

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Charter Communications, Inc.

Petition for Determination of Effective Competition in:

32 Massachusetts Communities

MB 18-283  
CSR-8965-E

**MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE  
OPPOSITION TO CHARTER COMMUNICATIONS, INC.'S  
PETITION FOR SPECIAL RELIEF**

Commonwealth of Massachusetts  
Department of Telecommunications and Cable

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Dated: October 25, 2018

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**I. Introduction and Summary**

The Federal Communications Commission (“Commission”) should deny the September 21, 2018, Petition for Special Relief (“Petition”) filed by Charter Communications, Inc. (“Charter”) because Charter is not subject to effective competition in the franchise areas referenced in the Petition (“franchise areas”).<sup>1</sup> Charter claims that it is subject to effective competition in the franchise areas under the local exchange carrier effective competition test. As fully explained below, the local exchange carrier test requires a direct, physical connection between a company providing local telephone exchange service in the franchise area and the households in the franchise area. AT&T’s DIRECTV NOW service does not meet this standard for several reasons, including that under the LEC test, AT&T is not a LEC in the franchise areas, and that AT&T’s DIRECTV NOW service does not provide channels and does not offer video

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<sup>1</sup> *Petition of Charter Commc’ns, Inc. for a Determination of Effective Competition*, MB Docket No. 18-283 (2018).

programming services directly to subscribers. Further, the Petition is contrary to the Commission's goals of encouraging facilities-based investment and limiting regulation of the Internet. The Massachusetts Department of Telecommunications and Cable ("MDTC") files this Opposition pursuant to section 76.7 of the Commission's rules, and in its capacity as regulator of cable rates in the Commonwealth of Massachusetts.<sup>2</sup>

## **II. The Local Exchange Carrier Test**

In 1996, Congress established a fourth test by which a cable operator could establish that it is subject to effective competition, known as the Local Exchange Carrier ("LEC") test.<sup>3</sup>

Congress stated that the Commission may determine that a cable operator is subject to effective competition if the operator can establish:

that 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

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<sup>2</sup> 47 C.F.R. § 76.7. The MDTC "is the certified 'franchising authority' for regulating basic service tier rates and associated equipment costs in Massachusetts." 207 C.M.R. § 6.02; *see also* MASS. GEN. LAWS ch. 166A, §§ 2A, 15 (establishing the MDTC's authority to regulate cable rates). In addition, the MDTC is charged with representing the Commonwealth before the Commission. MASS. GEN. LAWS ch. 166A, § 16. On September 26, 2018, the Commission granted an assented to motion for extension of time, extending the deadline for filing comments and oppositions to the Petition to October 25, 2018. E-mail from Brendan Murray, Deputy Chief, Policy Div., Media Bureau, Comm'n, to Sean M. Carroll, Deputy Gen. Counsel, MDTC (Sept. 26, 2018, 12:22 EDT).

<sup>3</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(b)(3), 110 Stat. 115 (1996); 47 U.S.C. § 543(l)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). The MDTC reiterates that deregulation on account of "effective competition" does not produce the intended result of basic service tier rates being held in check. *See, e.g., In re Amendment to the Comm'n's Rules Concerning Effective Competition*, MB Docket No. 15-53, MDTC Comments at 13-14, App. 1 (Apr. 9, 2015); *In re Charter Commc'ns, Inc. Petition for Determination of Effective Competition in 46 Local Franchise Areas*, CSR-8558-E, MDTC Opposition to Charter's Petition at 4 n.12 (Feb. 15, 2012); *cf.*, David Lieberman, *Charter CEO: Streaming Video Services Cannibalize Satellite Subscriptions*, DEADLINE, May 2, 2017, <https://deadline.com/2017/05/chartar-ceo-streaming-video-offerings-cannibalize-satellite-subscriptions-1202081436> (quoting Charter CEO, Tom Rutledge: "If you take a look at the evidence so far, the current [over the top] offerings just seem to be cannibalizing the same satellite providers' own base. It's just a shift.").

services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.<sup>4</sup>

A cable operator is presumed not to be subject to effective competition on account of the LEC test.<sup>5</sup> Accordingly, the cable operator bears the burden of proving that it is subject to effective competition under the test.<sup>6</sup>

To carry this burden, the cable operator must make several showings. First, the cable operator must demonstrate that the provider is a LEC, LEC affiliate, or multichannel video programming distributor (“MVPD”) using the facilities of such LEC or its affiliate as those terms are applied under the LEC test.<sup>7</sup> The cable operator then must demonstrate that a LEC “offers video programming services directly to subscribers.”<sup>8</sup> Services are “offered” for purposes of the LEC test if the provider is physically able to deliver service to potential subscribers, 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.<sup>9</sup> Further, the cable operator must demonstrate that the video programming offered is comparable

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<sup>4</sup> 47 U.S.C. § 543(l)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4).

<sup>5</sup> 47 C.F.R. § 76.906.

<sup>6</sup> *Id.* §§ 76.906-76.907(b); *In re Implementation of Cable Act Reform Provisions of the Telecomms. Act of 1996*, 14 FCC Rcd. 5296, 5305, *Report & Order* (1999) (“*Cable Reform Order*”).

<sup>7</sup> 47 U.S.C. § 543(l)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). Unless the context dictates otherwise, for administrative ease, the MDTC refers to LECs, LEC affiliates, and MVPDs using the facilities of LECs or affiliates collectively as LEC.

<sup>8</sup> 47 U.S.C. § 543(l)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4).

<sup>9</sup> *In re Cablevision of Boston, Inc.*, 17 FCC Rcd. 4772, 4773, *Memorandum Opinion & Order* (2002); *In re Time Warner Cable*, 16 FCC Rcd. 2958, 2962, *Memorandum Opinion & Order* (2001); *Cable Reform Order*, 14 FCC Rcd. at 5300 (incorporating the definition of “offered” in 47 C.F.R. § 76.905(e) into the LEC test); *see also* Petition at 8 (referencing the requirement that a LEC be physically able to deliver the service to households).

to its own programming.<sup>10</sup> The Commission has also stated that to carry its burden under the LEC test, a cable operator must show:

that the LEC intends to build-out its cable system within a reasonable period of time if it has not completed its build-out; that no regulatory, technical or other impediments to household service exist; that the LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased; that the LEC has actually begun to provide services; the extent of such services; the ease with which service may be expanded; and the expected date for completion of construction in the franchise area.<sup>11</sup>

As demonstrated below, Charter is not subject to effective competition in the franchise areas.

### **III. As The Cable Industry Has Consistently And Correctly Stated, Online Video Distributors, Such As AT&T Via Its DIRECTV NOW Service, Do Not Offer Channels Of Video Programming**

Charter cannot demonstrate that it is subject to effective competition under the LEC test, because AT&T does not offer programming that is comparable to Charter's programming.<sup>12</sup> The LEC test requires that a LEC offer video programming services that are comparable to the video programming services provided by the unaffiliated cable operator.<sup>13</sup> The Commission has made clear that "comparable programming" means "at least 12 channels of video programming, including at least one channel of nonbroadcast service programming."<sup>14</sup> The Commission adopted this definition of "comparable programming" and affirmed its applicability to the LEC

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<sup>10</sup> 47 U.S.C. § 543(l)(1)(D); *see also* 47 C.F.R. § 76.905(e), (g).

<sup>11</sup> *See, e.g., In re Cablevision of N.J., LLC*, 30 FCC Rcd. 7431, 7432, *Memorandum Opinion & Order* (2015).

<sup>12</sup> Unless the context dictates otherwise, for administrative ease, the MDTC refers to AT&T and DIRECTV, LLC collectively as AT&T.

<sup>13</sup> 47 U.S.C. § 543(l)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4).

<sup>14</sup> 47 C.F.R. § 76.905(g); *see also* Petition at 11.

test knowing that Congress had defined “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 (as television channel is defined by the Commission by regulation).”<sup>15</sup> Thus, to prove that AT&T provides comparable programming via DIRECTV NOW, Charter must prove that AT&T offers 12 portions of the electromagnetic frequency spectrum which are used in a cable system and which are capable of delivering a television channel. As the Commission has tentatively found and the cable industry, including Charter’s predecessor-in-interest and trade association, has repeatedly asserted, online video distributors (“OVDs”) that do not also provide this transmission path do not provide channels.<sup>16</sup>

Charter has not and cannot prove that AT&T offers 12 channels of video programming as that term is defined under federal law.<sup>17</sup> AT&T does not offer 12 portions of the electromagnetic frequency spectrum which are used in a cable system and which are capable of delivering a

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<sup>15</sup> 47 U.S.C. § 522(4); *see also Cable Reform Order*, 14 FCC Rcd. at 5307-08. The Commission’s regulations define a “television channel” as “a band of frequencies 6 MHz wide in the television broadcast band and designated either by number or by the extreme lower and upper frequencies.” 47 C.F.R. § 73.681; *see also id.* §§ 73.603, 73.606, 73.682(a)(1). The Commission’s regulations also define a “cable television channel” as a “signaling path provided by a cable television system.” *Id.* § 76.5(r)-(u). AT&T does not, through DIRECTV NOW, offer television channels or cable television channels.

<sup>16</sup> *See infra* Section IV.

<sup>17</sup> At the very least, the Commission cannot find that AT&T offers channels—and by extension, comparable programming—through DIRECTV NOW until it resolves its open rulemaking on the issue and finds that OVDs offer channels of video programming. *See Marseilles Land & Water Co. v. Fed. Energy Regulatory Comm’n*, 345 F.3d 916, 920 (D.C. Cir. 2003) (“For an administrative agency may not slip by the notice and comment rule-making requirements needed to amend a rule by merely adopting a *de facto* amendment to its regulation through adjudication.”); *In re Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs.*, 29 FCC Rcd. 15,995, *Notice of Proposed Rulemaking* (2014); *In re Interpretation of the Terms “Multichannel Video Programming Distributor” & “Channel” as Raised in Pending Program Access Complaint Proceeding*, 27 FCC Rcd. 3079, *Public Notice* (2012). To the extent the Commission does so in the future, and subsequently grants the Petition, the grant should be effective only as of the date the Commission finds that OVDs offer channels of video programming.

television channel.<sup>18</sup> Charter claims that AT&T's DIRECTV NOW is a streaming video service that provides customers with access to 65 channels of live television.<sup>19</sup> However, other than this conclusory statement, Charter does not attempt to carry its burden of demonstrating that AT&T provides channels as that term is defined.<sup>20</sup> Rather, Charter claims that defining the word "channel" by using the definition that Congress provided for the Commission would be inadvisable.<sup>21</sup> This claim is, of course, facially erroneous.<sup>22</sup> Moreover, the Commission rejected such a claim in *Sky Angel*, preliminarily concluding that an internet protocol television provider that provides video over a broadband Internet connection does not provide "channels" to its subscribers:

While Sky Angel appears to interpret the term "channel" in a non-technical sense to mean a stream of video programming, it fails to address the definitions of that term in the Act and the Commission's rules, which appear to include a transmission path as a necessary element of a "channel." . . . The evidence put forth at this stage of the proceeding indicates that Sky Angel does not provide its subscribers with a transmission path; rather, it is the subscriber's Internet service provider that provides the transmission path.<sup>23</sup>

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<sup>18</sup> See 47 U.S.C. § 522(4); 47 C.F.R. § 76.905(g).

<sup>19</sup> Petition at 3.

<sup>20</sup> Rather than addressing the relevant statutes and Commission precedent, Charter argues that DIRECTV NOW's service qualifies as comparable because using the statutory definition of channel would "effectively import into the LEC Test a requirement that a LEC affiliate also be an MVPD." Petition at 11 n.45, 16. Regardless of the merits of that claim, however, it is inapposite. Congress defined channel separately from its definition of MVPD. See 47 U.S.C. § 522(4), (13). There is no reason to look to the definition of MVPD to analyze whether DIRECTV NOW provides channels. For further discussion of Charter's claims regarding MVPDs and the LEC test, see *infra* Section IV.

<sup>21</sup> See Petition at 11 n.45 (seeking to eschew the statutory definition of "channel" for an "ordinary and more vernacular meaning" of the word).

<sup>22</sup> See *Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935) ("[D]efinition by the average man or even by the ordinary dictionary with its studied enumeration of subtle shades of meaning is not a substitute for the definition set before us by the lawmakers with instructions to apply it to the exclusion of all others. There would be little use in such a glossary if we were free in despite of it to choose a meaning for ourselves.") (citations omitted).

<sup>23</sup> *In re Sky Angel U.S., LLC*, 25 FCC Rcd. 3879, 3883, *Order* (2010) (footnotes omitted).



Charter's omission of any discussion of *Sky Angel* is telling. Like Sky Angel U.S., LLC, AT&T does not provide its DIRECTV NOW subscribers with a transmission path; rather, it is each subscriber's Internet service provider—ironically, in this case, Charter—that provides the transmission path.<sup>24</sup> As a result, AT&T does not provide its subscribers with channels and thus does not provide comparable programming.

This construction is so clear that Charter itself seemed to agree just three years ago. In 2015, the trade association that represents Charter, NCTA – The Internet and Television Association (“NCTA”), stated:

[Online video distributors] do not make available multiple “channels” of video programming for purchase by subscribers. The term “channel” is itself unambiguously defined, for purposes of Title VI of the Communications Act, to require the provision of a *transmission path* on which video programming is provided – and *not* simply the video programming itself. There is no indication that Congress intended to define “channel” differently for purposes of the Title VI definition of an MVPD. To the contrary, all evidence – in the statute and in the legislative history – indicates that Congress meant the term “channel” to mean a transmission path throughout Title VI . . . .<sup>25</sup>

Charter supported NCTA's comments, generally, and seemed to indicate agreement with this analysis, specifically.<sup>26</sup>

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<sup>24</sup> See Petition at 7-8 (stating that households must have an Internet connection to view DIRECTV NOW on their televisions). To find that Charter faces effective competition from AT&T's video product that is reliant on Charter's infrastructure would ignore the fact that DIRECTV NOW subscribers actually contribute to Charter's profits by subscribing to Charter's broadband service.

<sup>25</sup> *In re Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs.*, MB Docket No. 14-261, NCTA Comments at 1-2 (Mar. 3, 2015) (agreeing with the Commission's tentative findings in *Sky Angel*). Ironically, Charter is now asking the Commission to do exactly what NCTA told the Commission it could not do: “The Commission may not simply discard the statutory definition of a ‘channel’ and replace it with one that it claims better meets its *own* policy preferences.” *Id.* at 2.

<sup>26</sup> *In re Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs.*, MB Docket No. 14-261, Charter Comments at 2-3 & n.2 (Mar. 3, 2015) (agreeing with NCTA's claim that the Commission lacks authority to characterize non-facilities-based providers as MVPDs, which NCTA supported with the referenced analysis of the definition of channel).

Further, both NCTA and Charter's predecessor-in-interest, Time Warner Cable Inc., affirmed this same analysis just three years prior. NCTA stated that the statutory definition of channel "makes clear that a 'channel' of video programming is not the programming itself but the physical transmission path used to deliver that programming."<sup>27</sup> Likewise, Time Warner stated:

Congress's decision to define the term "channel" reflects its judgment that it should be treated as a term of art, despite any "more common," "less technical," or "everyday" meanings of the word. And Congress's subsequent decision not to repeal or otherwise alter the definition of "channel" when it enacted the 1992 Cable Act "indicate[s] that Congress intended for the pre-existing definition of 'channel' to apply in interpreting the term 'MVPD.'" To be sure, the 1984 definition of "channel" includes cable-specific language that does not apply literally to the transmission pathways employed by non-cable MVPDs. But it makes perfect sense that, in expanding its regulatory framework to cover new video distribution platforms in 1992, Congress intended its reference to "channels" in the definition of MVPD to conform to the understanding of "channel" grounded in the text and history of the Act. In contrast, there is no sound basis to posit that Congress sought to abandon the established meaning of "channel" *sub silentio*. As the [Commission's March 30, 2012] Public Notice recognizes, the fact that all of the entities included in "the illustrative list in the Act's definition of an MVPD . . . provide a transmission path for the delivery of video programming" confirms Congress's intent to build on, rather than supplant, the established definition of "channel."<sup>28</sup>

The Commission adopted the definition of comparable programming and affirmed its applicability to the LEC test with full knowledge of the definition of "channel" under federal

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<sup>27</sup> *In re Interpretation of the Terms "Multichannel Video Programming Distributor" & "Channel" as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, NCTA Comments at 2 (May 14, 2012) (referencing the definition of channel under 47 U.S.C. § 522(4)); *see also In re Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs.*, MB Docket No. 14-261, NCTA Comments at 7 (Mar. 3, 2015) (stating that it is "unambiguously clear that a channel is the transmission path that delivers video programming – not the video programming itself").

<sup>28</sup> *In re Interpretation of the Terms "Multichannel Video Programming Distributor" & "Channel" as Raised in Pending Program Access Complaint Proceeding*, MB Docket No. 12-83, Time Warner Comments at 3-4 (May 14, 2012) (footnotes omitted).

law.<sup>29</sup> If the Commission wished to establish a different standard for determining whether programming is comparable, it would have done so. As the Commission stated in the *Cable Reform Order*: “As a general matter of statutory interpretation, a term used repeatedly in the same connection should be given the same meaning unless different meanings are required to make the statute consistent.”<sup>30</sup> Congress and the Commission use the term “channel” repeatedly in the same connection, and different meanings are not required to make the statute consistent. Accordingly, there is no basis for a claim that “channel” should mean anything but “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).”<sup>31</sup> Because AT&T does not, via DIRECTV NOW, provide this transmission path, it does not provide channels. Accordingly, DIRECTV NOW does not provide programming comparable to Charter’s, and Charter thus cannot meet the LEC test.

#### **IV. If The Commission Does Determine That AT&T Offers Comparable Programming Through DIRECTV NOW, Such A Determination Would Reclassify Online Video Distributors As Multichannel Video Programming Distributors**

Either AT&T does not offer channels through DIRECTV NOW and thus does not provide comparable programming for purposes of the LEC test, or AT&T does offer channels through DIRECTV NOW and is thus an MVPD based on that online video offering.

Charter claims that the LEC test does not explicitly require that the LEC or LEC affiliate be an MVPD.<sup>32</sup> Regardless of the merits of this claim, however, if the Commission finds, albeit

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<sup>29</sup> See *Cable Reform Order*, 14 FCC Rcd. at 5307-08; 47 C.F.R. § 76.905(g).

<sup>30</sup> *Cable Reform Order*, 14 FCC Rcd. at 5307-08; see also Petition at 11 n.45.

<sup>31</sup> 47 U.S.C. § 522(4).

<sup>32</sup> Petition at 16-18. But see *In re Rifkin & Assocs., Inc.*, 16 FCC Rcd. 2918, 2920-21, *Memorandum Opinion & Order* (2001) (finding that the competing service was provided by a LEC affiliate because the provider

improperly, that AT&T's provision of DIRECTV NOW satisfies the LEC test, it necessarily would mean that AT&T is an MVPD based on this provision of online video service.<sup>33</sup> As discussed above, the LEC test requires that a LEC offer comparable programming, which the Commission has defined as 12 channels of video programming.<sup>34</sup> Congress defines an MVPD as "a person . . . who makes available for purchase, by subscribers or customers, multiple *channels* of video programming."<sup>35</sup> Therefore, if the Commission determines that DIRECTV NOW offers 12 channels of video programming, it necessarily follows that AT&T, through DIRECTV NOW, "makes available for purchase, by subscribers or customers, multiple channels of video programming" and is thus an MVPD based on that provision of service.<sup>36</sup>

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was "an MVPD affiliated with a LEC"). In its discussion on this subject, and indeed throughout the Petition, Charter ignores material parts of the LEC test, namely here the requirement that a LEC or LEC affiliate offer comparable programming. *See* 47 U.S.C. § 543(l)(1)(D); *supra* Section III; *infra* Sections V.A.2, V.B. The LEC test allows the cable operator to rely on a provider that offers video programming by any means, but only if such programming is comparable. 47 U.S.C. § 543(l)(1)(D).

<sup>33</sup> Given the findings necessary under the LEC test, this would be so even absent an explicit finding by the Commission.

<sup>34</sup> 47 U.S.C. § 543(l)(1)(D); 47 C.F.R. § 76.905(g).

<sup>35</sup> 47 U.S.C. § 522(13) (emphasis added); *see also* Petition at 3, 5, 12 (claiming that DIRECTV NOW offers 12 channels of video programming).

<sup>36</sup> 47 U.S.C. § 522(13). In 2014, then-Commissioner Pai stated: "I agree that it is time for the Commission to resolve the question of whether Internet-based distributors of video programming can be MVPDs, an issue that has been pending at the Commission for over four years." *In re Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs.*, 29 FCC Rcd. 15,995, 16,049 (2014) (Comm'r Pai, concurring). The MDTC agrees and would welcome such a resolution. In the interim, however, the Commission can—and should—deny the Petition because as federal law currently stands, OVDs that provide services such as DIRECTV NOW are not MVPDs on account of the fact that they do not provide channels. Indeed, the Commission cannot grant Charter's Petition without, at the very least, a change to federal law. *See Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) ("An agency is bound by its regulations so long as they remain operative, but may repeal them and substitute new rules in their place.") (citing *Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 389 (1932)).

As stated above, either AT&T offers channels via DIRECTV NOW and is an MVPD based on that online video offering, or AT&T does not offer channels through DIRECTV NOW and does not provide comparable programming under the LEC test.

**V. AT&T Does Not Offer Video Programming Services Directly To Subscribers In The Franchise Areas**

The LEC test requires that a LEC offer video programming directly to subscribers in the franchise areas.<sup>37</sup> Charter has failed to demonstrate that AT&T “offers” DIRECTV NOW in the franchise areas and that AT&T offers DIRECTV NOW “directly to subscribers.”

**A. AT&T Does Not Offer Video Programming Services In The Franchise Areas**

A service is “offered” for purposes of the LEC test if the service is technically and actually available.<sup>38</sup> A service is technically available if the service provider is physically able to deliver the service to potential subscribers with no or only minimal additional investment by the provider.<sup>39</sup> The service is actually available if no regulatory, technical, or other impediments to households taking service exist.<sup>40</sup>

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<sup>37</sup> 47 U.S.C. § 543(l)(1)(D).

<sup>38</sup> *Cable Reform Order*, 14 FCC Rcd. at 5300, 5303, 5305 (“The definition of ‘offer’ incorporated into the LEC test requires that LEC service be both technically and actually available to households.”); *see also In re Implementation of Section of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd. 5631, 5654, *Report & Order & Further Notice of Proposed Rulemaking* (1993) (reaffirming that service must be actually available in addition to technically available).

<sup>39</sup> *Cable Reform Order*, 14 FCC Rcd. at 5300; *see also In re Cablevision of Boston, Inc.*, 17 FCC Rcd. 4772, 4773, *Memorandum Opinion & Order* (2002); *In re Time Warner Cable*, 16 FCC Rcd. 2958, 2962, *Memorandum Opinion & Order* (2001). A LEC’s service must also substantially overlap the incumbent cable operator’s service and potential subscribers in the franchise area must be reasonably aware that they may purchase the services. *Cable Reform Order*, 14 FCC Rcd. at 5305.

<sup>40</sup> *Cable Reform Order*, 14 FCC Rcd. at 5300 (incorporating the definition of “offered” in 47 C.F.R. § 76.905(e) into the LEC test).

1. *AT&T is not physically able to deliver DIRECTV NOW to potential subscribers in the franchise areas*

Under the LEC test, the cable operator has the burden to prove that a LEC's service is technically available by showing that a LEC is physically able to deliver service to potential subscribers.<sup>41</sup> As an example of such technical availability, the Commission discussed a cable operator's system, "namely its cable," passing a household.<sup>42</sup> As evidenced by the discussion of "channels" above, the Commission clearly requires a LEC to have and provide a physical connection, whether by wire or spectrum, the entire way to the subscribing household.<sup>43</sup> AT&T does not have that physical connection to households in the franchise areas.

Charter concedes that AT&T cannot provide DIRECTV NOW to households without a broadband connection.<sup>44</sup> And AT&T does not provide broadband internet access service in the franchise areas.<sup>45</sup> Thus, AT&T is not "physically able to deliver" DIRECTV NOW to potential subscribers. At most, AT&T is physically able to deliver DIRECTV NOW to broadband networks, which then physically deliver the service to subscribers. This does not meet the LEC test's standard. The standard is not that a LEC be physically able to deliver the service part of the way to potential subscribers, or that a LEC be able to prepare the service for delivery to

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<sup>41</sup> *Id.* at 5300; 47 C.F.R. § 76.905(e).

<sup>42</sup> *In re Implementation of Section of the Cable Television Consumer Prot. & Competition Act of 1992: Rate Regulation*, 8 FCC Rcd. 5631, 5655, *Report & Order & Further Notice of Proposed Rulemaking* (1993).

<sup>43</sup> *See supra* Section III; *cf. infra* Section V.B (discussing the requirement that the provision of service be direct to subscribers).

<sup>44</sup> Petition at 7, 8.

<sup>45</sup> FCC, Fixed Broadband Deployment Data from FCC Form 477, MA - Fixed - Jun 17v1, <https://transition.fcc.gov/form477/BroadbandData/Fixed/Jun17/Version%201/MA-Fixed-Jun2017.zip> (last visited Oct. 3, 2018). Indeed, Charter references only its own broadband service in the Petition. *See* Petition at 8.

potential subscribers; the requirement is that a LEC be “physically able to deliver service to potential subscribers.”<sup>46</sup> AT&T does not meet this standard and DIRECTV NOW is not technically available under the LEC test. As a result, AT&T does not “offer” DIRECTV NOW in the franchise areas under the LEC test.

*2. The prerequisite that households subscribe to broadband service is an impediment to households taking DIRECTV NOW*

In addition to not being technically available, DIRECTV NOW is not actually available under the LEC test. The cable operator has the burden to prove that a LEC’s service is actually available by showing that no regulatory, technical, or other impediments to households taking a LEC’s service exist.<sup>47</sup> As stated above, Charter acknowledges that households cannot subscribe to DIRECTV NOW if they do not also subscribe to broadband service.<sup>48</sup> The only broadband service available in the franchise areas that Charter references is its own broadband service.<sup>49</sup> Charter’s website advertises its broadband service in Auburn, one of the franchise areas, at a price of \$44.99, plus taxes and fees, per month.<sup>50</sup> A per-month subscription from an unaffiliated

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<sup>46</sup> *Cable Reform Order*, 14 FCC Rcd. at 5300; 47 C.F.R. § 76.905(e)(1). Charter seems to conflate “physically able to offer” and “physically able to deliver,” discussing the latter in the context of actual availability as opposed to technical availability. *Compare* Petition at 7, *with* Petition at 8, 9. While physical ability to offer is required, the Commission has made clear that technical availability requires that a LEC must be physically able to *deliver* the service. *Cable Reform Order*, 14 FCC Rcd. at 5300; *see also* 47 C.F.R. § 76.905(e)(1); *In re Coxcom, Inc.*, 25 FCC Rcd. 3233, 3236 n.25, *Memorandum Opinion & Order* (2010); *In re Cablevision of Boston, Inc.*, 17 FCC Rcd. 4772, 4773, *Memorandum Opinion & Order* (2002).

<sup>47</sup> *Cable Reform Order*, 14 FCC Rcd. at 5300 (incorporating the definition of “offered” in 47 C.F.R. § 76.905(e) into the LEC test); *see also In re Cablevision of N.J., LLC*, 30 FCC Rcd. 7431, 7432, *Memorandum Opinion & Order* (2015).

<sup>48</sup> *See* Petition at 7, 8.

<sup>49</sup> *Id.* at 8.

<sup>50</sup> This is a promotional rate, currently available, for 12 months, with the standard rate of \$64.99 applying thereafter. *See* SPECTRUM INTERNET, <https://www.spectrum.com/internet> (last visited Oct. 1, 2018).

third party that costs more than DIRECTV NOW itself is clearly an impediment to households taking DIRECTV NOW. As Charter is seeking to claim DIRECTV NOW as a direct competitor to its cable service, the comparison is between Charter's service (currently \$18.07 per month for the basic service tier in Auburn)<sup>51</sup> to AT&T's DIRECTV NOW service (\$40.00 per month for the most inexpensive plan, plus \$44.99 per month for a broadband subscription in Auburn, plus additional taxes and fees).<sup>52</sup> That is \$84.99, rather than \$18.07, a clear impediment to households taking the service. Indeed, the Commission has stated that cost and "many other factors" are impediments to households benefitting from online entertainment services.<sup>53</sup> The necessity to subscribe to broadband service as a prerequisite is an impediment to households taking online streaming services such as DIRECTV NOW.

Charter attempts to disregard this impediment by claiming that it does not qualify as a "technical impediment."<sup>54</sup> Essentially, Charter argues that the Commission's standard of whether a service is "technically available"—specifically the absence of a need for substantial additional investment by the distributor—also applies to whether a technical impediment exists

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<sup>51</sup> This rate is currently under review pursuant to the Commission's rate regulations. *See Petition of Charter Commc'ns to establish & adjust the basic serv. tier programming, equip., & installation rates for the cmtys. in Mass. served by Charter Commc'ns that are currently subject to rate regulation*, D.T.C. Docket No. 17-5 (filed Nov. 2, 2017).

<sup>52</sup> *See* Petition at Attachment B (advertising the most inexpensive DIRECTV NOW plan for \$40 per month); SPECTRUM INTERNET, <https://www.spectrum.com/internet> (last visited Oct. 1, 2018).

<sup>53</sup> FED. COMM'NS COMM'N, STRATEGIES AND RECOMMENDATIONS FOR PROMOTING DIGITAL INCLUSION (2017), <https://docs.fcc.gov/public/attachments/DOC-342993A1.pdf>; *see also In re Inquiry Concerning Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable & Timely Fashion*, GN Docket No. 17-199, MDTC Comments at 4-5, App. (Sept. 21, 2017) (discussing affordability as an impediment to broadband adoption).

<sup>54</sup> Petition at 8-9.



to households taking service.<sup>55</sup> This claim fails for two reasons. First, if the requirements that the service be technically available and that no technical impediments exist were interchangeable, the Commission would not need both of them.<sup>56</sup> At the very least, the Commission would have made clear that the requirements could be met by the same proof. Second, presuming *arguendo* Charter’s claim that “technical impediments” refers only to impediments faced by the video distributor, it still does not demonstrate that AT&T faces no technical impediments to households taking DIRECTV NOW. Even if the no-impediments requirement is viewed from AT&T’s perspective, the broadband prerequisite is an impediment that AT&T itself faces to households taking DIRECTV NOW. AT&T is a for-profit company seeking as many DIRECTV NOW subscribers as possible.<sup>57</sup> If a household faces an impediment to subscribing to DIRECTV NOW—such as the necessity of maintaining an independent broadband connection—that impediment is no less of an impediment from AT&T’s perspective since the company seeks to acquire that household as a subscriber.

Moreover, even if the necessity of a broadband connection was somehow deemed to not be a *technical* impediment to households taking DIRECTV NOW, the necessity is nevertheless an impediment. Under the LEC test, the burden is on Charter to prove “that no regulatory, technical *or other impediments* to households taking service exist.”<sup>58</sup> Charter has not carried this

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<sup>55</sup> *Id.* (attempting to connect the Commission’s definition of “technically available” to a Notice of Proposed Rulemaking also discusses technical impediments).

<sup>56</sup> *See supra* notes 38-40 and accompanying text (explaining that the Commission requires both technical availability and actual availability, where actual availability requires no technical impediments to taking service).

<sup>57</sup> *See* Petition at 9-11, Attachment E (describing AT&T’s efforts to advertise DIRECTV NOW).

<sup>58</sup> *Cable Reform Order*, 14 FCC Rcd. at 5300 (emphasis added); *see also* 47 C.F.R. § 76.906; *In re Cablevision of N.J., LLC*, 30 FCC Rcd. 7431, 7432, *Memorandum Opinion & Order* (2015).

burden. In fact, Charter did not even attempt to carry this burden, relying instead on its “technical impediment” argument and providing only a conclusory claim about the availability of broadband in the franchise areas.<sup>59</sup> The necessity of a broadband connection is an impediment, technical or otherwise, to households taking DIRECTV NOW. Accordingly, DIRECTV NOW is not actually available under the LEC test, and AT&T thus does not “offer” DIRECTV NOW in the franchise areas under the LEC test.

**B. AT&T Does Not Offer Video Programming Services *Directly To Subscribers In The Franchise Areas***

In addition to not “offering” its service to households as that term is defined under the LEC test, AT&T does not provide its service directly to subscribers. To establish effective competition via the LEC test, Charter must demonstrate that a LEC offers video programming services “directly to subscribers.”<sup>60</sup> AT&T does not offer DIRECTV NOW directly to subscribers. As Charter acknowledges, AT&T provides DIRECTV NOW to subscribers only via the subscribers’ broadband internet access service.<sup>61</sup> And AT&T does not provide broadband internet access service in the franchise areas.<sup>62</sup> In fact, the only broadband service Charter references specifically is its own broadband service.<sup>63</sup> At most, then, Charter can claim that AT&T provides DIRECTV NOW indirectly to subscribers, over Charter’s broadband facilities.<sup>64</sup>

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<sup>59</sup> Petition at 8.

<sup>60</sup> 47 U.S.C. § 543(l)(1)(D).

<sup>61</sup> Petition at 7, 8.

<sup>62</sup> FCC, Fixed Broadband Deployment Data from FCC Form 477, MA - Fixed - Jun 17v1, <https://transition.fcc.gov/form477/BroadbandData/Fixed/Jun17/Version%201/MA-Fixed-Jun2017.zip> (last visited Oct. 3, 2018).

<sup>63</sup> Petition at 8.

<sup>64</sup> *See id.*

As the D.C. District Court recently stated, Internet-based video services transmit video signals “to Internet service providers, as opposed to sending them directly to the subscribers’ digital device.”<sup>65</sup>

In addition to being indirect in plain, practical terms, Black’s Law Dictionary defines “direct” as “undeviating” or “[f]ree from extraneous influence.”<sup>66</sup> AT&T does not provide DIRECTV NOW to subscribers undeviating or free from extraneous influence. Charter describes its broadband internet access service as follows:

Charter utilizes as necessary a variety of reasonable network management practices consistent with industry standards to ensure that all of its Customers have a high quality online experience. These practices are undertaken without regard to the source, destination, content, application, or service, and which are designed to protect Customers from activities that can unreasonably burden our network or compromise security. Charter’s online network is a bidirectional network, the proper management of which is essential to promote the use and enjoyment of the Internet by all of our Customers. Charter monitors its network and attempts to address projected demand for capacity, taking reasonable steps to expand capacity as necessary.<sup>67</sup>

Because Charter reasonably manages traffic on its broadband network, including DIRECTV NOW, AT&T does not provide DIRECTV NOW to subscribers free from extraneous influence, but rather subject to Charter’s influence.<sup>68</sup> However nondiscriminatory that influence may be, it

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<sup>65</sup> *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 19 (D.D.C. 2015).

<sup>66</sup> *Direct*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>67</sup> CHARTER SPECTRUM, NETWORK MANAGEMENT PRACTICES, <https://www.spectrum.com/policies/network-management-practices> (last visited Oct. 1, 2018). As noted above, it defies logic to find that Charter faces effective competition from a video provider that is reliant on Charter’s infrastructure. See *supra* note 24.

<sup>68</sup> The MDTC notes that the Commission recently ruled that broadband internet access service providers such as Charter are no longer subject to Commission-imposed network management conduct rules such as prohibitions on blocking, throttling, or paid prioritization. *In re Restoring Internet Freedom*, 33 FCC Rcd. 311, *Declaratory Ruling, Report & Order, & Order* (2018). Accordingly, while Charter has committed to refrain from blocking or degrading lawful content or service, under Commission rules Charter is now free, upon appropriate notice, to degrade or discriminate against online streaming video services such as DIRECTV NOW if it so choose. See CHARTER SPECTRUM, NETWORK MANAGEMENT PRACTICES, <https://www.spectrum.com/policies/network-management-practices> (last visited Oct. 1, 2018).

is unquestionably an influence that is extraneous from AT&T, foreclosing a finding that AT&T provides DIRECTV NOW directly to subscribers.

Charter neglects to address substantively the requirement that video service be provided “directly to subscribers,” effectively writing the word “directly” out of the statute.<sup>69</sup> The Commission, however, does not have that luxury.<sup>70</sup> The word “directly” does not appear in any other effective competition test.<sup>71</sup> As then-Commissioner Furchtgott-Roth correctly stated in response to the Commission’s order implementing the LEC test: “[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.”<sup>72</sup> Charter states that due to “controlling statutory language, there is no reason to consult the limited legislative history regarding the LEC test.”<sup>73</sup> The MDTC agrees.<sup>74</sup> The

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<sup>69</sup> Charter makes two references to “direct,” but neither addresses this requirement, let alone demonstrates that AT&T offers DIRECTV NOW directly to subscribers. First, Charter states that streaming devices such as Chromecast or Roku allow customers to stream DIRECTV NOW “directly to their televisions.” Petition at 7. This claim of directness, however, is in reference to those devices, not AT&T. By the time DIRECTV NOW service reaches a streaming device, the service has already traveled over the required broadband connection, rendering it indirect as from AT&T. Elsewhere, Charter states that AT&T provides DIRECTV NOW “to consumers directly over the Internet.” *Id.* at 17. This is, of course, not the same thing as saying that AT&T offers DIRECTV NOW “directly to subscribers.” Charter does not attempt to claim, because it cannot, that the service it provides via a third party’s broadband facilities is direct. *See id.*

<sup>70</sup> *See id.* at 16 (quoting *Landstar Exp. Am., Inc. v. Fed. Maritime Comm’n*, 569 F.3d 493, 498 (D.C. Cir. 2009) (stating that federal agencies cannot rewrite a statute’s plain text)); *Ajit Pai*, FCC.GOV, <https://www.fcc.gov/about/leadership/ajit-pai> (last visited Oct. 2, 2018) (“As a creature of Congress, the FCC must respect the law as set forth by the legislature.”).

<sup>71</sup> 47 U.S.C. § 543(l)(1).

<sup>72</sup> *Cable Reform Order*, 14 FCC Rcd. at 5385 (Comm’r Furchtgott-Roth, dissenting) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

<sup>73</sup> Petition at 14.

<sup>74</sup> *But see infra* Section VI (discussing why the legislative history of the LEC test demands that the Commission deny the Petition).

statute plainly requires a LEC to offer service directly to subscribers.<sup>75</sup> In fact, Congress used the term “directly” elsewhere in the exact same section of the Telecommunications Act of 1996, discussing a cable operator’s provision of service “directly or through an affiliate,” demonstrating that Congress knew how to modify the word “directly” if it so desired.<sup>76</sup> AT&T does not provide DIRECTV NOW directly to subscribers. Accordingly, Charter has not demonstrated that it is subject to effective competition under the LEC test.

## **VI. Charter Has Not Demonstrated That AT&T Is A Local Exchange Carrier Under The LEC Test**

AT&T is not a local exchange carrier in the Massachusetts franchise areas. To be a local exchange carrier, an entity must be “engaged in the provision of telephone exchange service or exchange access.”<sup>77</sup> AT&T is not engaged in the provision of telephone exchange service or exchange access in the franchise areas.<sup>78</sup> Although AT&T may be registered as a local exchange carrier in Massachusetts, this is not sufficient to meet Congress’s definition of a local exchange carrier, which requires actual provision of service.<sup>79</sup>

Further, Congress made clear when it established the LEC test that its focus was on the local, facilities-based presence of local exchange carriers in the relevant franchise area.<sup>80</sup> Under

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<sup>75</sup> 47 U.S.C. § 543(l)(1)(D).

<sup>76</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, § 301, 110 Stat. 56, 116 (1996) (codified as 47 U.S.C. § 543(m)(2)). Congress modified and broadened the word “direct” in other parts of the Act as well. See, e.g., *id.* § 101 (codified as 47 U.S.C. § 251(a)(1)).

<sup>77</sup> 47 U.S.C. § 153(32).

<sup>78</sup> *AT&T home & business services in the United States*, ATT.COM, <https://www.att.com/local/phone> (last visited Oct. 2, 2018) (listing the states in which AT&T provides telephone exchange service, but not listing Massachusetts).

<sup>79</sup> 47 U.S.C. § 153(32).

<sup>80</sup> See 142 CONG. REC. H1159 (daily ed. Feb. 1, 1996) (statement of Rep. Boucher) (predicting that, due to their physical presence, telephone companies offering cable service would deploy broadband “throughout their local exchanges”). Indeed, the entire thrust of the Telecommunications Act of 1996 was facilities-

the statutory construction canon *noscitur a sociis*, “[a] word is given more precise content by the neighboring words with which it is associated.”<sup>81</sup> The LEC test covers video programming services offered by “a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate).”<sup>82</sup> The parenthetical’s reference to the facilities of a LEC or its affiliate makes clear that the services offered by a “LEC” or “LEC affiliate” must be offered using the facilities of that LEC or its affiliate. As the Commission stated: “We believe that Congress [in the Telecommunications Act of 1996] expressed a clear preference, where possible, for facilities-based competition in the video marketplace from both cable operators and telephone companies.”<sup>83</sup> Indeed, in implementing the LEC test, the Commission specifically emphasized LECs’ “ubiquitous presence in the market” as part of Congress’s rationale in adopting the test.<sup>84</sup> LECs, collectively, may have a ubiquitous presence nationwide, but a company clearly does not have a ubiquitous, facilities-based presence in a state in which it does not provide telephone exchange service or exchange access. In referencing the legislative history of the LEC test, Charter omits from Senator Pressler’s

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based competition. *See In re Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd. 18,223, 18,259, *Second Report & Order* (1996).

<sup>81</sup> *See, e.g., Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 740 (2017), *cited in In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, FCC 18-133, ¶ 55, *Declaratory Ruling & Third Report & Order* (2018).

<sup>82</sup> 47 U.S.C. § 543(l)(1)(D).

<sup>83</sup> *In re Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd. 18,223, 18,259, *Second Report & Order* (1996).

<sup>84</sup> *Cable Reform Order*, 14 FCC Rcd. at 5302 (confirming Congress’s intent that “the LEC presence would be ubiquitous” in the franchise area); *see also In re Comcast of Potomac, LLC*, 31 FCC Rcd. 3947, 3949 n.21, *Memorandum Opinion & Order* (2016) (“The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so.”); *In re Mediacom Del. LLC*, 26 FCC Rcd. 3668, 3674 n.60, *Memorandum Opinion & Order* (2011) (reaffirming the LEC’s ubiquity in the franchise area as a congressional rationale); *Cable Reform Order*, 14 FCC Rcd. at 5305 (referring to a LEC’s construction to enable video service in the franchise area).

rationale “the technological evolution [LECs’] networks are undergoing.”<sup>85</sup> The Senator’s statement is again a clear reference to LECs’ use of their own facilities in the relevant franchise area to provide the competing video service.

Furthermore, the Commission has consistently found that LECs meet the “local exchange carrier” requirement in the LEC test due to their actual provision of telephone exchange service *in the relevant franchise area*.<sup>86</sup>

Charter’s reliance on LEC affiliates’ provision of multichannel multipoint distribution service (“MMDS”) misses the mark.<sup>87</sup> Charter uses MMDS to argue that a video service need

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<sup>85</sup> 141 CONG. REC. S8243 (daily ed. June 13, 1995) (statement of Sen. Pressler); *see also* Petition at 15.

<sup>86</sup> *In re Paragon Commc'ns, Inc.*, 17 FCC Rcd. 27,866, 27,866, *Memorandum Opinion & Order* (2002) (finding that RCN was a LEC in Gardena because it provided local exchange and other telephone services within Gardena); *In re AT&T CSC, Inc.*, 17 FCC Rcd. 24,638, 24,639, *Memorandum Opinion & Order* (2002) (finding that RCN was a LEC in Lexington because it provided local exchange and other telephone services within Lexington); *In re Kansas City Cable Partners*, 16 FCC Rcd. 18,751, 18,752, *Memorandum Opinion & Order* (2001) (holding that Everest Connections Corporation was a LEC under the LEC test because the company was a local exchange carrier “serving customers in Kansas”); *In re Time Warner Entm't-Advance/Newhouse P'ship*, 16 FCC Rcd. 4822, 4823, *Memorandum Opinion & Order* (2001) (deeming ClearSource a LEC in Waco under the LEC test due to its provision of telephone exchange and other telephone services within Waco); *In re Cablevision of Midwest*, 16 FCC Rcd. 1383, 1384, *Memorandum Opinion & Order* (2000) (finding that Ohio Bell was a LEC because it provided telephone exchange and other telephone services *within the franchise areas*). Even in cases where the Commission references a statewide telecommunications service registration, the Commission’s findings are generally backed by a LEC’s actual provision of service in the franchise area. *In re Bright House Networks, LLC*, 22 FCC Rcd. 12,905, 12,905, *Memorandum Opinion & Order* (2007) (finding Verizon to be a LEC for purposes of the LEC test in the franchise area where it provided local exchange access services); *In re Mediacom Minn. LLC*, 21 FCC Rcd. 204, 204, *Memorandum Opinion & Order* (2006) (“Mediacom further asserts that Wabash and HomeTown Solutions are local exchange carriers that *provide local exchange access services in the respective Franchise Areas*.”) (emphasis added); *In re Time Warner Entm't Co., L.P.*, 18 FCC Rcd. 1837, 1837, *Memorandum Opinion & Order* (2003) (determining that Doylestown Telephone Company Inc. was a LEC in the franchise areas for purposes of the LEC test where it provided service in the franchise areas); *In re Tex. Cable Partners, L.P.*, 17 FCC Rcd. 4377, 4377 *Memorandum Opinion & Order* (2002) (finding that ClearSource, Inc. was a LEC in Corpus Christi under the LEC test where the company provided “local exchange carrier (“LEC”) service” in Corpus Christi); *see also In re MCC Iowa LLC*, 20 FCC Rcd. 15,273, 15,273, 15,275, *Memorandum Opinion & Order* (2005) (relying on *Texas Cable Partners* due in part to ClearSource’s actual provision of “local exchange access services” in Corpus Christi).

<sup>87</sup> *See* Petition at 14.

not be provided over a LEC's facilities to qualify for the LEC test.<sup>88</sup> However, in the cases on which Charter relies, the LEC affiliates provided MMDS via microwave, which requires a license from the Commission.<sup>89</sup> Therefore, the affiliates actually did provide MMDS over LEC-affiliated facilities, thus rendering Charter's argument actually supportive of the fact that the LEC test requires use of LEC or LEC-affiliated facilities in the franchise area.

Finally, because carriage classification is activity-based, a provider can be classified as a local exchange carrier only where it is actually engaged in the provision of telephone exchange service or exchange access.<sup>90</sup> For example, in the context of common carriage, the Ninth Circuit recently held that an entity is a common carrier only with respect to its common carriage activities.<sup>91</sup> In other words, an entity is not a common carrier with respect to its non-common-carriage activities.<sup>92</sup> Likewise, then, an entity is a local exchange carrier only with respect to its provision of telephone exchange service or exchange access.<sup>93</sup> And an entity is not a local exchange carrier with respect to areas in which it does not provide telephone exchange service. As a result, AT&T is a LEC only where it actually provides telephone exchange service or

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<sup>88</sup> *Id.*

<sup>89</sup> *See* 47 C.F.R. Part 27.

<sup>90</sup> *See Fed. Trade Comm'n v. AT&T Mobility LLC*, 883 F.3d 848 (9th Cir. 2018) (holding that AT&T's classification as a common carrier extends only insofar as it is engaging in common-carrier services).

<sup>91</sup> *See id.* (upholding the Commission's interpretation that the Federal Trade Commission has jurisdiction "over non-common-carrier services of entities that also engage in common carriage services within the exclusive jurisdiction of the FCC").

<sup>92</sup> *Id.* at 863-64.

<sup>93</sup> *See* 47 U.S.C. § 153(32).



exchange access.<sup>94</sup> As AT&T does not provide telephone exchange service in the franchise areas, it is not a LEC in the franchise areas, and Charter cannot meet the LEC Test.

**VII. If The Commission Determines That AT&T Is A LEC In The Franchise Areas, Such A Determination Would Inherently Subject AT&T's Provision Of DIRECTV NOW To Cable Franchising And Other Regulatory Requirements**

If the Commission were to determine that AT&T is a LEC in the franchise areas for purposes of the LEC test, it would follow that AT&T and its provision of DIRECTV NOW are subject to the regulations and restrictions imposed on telephone companies that provide video programming services.<sup>95</sup> Federal law provides that when a “common carrier is providing video programming to its subscribers in any manner other than through radio-based systems, common carriage of video traffic, or an open video system, it is subject to the requirements of Subchapter V–A of the Cable Act.”<sup>96</sup> Among those requirements is cable franchising.<sup>97</sup>

Generally cable franchising requirements apply to common carriers only when they act as cable operators providing cable service.<sup>98</sup> If the Commission were to find in this case that AT&T's provision of DIRECTV NOW satisfies the LEC test, the Commission would also be required to find that AT&T is a “cable operator” that provides DIRECTV NOW, a “cable

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<sup>94</sup> Additionally, if DIRECTV, LLC's MVPD status based on its provision of direct broadcast satellite service does not attach to its provision of DIRECTV NOW, neither should AT&T's status as a LEC outside of Massachusetts attach to its provision of unrelated video service within Massachusetts. *See supra* Section IV.

<sup>95</sup> *See* 47 U.S.C. §§ 571-73.

<sup>96</sup> *Pac. Bell Tel. Co. v. City of Walnut Creek*, 428 F. Supp. 2d 1037, 1045 (N.D. Cal. 2006) (citing 47 U.S.C. §§ 571-73).

<sup>97</sup> 47 U.S.C. § 541; *see also Pac. Bell Tel. Co. v. City of Walnut Creek*, 428 F. Supp. 2d 1037, 1045 (N.D. Cal. 2006) (noting that “§ 571(a)(3), on its face, can be read to impose cable franchising requirements on common carriers who provide ‘video programming to [their] subscribers in any manner’ other than through radio-based systems, common carriage of video traffic, or an open video system.”).

<sup>98</sup> *See* 47 U.S.C. § 541(b)(1) (requiring a cable operator providing cable service to obtain a cable franchise).

service,” over a “cable system.”<sup>99</sup> A “cable operator” is an entity “(A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.”<sup>100</sup> AT&T would meet either of these definitions if the Commission grants the Petition. First, a “cable service” is a one-way transmission to subscribers of video programming.<sup>101</sup> DIRECTV NOW is a “cable service” because it is the one-way transmission to subscribers of video programming.<sup>102</sup> Second, a common carrier’s facility is a cable system “to the extent such facility is used in the transmission of video programming directly to subscribers.”<sup>103</sup> If the Commission were to grant the Petition, it would have to find under the LEC test that AT&T is a common carrier of local exchange service that transmits video programming directly to subscribers.<sup>104</sup> The Commission would concurrently be deeming AT&T to be providing DIRECTV NOW over a “cable system” because AT&T would be transmitting video programming directly to subscribers.<sup>105</sup> Accordingly, AT&T would be a “cable operator” because it would be providing cable service over a cable system.<sup>106</sup> And as a common carrier acting as a cable operator providing cable service, AT&T would be

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<sup>99</sup> *Id.* § 522(5)-(7).

<sup>100</sup> *Id.* § 522(5).

<sup>101</sup> *Id.* § 522(6).

<sup>102</sup> *See id.*

<sup>103</sup> *Id.* § 522(7)(C). *But see supra* Section V.B.

<sup>104</sup> *See* 47 U.S.C. § 543(l)(1)(D).

<sup>105</sup> *See id.* § 522(7)(C).

<sup>106</sup> *See id.* § 522(5).

subject to cable franchising, in addition to the other requirements and restrictions of Subchapter V-A of Title 47.<sup>107</sup>

### **VIII. A Finding Of Effective Competition Based On A Non-Facilities-Based, Streaming Video Service Would Undermine Commission Policy Goals**

Granting Charter's Petition would contravene the Commission's goals of encouraging facilities-based investment and limiting regulation of the Internet.

Without question one of the Commission's primary goals in recent years has been to make decisions that encourage investment in broadband-capable facilities.<sup>108</sup> A finding of effective competition based on AT&T's provision of a service over an unaffiliated entity's broadband facilities is wholly inconsistent with that goal. As discussed above, Congress intended the LEC test to promote facilities-based competition in the video marketplace. Granting Charter's Petition would not only disregard the desirability of facilities-based investment on its own, but this disregard would be particularly striking in light of the congressional intent behind the LEC test. Such a finding would construe a statute by which Congress referred to LECs' facilities and attempted to encourage facilities-based competition in a way that actually discourages network investment. Specifically, to enable claims of effective competition based on non-facilities-based online video service would be a message to competitive broadband providers and content providers that also provide broadband (*e.g.*,

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<sup>107</sup> *Id.* § 571(a)(3); *see also id.* § 541(b)(1).

<sup>108</sup> *See, e.g., In re Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32 FCC Rcd. 3266, *Notice of Proposed Rulemaking, Notice of Inquiry, & Request for Comment* (2017) (seeking ways to better enable broadband providers such as AT&T to build, maintain, and upgrade their networks); *In re Bridging the Digital Divide for Low-Income Consumers*, 32 FCC Rcd. 10,475, *Fourth Report & Order, Order on Reconsideration, Memorandum Opinion & Order, Notice of Proposed Rulemaking, & Notice of Inquiry* (2017) (proposing to amend the Commission's Lifeline rules "to encourage investment in broadband-capable networks"); Ajit Pai, Comm'r, Fed. Commc'ns Comm'n, Remarks of Commissioner Ajit Pai at the Brandery: A Digital Empowerment Agenda (Sept. 13, 2016) (discussing the importance of incentivizing broadband network buildout).

AT&T, Comcast, Google) that using a competitor's broadband facilities for provision of their content rather than expanding their own is good enough for the Commission. This is particularly so given the Commission's consistent presupposition of some sort of physical presence when applying the LEC test. For almost two decades, the Commission, as Congress intended, has construed the LEC test to require some sort of facilities in the franchise area.<sup>109</sup> Given this history, granting Charter's Petition without any physical presence from a LEC would be a stark course reversal, enhancing such a finding's inconsistency with the Commission's policy goals.

Further, granting the Petition would necessarily expand regulation of the Internet, contrary to the Commission's consistent policy to strive for a deregulatory environment with respect to the Internet.<sup>110</sup> First, if the Commission granted the Petition and thus deemed AT&T a local exchange carrier that provides video programming services, AT&T and its provision of DIRECTV NOW would be subject to the regulations and restrictions the Telecommunications Act of 1996 imposed on telephone companies that provide video programming services, including cable franchising.<sup>111</sup> It seems clear that this expansion of regulation to streaming online video would be contrary to the Commission's policy goals.

Additionally, as fully discussed above, if the Commission finds that AT&T's provision of DIRECTV NOW satisfies the LEC test, it necessarily follows that AT&T's provision of online

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<sup>109</sup> See, e.g., *In re Comcast of Potomac, LLC*, 31 FCC Rcd. 3947, 3949 n.21, *Memorandum Opinion & Order* (2016) ("The incumbent also must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not already done so."); *Cable Reform Order*, 14 FCC Rcd. at 5305 ("Where the competition is from a wire or cable distribution system, the incumbent cable operator must show what commitments the LEC has made to serve that area, *including the status of construction* and the estimated completion date.") (emphasis added); *supra* Section VI.

<sup>110</sup> See, e.g., *In re Restoring Internet Freedom*, 33 FCC Rcd. 311, *Declaratory Ruling, Report & Order, & Order* (2018).

<sup>111</sup> See 47 U.S.C. §§ 571-573; *supra* Section VII.

video service renders the company an MVPD.<sup>112</sup> If OVDs are classified as MVPDs, the Commission’s regulatory reach expands immensely, extending to online video providers like Netflix, Hulu, and Amazon, among many others. To demonstrate this, Chairman Pai stated correctly as a Commissioner concurring with Chairman Wheeler’s proposal to classify OVDs as MVPDs: “In my view, the Commission’s fundamental proposal . . . is premature. And the legal analysis contained in the Notice is heavily slanted to support that result.”<sup>113</sup> Then-Commissioner Pai continued: “Indeed, I fear that [the proposal] could impede continued innovation. I am also worried that this proposal will pave the way for more comprehensive regulation of Internet-based services.”<sup>114</sup> These statements are consistent with Commission regulatory policy since the Chairman was appointed in 2017. The Commission would undermine this policy if it granted the Petition.

In sum, the Commission has diligently fostered a regulatory environment that encourages investment in broadband facilities and does not unnecessarily regulate nascent services. The Commission would contravene these policy goals if it granted the Petition. The Commission should deny the Petition.

## **IX. Conclusion**

The Commission should deny the Petition because Charter is not subject to effective competition in the franchise areas. To establish effective competition based on the LEC test, a cable operator must prove a direct, physical connection between a local exchange carrier and the

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<sup>112</sup> *See supra* Section IV.

<sup>113</sup> *In re Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs.*, 29 FCC Rcd. 15,995, 16,049 (2014) (Comm’r Pai, concurring).

<sup>114</sup> *Id.*

households in the franchise area. Charter has not carried its burden of rebutting the presumption that effective competition does not exist because, under the LEC test, AT&T is not a LEC in the franchise areas, and AT&T's DIRECTV NOW service does not provide channels and does not offer video programming services directly to subscribers. Accordingly, the Commission should deny the Petition.

Respectfully submitted,

KAREN CHARLES PETERSON  
COMMISSIONER

By: /s/ Sean M. Carroll  
Sean M. Carroll  
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October 25, 2018

**CERTIFICATION PURSUANT TO 47 C.F.R. § 76.6(a)(4)**

The undersigned signatory has read the foregoing Opposition, and, to the best of my knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and it is not interposed for any improper purpose.

Respectfully submitted,



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Sean M. Carroll

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October 25, 2018

## DECLARATION OF MICHAEL MAEL

I, Michael Mael, declare, under penalty of perjury that:

1. I am a senior financial analyst at the Massachusetts Department of Telecommunications and Cable ("MDTC"). My duties include, among other things, maintaining the MDTC's records of cable basic service tier rates.
2. I have read the foregoing Opposition to Charter's Petition for Special Relief, and I am familiar with the contents thereof and the matters referred to therein.
3. The facts contained within the Opposition are true and correct to the best of my knowledge, information, and belief.



Date: October 25, 2018

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Michael P. Mael



## **CERTIFICATE OF SERVICE**

I, Shonda D. Green, do hereby certify on this 25th day of October, 2018, that a true and correct copy of the foregoing “Opposition to Charter Communications, Inc.’s Petition for Special Relief” has been sent via U.S. mail, postage prepaid, to the following:

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Shonda D. Green