the exception of multiple dwelling buildings billed as a single customer. Individual units of multiple dwelling buildings will count as separate households. The term "households" shall not include those dwellings that are used solely for seasonal, occasional, or recreational use.

(d) A multichannel video program distributor, for purposes of this section, is an entity such as, but not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, a video dialtone service provider, or a satellite master antenna television service provider that makes available for purchase, by subscribers or customers, multiple channels of video programming.
(e) Service of a multichannel video programming distributor will be deemed offered:
(1) When the multichannel video programming distributor is physically able to deliver service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service; and
(2) When no regulatory, technical or other impediments to households taking service exist, and potential subscribers in the franchise area are reasonably aware that they may purchase the services of the multichannel video programming distributor.
(f) For purposes of determining the number of households subscribing to the services of a multichannel video programming distributor other than the largest multichannel video programming distributor, under paragraph (b)(2)(ii) of this section, the number of subscribers of all multichannel video programming distributors that offer service in the franchise area will be aggregated.
(g) In order to offer comparable programming as that term is used in this section, a competing multichannel video programming distributor must offer at least 12 channels of video programming, including at least one channel of nonbroadcast service programming.
(h) For purposes of paragraph (b)(2) of this section, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities. Attributable interest shall be defined by reference to the criteria set forth in Notes 1 through 5 to § 76.501.
(i) For purposes of paragraph (b)(4) of this section, entities are affiliated if either entity has an attributable interest in the other or if a third party has an attributable interest in both entities. Attributable interest shall be defined as follows:
(1) A 10% partnership or voting equity interest in a corporation will be cognizable.
(2) Subject to paragraph (i)(3), a limited partnership interest of 10% or more shall be attributed to a limited partner unless that partner is not materially involved, directly or indirectly, in the management or operation of the media-related activities of the partnership and the relevant entity so certifies. An interest in a Limited Liability Company ("LLC") or Registered Limited Liability Partnership ("RLLP") shall be attributed to the interest holder unless that interest holder is not materially involved, directly or indirectly, in the management or operation of the

media-related activities of the partnership and the relevant entity so certifies. Certifications must be made pursuant to the guidelines set forth in Note 2(f) to § 76.501.
(3) Notwithstanding paragraph (i)(2), the holder of an equity or debt interest or interests in an entity covered by this rule shall have that interest attributed if the equity (including all stockholdings, whether voting or nonvoting, common or preferred, and partnership interests) and debt interest or interests, in the aggregate, exceed 33 percent of the total asset value (all equity plus all debt) of that entity.
(4) Discrete ownership interests held by the same individual or entity will be aggregated in determining whether or not an interest is cognizable under this section. An individual or entity will be deemed to have a cognizable investment if the sum of the interests other than those held by or through "passive investors" is equal to or exceeds 10%.

47 C.F.R. § 76.906

§ 76.906 Presumption of effective competition.

In the absence of a demonstration to the contrary cable systems are presumed: (a) To be subject to effective competition pursuant to section 76.905(b)(2); and (b) Not to be subject to effective competition pursuant to section 76.905(b)(1), (3) or (4).

47 C.F.R. § 76.907

§ 76.907 Petition for a determination of effective competition.

(a) A cable operator (or other interested party) may file a petition for a determination of effective competition with the Commission pursuant to the Commission's procedural rules in § 76.7.
(b) If the cable operator seeks to demonstrate that effective competition as defined in § 76.905(b)(1), (3), or (4) exists in the franchise area, it bears the burden of demonstrating the presence of such effective competition. Effective competition as defined in § 76.905(b)(2) is governed by the presumption in § 76.906, except that where a franchising authority has rebutted the presumption of competing provider effective competition as defined in § 76.905(b)(2)and is certified, the cable operator must demonstrate that circumstances have changed and effective competition is present in the franchise area.

Note to paragraph (b): The criteria for determining effective competition pursuant to § 76.905(b)(4) are described in Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report and Order in CS Docket No. 96–85, FCC 99–57 (released March 29, 1999).
(c) If the evidence establishing effective competition is not otherwise available, cable operators may request from a competitor information regarding the competitor's reach and number of subscribers. A competitor must respond to such request within 15 days. Such responses may be limited to numerical totals. In addition, with respect to petitions filed seeking to demonstrate the presence of effective competition pursuant to § 76.905(b)(4), the Commission may issue an order directing one or more persons to produce information relevant to the petition's disposition.

47 C.F.R. § 76.910

§ 76.910 Franchising authority certification.

(a) A franchising authority must be certified by the Commission in order to regulate the basic service tier and associated equipment of a cable system within its jurisdiction.
(b) To be certified, the franchising authority must file with the Commission a written certification that:
(1) The franchising authority will adopt and administer regulations with respect to the rates for the basic service tier that are consistent with the regulations prescribed by the Commission for regulation of the basic service tier;
(2) The franchising authority has the legal authority to adopt, and the personnel to administer, such regulations;
(3) Procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties; and
(4) The cable system in question is not subject to effective competition. The franchising authority must submit specific evidence demonstrating its rebuttal of the presumption in § 76.906 that the cable operator is subject to effective competition pursuant to section 76.905(b)(2). Unless a franchising authority has actual knowledge to the contrary, the franchising authority may rely on the presumption in § 76.906 that the cable operator is not subject to effective competition pursuant to section 76.905(b)(1), (3), or (4). The franchising authority bears the burden of submitting evidence rebutting the presumption that competing provider effective competition, as defined in § 76.905(b)(2), exists in the franchise

area. If the evidence establishing the lack of effective competition is not otherwise available, franchising authorities may request from a multichannel video programming distributor information regarding the multichannel video programming distributor's reach and number of subscribers. A multichannel video programming distributor must respond to such request within 15 days. Such responses may be limited to numerical totals.

(c) The written certification described in paragraph (b) of this section shall be made by completing and filing FCC Form 328. FCC Form 328 can be obtained from the internet at http://www.fcc.gov/Forms/Form328/328.pdf or by calling the FCC Forms Distribution Center at 1–800–418–3676. The form must be filed by

(1) Registered mail, return receipt requested, or

(2) Hand-delivery to the Commission and a date-stamped copy obtained. The date on the return receipt or on the date-stamped copy is the date filed.

(d) A copy of the certification form described in paragraph (c) of this section must be served on the cable operator before or on the same day it is filed with the Commission.

(e) Unless the Commission notifies the franchising authority otherwise, the certification will become effective 30 days after the date filed, provided, however, That the franchising authority may not regulate the rates of a cable system unless it:

(1) Adopts regulations:

(i) Consistent with the Commission's regulations governing the basic tier; and

(ii) Providing a reasonable opportunity for consideration of the views of interested parties, within 120 days of the effective date of certification; and

(2) Notifies the cable operator that the authority has been certified and has adopted the regulations required by paragraph (e)(1) of this section.

(f) If the Commission denies a franchising authority's certification, the Commission will notify the franchising authority of any revisions or modifications necessary to obtain approval.