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REDACTED - FOR PUBLIC INSPECTION

February 13, 2020

Opposition -- Filed Via Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
455 12th Street, SW
Washington, DC 20554

Re: *In re CoxCom, LLC Petition for Determination of Effective Competition*, MB Docket No. 20-10

Dear Ms. Dortch:

Pursuant to 47 C.F.R. §§ 0.459, 76.7(b), and 76.9(b), the Massachusetts Department of Telecommunications and Cable ("MDTC") submits this redacted version of its Opposition in the above-captioned proceeding. The MDTC submitted its confidential Opposition in accordance with *In re Comcast Cable Commc'ns, LLC Petitions for Determination of Effective Competition in 41 Cmtys. in Pa.*, 28 FCC Rcd. 3375, 3376-77 n.16, *Memorandum Opinion & Order* (2013), yesterday via overnight delivery. The attached redacted public copy has been marked "REDACTED – FOR PUBLIC INSPECTION."

Please let me know if you have any questions.

Respectfully submitted,

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

In the Matter of

CoxCom, LLC d/b/a Cox Communications

for Determination of Effective Competition in

Holland, Massachusetts

MB 20-10
CSR-8985-E

**MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
OPPOSITION TO COXCOM, LLC'S PETITION FOR SPECIAL RELIEF**

Commonwealth of Massachusetts
Department of Telecommunications and Cable

KAREN CHARLES PETERSON,
COMMISSIONER

1000 Washington Street, Suite 600
Boston, MA 02118-6500
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Dated: February 13, 2020

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I. Introduction and Summary

The Federal Communications Commission (“Commission” or “FCC”) should deny the Petition for Special Relief (“Petition”) filed by CoxCom, LLC (“Cox” or “Petitioner”) on December 18, 2019 because Cox is not subject to effective competition in its Holland, Massachusetts, franchise area (“Holland” or “Franchise Area”).¹ Cox claims that it is subject to effective competition in the Franchise Area under the statutory local exchange carrier effective competition test (“LEC Test”).² As fully explained below, the LEC Test requires that a LEC or its affiliate offer comparable video programming services to the households in the franchise area. DIRECTV, LLC (“DIRECTV”)’s AT&T TV NOW service does not meet this standard, because it fails to satisfy three of the statute’s requirements: 1) DIRECTV does not offer video

¹ *Petition of CoxCom, LLC for a Determination of Effective Competition*, MB Docket No. 20-10 (2019).

² 47 U.S.C. § 543(l)(1)(D).

programming services directly to consumers in the Franchise Area, 2) DIRECTV does not provide video programming services comparable to that offered by Cox, and 3) AT&T is not a LEC in the Franchise Area. Any amendment to FCC regulations which might allow AT&T TV NOW to satisfy the statutory requirements of the LEC Test would require a rulemaking and cannot be completed via the Charter Order³ or this proceeding. Further, the Petition is contrary to the Cable Act's goal of protecting consumers and to the Commission's goals of encouraging facilities-based investment and limiting regulation of the Internet.⁴ 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.⁵

³ *In re Petition for Determination of Effective Competition in 32 Mass. Cmty. & Kauai, HI*, MB Docket No. 18-283, CSR 8965-E, *Memorandum Opinion & Order* (Oct. 25, 2019) ("Charter Order").

⁴ 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/charters-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.").

⁵ 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 January 13, 2020, the Commission granted a joint motion for extension of time, extending the deadline for filing comments and oppositions to the Petition to February 13, 2020. E-mail from Brendan Murray, Deputy Chief, Policy Div., Media Bureau, Comm'n, to Sean M. Carroll, Gen. Counsel, MDTC (Jan. 13, 2020, 13:25 EST).

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 LEC Test. 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 services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁶

A cable operator is presumed not to be subject to effective competition on account of the LEC Test.⁷ Accordingly, the cable operator bears the burden of proving that it is subject to effective competition under the LEC Test.⁸

To carry this burden, the Commission has determined that a cable operator petitioner must make several showings. Among them, a petitioner must demonstrate that the purported competitive service is provided by 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.⁹ Second, the petitioner must demonstrate that a LEC “offers video programming services directly to subscribers.”¹⁰ FCC regulations interpret this statutory

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

⁷ 47 C.F.R. § 76.906.

⁸ *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*”).

⁹ 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 LECs.

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

requirement to mean that: 1) an MVPD must be “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,”¹¹ 2) “no regulatory, technical, or other impediments to households taking service exist,”¹² and 3) “potential subscribers in the franchise area are reasonably aware that they may purchase the services of the MVPD.”¹³ Third, FCC regulations dictate that an MVPD must demonstrate that it offers “at least 12 channels of video programming, including at least one channel of nonbroadcast service programming” in order for such video programming to be deemed “comparable” for purposes of Section 76.905.¹⁴ DIRECTV is an MVPD¹⁵ and, therefore, subject to these requirements regardless of whether the AT&T TV NOW service is deemed multichannel video programming.¹⁶

As demonstrated below, because AT&T TV NOW cannot satisfy these requirements, Cox is not subject to effective competition in the Franchise Area.

¹¹ 47 C.F.R. § 76.905(e)(1).

¹² *Id.* § 76.905(e)(2).

¹³ *Id.*

¹⁴ *Id.* § 76.905(g).

¹⁵ *See In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 27 FCC Rcd. 8610, 8617, ¶ 18, *Fourteenth Report*, MB Docket No. 07-269 (2012).

¹⁶ *See 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).

III. DIRECTV Does Not Offer AT&T TV NOW in the Franchise Area.

The LEC Test requires that a LEC offer comparable video programming directly to subscribers in the franchise area.¹⁷ Cox has failed to demonstrate that DIRECTV “offers” AT&T TV NOW in the Franchise Area.

AT&T TV NOW is not offered in the Franchise Area, as required by the LEC Test, because the applicable FCC regulations dictate that a LEC’s video programming service—here purportedly a streaming service that consumers can receive only via a broadband connection—is only “offered” to those who either: 1) have a broadband subscription with sufficient capacity to receive the service, or 2) do not have such a broadband service but could obtain one as a result of actions taken by the LEC. AT&T TV NOW cannot meet the statutory requirement of offering service under the plain language of the existing FCC regulations.

Specifically, FCC regulations state that a service is deemed “offer[ed]” 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,”¹⁸ and 2) “no regulatory, technical or other impediments to households taking service exist,”¹⁹ and 3) “potential subscribers in the franchise areas are reasonably aware that they may purchase the service[]”²⁰ The Petitioner has failed to prove that AT&T TV NOW satisfies any of the three parts of this definition of offer.

¹⁷ 47 U.S.C. § 543(l)(1)(D).

¹⁸ 47 C.F.R. § 76.905(e)(1) (emphasis added); *see also Cable Reform Order*, 14 FCC Rcd. 5296, 5300, ¶ 7 (stating that “offer” in 47 U.S.C. § 543(l)(1)(D) “has the same meaning given that term” in 47 C.F.R. § 76.905(e)(1) and (2)).

¹⁹ 47 C.F.R. § 76.905(e)(2).

²⁰ *Id.*

A. DIRECTV Is Not Physically Able to Offer AT&T TV NOW to Potential Customers.

The first part of the definition of “offer” requires that a LEC be physically able to deliver the service to potential subscribers. DIRECTV cannot deliver AT&T TV NOW to households without a broadband connection.²¹ Cox relies on its own broadband service to attempt to show that DIRECTV offers AT&T TV NOW in the Franchise Area.²² In fact, as discussed more fully in Section VII.C *infra*, Cox has at least a [REDACTED] % share of the broadband internet access services market in the Franchise Area.²³ The problem with Cox’s claim is that the FCC has held that “to qualify as an entity effectively competing with a cable operator . . . the facilities [that] a multichannel distributor uses cannot be those of the operator.”²⁴ The FCC’s underlying point with this finding was not limited to MVPDs, but was, of course, a basic market economic principle that a service cannot effectively compete with a cable operator if the service requires the cable operator’s facilities in order to be received. In other words, Cox cannot demonstrate that AT&T TV NOW competes with Cox by relying on the claim that Cox Internet subscribers can stream AT&T TV NOW over Cox’s facilities.

²¹ See Charter Order, ¶¶ 8-9; Petition at 10-13 & n.51.

²² Petition at 11.

²³ The MDTC obtained fixed broadband subscribership data for the Franchise Area from the FCC, and such data was provided to the MDTC on the condition that the MDTC maintain such data’s confidentiality. See FCC, STATE REGULATORY COMMISSION ACCESS TO STATE-SPECIFIC FCC FORM 477 DATA, <https://www.fcc.gov/general/process-state-regulatory-commissions-obtain-state-specific-fcc-form-477-data> (last visited Feb. 10, 2020). Thus the MDTC submits fixed broadband subscribership data for the Franchise Area confidentially. See *In re Comcast Cable Commc’ns, LLC Petitions for Determination of Effective Competition in 41 Cmty. in Pa.*, 28 FCC Rcd. 3375, 3376-77 n.16, *Memorandum Opinion & Order* (2013) (permitting a party in an effective competition proceeding to file data confidentially and reserving the right, if another party requested access to the confidential data, to engage in a more formal process for their evaluation, protection, and limited disclosure).

²⁴ *Implementation of Section of the Cable Television Consumer Prot. & Competition Act of 1992 Rate Regulation*, 8 FCC Rcd. 5631, 5652, ¶ 23, *Report & Order & Further Notice of Proposed Rulemaking* (1993) (“1993 Cable Order”).

Further, neither DIRECTV nor any AT&T affiliate provides fixed broadband Internet access service in the Franchise Area.²⁵ Thus, DIRECTV is not “physically able to deliver” AT&T TV NOW to potential subscribers. At most, DIRECTV is physically able to deliver AT&T TV NOW to a broadband network, which then physically delivers the service to subscribers. This does not meet the LEC Test’s standard. The statutory requirement is that a LEC be “physically able to deliver service to potential subscribers,”²⁶ not that it prepare the service for delivery by a third party that the LEC does not control. Cox has not carried its burden of demonstrating that DIRECTV meets this standard. As a result, DIRECTV does not “offer” AT&T TV NOW in the Franchise Area under the LEC Test.

i. Broadband service is not “ubiquitous” in the Franchise Area.

In determining whether the LEC is physically able to deliver the service to potential subscribers, the Commission considers whether the competing service is “ubiquitous” in the franchise area.²⁷ The Commission regards the relevant “potential subscribers” to be the residents

²⁵ FCC, FORM 477 BROADBAND DEPLOYMENT DATA – DECEMBER 2018 (VERSION 1), MA., <https://transition.fcc.gov/form477/BroadbandData/Fixed/Dec18/Version%201/MA-Fixed-Dec2018.zip> (“2018 FCC Form 477 Deployment Data”) (showing that AT&T does not report offering fixed broadband service in any Massachusetts census block). Cox does not provide any evidence that DIRECTV or an affiliate offers any form of broadband service in the Franchise Area capable of streaming AT&T TV NOW nor was any such evidence contained in the Petition giving rise to the Charter Order. As discussed *infra* Section III.A.ii, wireless broadband service is not a substitute for fixed broadband service.

²⁶ *Cable Reform Order*, 14 FCC Rcd. at 5300; 47 C.F.R. § 76.905(e)(1); *see also 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).

²⁷ *See Cable Reform Order*, 14 FCC Rcd. at 5302, ¶¶ 9, 10; *In re Cablevision of Boston, Inc.*, 17 FCC Rcd. 4772, 4776, ¶ 2 *Memorandum Opinion & Order* (Mar. 13, 2002) (“We have said that there is an ‘expectation that the LEC presence [will] be ubiquitous,’” citing *Cable Reform Order* at 5302); *Cablevision of Boston, Inc.*, 16 FCC Rcd. 14,056, 14,061, ¶¶ 14-15, *Memorandum Opinion & Order* (July 20, 2001) (finding that franchise agreement obligations and competing service provider’s financial capacity and intent to build-out services in every Boston neighborhood satisfies the offer rule); *Cablevision Sys. Long Island Corp.*, 22 FCC Rcd. 13,176, 13,178, ¶ 7, *Memorandum Opinion & Order* (July 19, 2007) (finding that competing cable service provider’s completion of build-out to 94% of households in the franchise area in the first year and franchise agreement obligation to build-out to all remaining areas of the franchise area satisfies the offer requirement). The MDTC acknowledges the Commission’s interpretation that the LEC Test does not contain a minimum penetration requirement. Here we are talking about the purported

of the franchise area, not just a petitioner’s existing customers.²⁸ In other words, determining whether a LEC’s video service is offered does not depend on whether the petitioner’s existing customers could receive that service, it depends on whether all of the households—whether or not they are currently customers of the petitioner—in the franchise area *can* receive the LEC’s video service.

Both the Commission and the Petitioner acknowledge that AT&T TV NOW cannot be delivered to households that do not subscribe to adequate broadband service.²⁹ Even the media articles that Petitioner provides clearly state, for example, that: “[i]n order to watch AT&T TV NOW you need both a high-speed internet connection and a compatible device.”³⁰ Yet the Petitioner has only provided data on the percentage of its own subscribers in the Franchise Area who could subscribe to AT&T TV NOW. The relevant metric to determine whether DIRECTV offers AT&T TV NOW in the Franchise Area is instead the households in the Franchise Area that *can* subscribe to AT&T TV NOW.³¹ DIRECTV is not physically able to deliver AT&T TV

competitor’s, DIRECTV’s, ability to actually provide the service, which can only be provided to households who subscribe to adequate broadband service.

²⁸ See, e.g., *Cable Reform Order*, 14 FCC Rcd. at 5304, ¶ 12 (determining that a LEC’s service that serves only a “specialized or niche market” does not satisfy the LEC Test); *In re CoxCom, Inc.*, 17 FCC Rcd. 17,188, 17,190, ¶ 5 nn.23, 24, *Memorandum Opinion & Order* (Sept. 18, 2002) (determining whether a LEC’s video service met the “offer” requirement of the LEC Test by measuring the percentage of franchise area households which had access to the service); *Cablevision Sys. Long Island Corp.*, 22 FCC Rcd. 13,176, 13,178, ¶ 7, *Memorandum Opinion & Order* (July 19, 2007) (finding that competing cable service provider’s completion of build-out to 94% of households in the franchise area in the first year and franchise agreement obligation to build-out to all remaining areas of the franchise area satisfies the offer requirement).

²⁹ Charter Order, ¶¶ 8-9; Petition at 10-13 & n.51.

³⁰ Petition at Exh. 4. Notably, AT&T TV NOW is no longer supported on Roku, the “most popular streaming platform on the planet.” Stephen Lovely, *Losing Roku Is Just the Latest Disaster for AT&T TV Now*, THE MOTLEY FOOL, Jan. 15, 2020, <https://www.fool.com/investing/2020/01/15/losing-roku-is-just-the-latest-disaster-for-att-tv.aspx>; see also *infra* notes 139-140.

³¹ See *supra* note 27.

NOW to households that do not subscribe to broadband service, regardless of whether those households could choose to subscribe to broadband service.

The Petitioner has not met the offer requirement of the LEC Test because under the plain meaning of the words of Section 76.905(e)(1) DIRECTV cannot provide AT&T TV NOW to all households in the Franchise Area, as detailed below, because a significant percentage of households do not subscribe to an adequate broadband connection. In addition, as discussed more fully in Section III.B. *infra*, the plain meaning of the words of Section 76.905(e)(2) mean that DIRECTV—“the distributor”—cannot make those households capable of subscribing to AT&T TV NOW because neither DIRECTV nor any other AT&T affiliate provides fixed broadband service in the Franchise Area,³² much less is capable of subscribing residents on their behalf.³³ There may be policy reasons to change these regulatory provisions so that it would be sufficient, for proving that a LEC’s service is “offered,” that households, rather than the distributor, have the ability to change households’ capacity to access the LEC’s service. But that is not the plain meaning of either subsections (1) or (2) of Section 76.905(e). And there are

³² See 2018 FCC Form 477 Deployment Data, *supra* note 25. Indeed, although Cox claims that other broadband providers may offer 25/3 Mbps service in the Franchise Area, it references only its own broadband service in the Petition. See Petition at 11.

³³ The first part of the offer rule can also be met by a showing that the LEC has started to offer its service in the franchise area and that the service will become ubiquitous in the future, even if it was not at the time of the petition, given franchise-agreement or similarly binding obligations to build-out throughout the franchise area combined with a showing that the LEC has both the ability and intent to complete such a build-out. *Cablevision Sys. Long Island Corp.*, 22 FCC Rcd. 13,176, 13,178, ¶ 7, *Memorandum Opinion & Order* (July 19, 2007) (finding that competing cable service provider’s completion of build-out to 94% of households in the franchise area in the first year and franchise agreement obligation to build-out to all remaining areas of the franchise area satisfies the offer requirement). Here, where the distributor, DIRECTV, does not offer the broadband internet access service that is required for a potential subscriber to physically access AT&T TV NOW, there is no chance, much less an assurance, that the distributor can or intends to expand the necessary broadband subscriptions in the Franchise Area to make them ubiquitous.

compelling policy reasons, detailed more fully below,³⁴ that the Commission should not change Section 76.905 to have that meaning.

The Petitioner's own broadband subscription numbers³⁵ show that [REDACTED] % of housing units in Holland do not have a broadband internet access service adequate for DIRECTV to physically deliver its AT&T TV NOW service.³⁶ While Cox boasts a subscriber count in Holland that exceeds the number of occupied households in the town,³⁷ Cox's subscriber count appears to include the seasonal and vacation homes that are not included in the number of occupied households but still may subscribe to broadband service from Cox. According to 2018 data from the U.S. Census, there are 1,352 residential properties in Holland.³⁸ Thus, Cox's self-reported 1,027 broadband subscribers comprise approximately 76% of residential properties in Holland, a figure more precise than the 101% of "occupied households" that Cox serves.³⁹

³⁴ See *infra* Section VII.C.

³⁵ Petition at 11 n.53.

³⁶ The number of housing units to which DIRECTV is not physically able to offer AT&T TV NOW has been calculated by the MDTC using the data most favorable to Cox. Specifically, this percentage is based on the number of broadband subscribers Cox claimed to have in Holland on Nov. 30, 2019 in the Petition, and on the number of other providers' subscribers contained in the FCC's most current Form 477 subscription data, as of December 2017. Petition at n.53; UNITED STATES CENSUS BUREAU, 2018 ACS 5-YEAR ESTIMATES DATA PROFILES: SELECTED HOUSING CHARACTERISTICS, <https://data.census.gov/cedsci/table?q=housing%20units&g=0600000US2501372390,2501330665&lastDisplayedRow=34&table=DP04&tid=ACSDP5Y2018.DP04&t=Housing%20Units&vintage=2018&mode=&hidePreview=true> (last visited Jan. 31, 2020). If calculated entirely based upon the most recent available Form 477 data, rather than on Cox's subscription numbers as provided in the Petition, fully [REDACTED] % of Holland housing units did not subscribe to broadband internet access service adequate to receive AT&T TV NOW; see *supra* note 23.

³⁷ Petition at 11 n.53.

³⁸ UNITED STATES CENSUS BUREAU, 2018 ACS 5-YEAR ESTIMATES DATA PROFILES: SELECTED HOUSING CHARACTERISTICS, *supra* note 36.

³⁹ Petition at 11 n.53.

ii. *Mobile broadband is not a substitute for fixed broadband service.*

Cox also makes a reference that mobile broadband internet access service might satisfy the regulatory requirements of the LEC Test’s requirements that DIRECTV “offer” its service “directly to subscribers.”⁴⁰ However, Cox cannot point to a single instance where the Commission has based a finding of effective competition solely on the availability of mobile broadband service. In fact, the Commission has never found that mobile broadband is a functional equivalent of fixed broadband internet access service, and with good reasons.⁴¹

First, mobile broadband may be unavailable in locations where the FCC’s Form 477 data show it to be available or may be available at speeds that differ from what the data reported by providers show, a fact the Commission explicitly acknowledges.⁴² Although Cox cites to coverage maps from the four largest mobile service providers,⁴³ including the coverage maps those providers submitted to the Commission as a part of the Commission’s Form 477 data collection process,⁴⁴ independent observers have found a significant number of locations without

⁴⁰ See, e.g., Petition at 11-12. While DIRECTV claims that AT&T TV NOW can be viewed on a mobile device using as little as 150 kbps download speeds, independent observers have found that streaming video generally requires a minimum of 1 Mbps download speeds on mobile devices. See, e.g., James K. Willcox, *Is Your Internet Fast Enough for Streaming*, CONSUMER REPORTS, Apr. 5, 2019, <https://www.consumerreports.org/broadband/internet-fast-enough-for-streaming-broadband-speed/>.

⁴¹ See, e.g., *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable & Timely Fashion*, GN Docket No. 18-238, 2019 Broadband Deployment Report, FCC 19-44, ¶ 11 (2019).

⁴² See, e.g., *Establishing the Digital Opportunity Data Collection*, WC Docket No. 19-195, *Report & Order & Second Further Notice of Proposed Rulemaking*, FCC 19-79, ¶ 112 (2019) (“Mobile network speed at a particular location and the coverage area of any specific cell site can vary depending on a wide variety of factors, including: (1) the spectrum band employed; (2) cell traffic loading and network capacity in different locations; (3) the availability and quality of cell site backhaul; (4) the capability of consumers’ devices; (5) whether a consumer is using a device indoors or outdoors; (6) terrain and the presence of obstacles between a consumer’s device and the provider’s nearest cell site (e.g., buildings, trees, and other local structures); and (7) weather conditions.”).

⁴³ Petition at 12 & n.57.

⁴⁴ Petition at 11 & n.55.

service or with service at slower speeds than those claimed by providers in their coverage maps.⁴⁵ The FCC investigated alleged mobile service provider map errors and concluded that certain carriers overstated their actual coverage.⁴⁶

Second, mobile broadband is often less reliable than fixed broadband, especially in rural areas like Holland, for several additional reasons. Recent studies have shown that streaming service providers may purposely slow their service, and that mobile service providers in the U.S. routinely throttle their broadband services.⁴⁷ In addition, the interaction of infrastructure capacity and simultaneous demand, both from multiple devices on a single customer's account and from other devices using other accounts which utilize some or all of the same infrastructure the customer relies on for service, can further reduce mobile broadband speeds and availability.⁴⁸

⁴⁵ See, e.g., SASCHA D. MEINRATH, BROADBAND AVAILABILITY & ACCESS IN RURAL PA. 8 (June 2019), https://www.rural.palegislature.us/broadband/Broadband_Availability_and_Access_in_Rural_Pennsylvania_2019_Report.pdf (finding that although mobile providers' coverage maps submitted to the FCC reported 100% statewide availability of mobile broadband service throughout Pennsylvania, user data indicated that such service was not available to a majority of the population of any county in that state); VT. DEPT. OF PUBLIC SERVICE, MOBILE WIRELESS IN VT. (Jan. 15, 2019), https://publicservice.vermont.gov/sites/dps/files/documents/Mobile%20Wireless%20Coverage%20in%20VT_Jan%202019.pdf (finding that in 76% of the 6,065 one square kilometer blocks in Vermont for which mobile service providers reported availability of mobile service to the FCC, speed tests conducted by the Vermont Public Utility Commission could not verify such service).

⁴⁶ *Mobility Fund Phase II Challenge Process*, GN Docket No. 19-367, *Coverage Maps Investigation Staff Report* ¶¶ 4, 74, Tables 3-9 (2019), <https://docs.fcc.gov/public/attachments/DOC-361165A1.pdf>.

⁴⁷ See, e.g., Aria Bracci & Lia Petronio, *New research shows that, post net neutrality, internet providers are slowing down your streaming*, NEWS@NORTHEASTERN, Sept. 10, 2018, <https://news.northeastern.edu/2018/09/10/new-research-shows-your-internet-provider-is-in-control/> (discussing research by Prof. David Choffnes, Northeastern University Assistant Professor of Computer and Information Science); Ryan Knutson & Shalini Ramachandran, *Verizon Throttles Its Videos on AT&T*, *Verizon Networks*, THE WALL STREET JOURNAL, Mar. 24, 2016, <https://www.wsj.com/articles/netflix-throttles-its-videos-on-at-t-verizon-phones-1458857424>.

⁴⁸ Willcox, *supra* note 40; FED. COMM'NS COMM'N, OBI TECHNICAL PAPER NO. 4: BROADBAND PERFORMANCE 19 (2010), <https://transition.fcc.gov/national-broadband-plan/broadband-performance-paper.pdf> ("Finally, cellular signals are shared by many users—the more simultaneous usage, the lower the potential performance of any one connection.... This is a difficulty shared with fixed networks, but the scarcity of spectrum and the variability of receiver location—users can change position or move in and out of coverage areas constantly—make speed and performance measurements far more complex than in a fixed environment.").

Rural mobile broadband customers also face higher latency than those in denser neighborhoods, on average.⁴⁹ Combined, these factors make reliance on mobile broadband to view a streaming service—on a cellular phone or tablet screen⁵⁰—both impractical in many cases and less desirable.

Finally, finding accessing streaming video via mobile broadband to constitute effective competition for basic service tier cable service would be unreasonable and would undermine the Commission’s and the Cable Act’s related goals of fostering competition and, thereby, protecting consumers.⁵¹ In addition to the reliability challenges of streaming video over a mobile broadband connection, streaming video over mobile broadband is significantly more expensive than accessing video through basic service tier cable service.⁵² Further, a significant proportion of low-income and older Americans do not own devices capable of accessing a streaming service,⁵³ and streaming video through a mobile broadband connection is more expensive than doing so through a fixed broadband connection, particularly given provider data caps.⁵⁴

⁴⁹ See, e.g., Francesco Rizzato, *Mobile Experience in Rural USA – An Operator Comparison*, OPENSIGNAL, Sept. 24, 2019, <https://www.opensignal.com/2019/09/24/mobile-experience-in-rural-usa-an-operator-comparison>.

⁵⁰ See Matt Buckler, *From color television to TV everywhere*, JOURNAL INQUIRER, Nov. 14, 2019, Petition at Exh. 4 (“Granted, I am staring at a small screen and sometimes it’s difficult to read type at the bottom of the screen.”).

⁵¹ See, e.g., 47 U.S.C. § 543(l)(1)(D); *Cable Reform Order*, 14 FCC Rcd. at 5304, ¶ 12 (“We do not believe that Congress intended for us to apply the LEC test so broadly that the protections Congress intended through the rate regulation system are lost to consumers without the prospect of competition.”).

⁵² See *infra* Section VII.C for further discussion of pricing concerns.

⁵³ According to a 2019 Pew Research Center survey, 29% of Americans earning below \$30,000 and 47% of Americans over the age of 65 of all income groups reported not owning a smartphone. <https://www.pewresearch.org/internet/fact-sheet/mobile/>.

⁵⁴ Letter from Lindsay Stern, Public Knowledge, to Marlene H. Dortch, Sec’y, FCC, GN Docket No. 19-285 at 3-5 (filed Jan. 21, 2020). For example, while Cox is currently offering its fixed broadband service with a 1 terabit data cap (beyond which Cox slows service speeds) for \$59.99/month to potential customers in Holland (see Petition at Exh. 5), Verizon’s mobile broadband service plan with the highest data cap, 75 GB, costs \$90/month. VERIZON WIRELESS, COMPARE VERIZON UNLIMITED DATA PLANS, <https://www.verizonwireless.com/support/compare-unlimited/> (last visited Jan. 29, 2020). AT&T Wireless,

B. Cox Has Not Shown That There Are No Impediments to Households Taking AT&T TV NOW.

The Petitioner also fails to address its burden to show that “no regulatory, technical or other impediments to households taking service exist.”⁵⁵ In any event, the data that Petitioner used to attempt to satisfy the first part of the offer requirement would also fail to satisfy this second part.

Broadband availability and adoption data for Holland do not demonstrate that lacking a broadband connection is not an impediment to households taking AT&T TV NOW.⁵⁶ The Commission has found that this second part of the offer rule can be met even if households currently face a technical or other impediment to taking the LEC’s video service if an “individual investment,” such as installing a drop from an existing street trunk to a home, can enable service, but cannot be met if a “community investment,” such as installing a cable trunk to the street, is required.⁵⁷ But the Petitioner provides no evidence as to how many of those households in the Franchise Area that currently cannot receive AT&T TV NOW could do so with only an “individual investment.”⁵⁸ The Petitioner does not identify how many households in the

which allows certain of its customers to stream AT&T TV NOW over its mobile broadband network without counting it against the customers’ data cap, starts at \$50 per month for service recommended for streaming video on a mobile device. AT&T, AT&T WIRELESS PLANS – EXPLORE OUR BEST CELL PHONE PLANS, <https://www.att.com/plans/wireless/> (last visited Feb. 11, 2020); AT&T, AT&T TV NOW UNLIMITED DATA USAGE FAQ, (last visited Feb. 11, 2020). AT&T’s \$50 per month mobile plan has a monthly cap of 30 GB for use as a mobile hotspot, which would permit only 14.3 hours per month of viewing AT&T TV NOW on a connected device such as a television at the highest video quality. AT&T, AT&T WIRELESS PLANS – EXPLORE OUR BEST CELL PHONE PLANS, *supra*; *see also* notes 158 and 160 and accompanying text (discussing amount of broadband data capacity required in order to stream video and the fact that the average American watches approximately four hours of television per day).

⁵⁵ 47 C.F.R. § 76.905(e)(2).

⁵⁶ *See* Petition at 13-14.

⁵⁷ 1993 Cable Order, ¶ 27.

⁵⁸ *Id.*

Franchise Area lack access to the necessary download speeds required for AT&T TV NOW service, only that “broadband internet access service is widespread among Holland residents.”⁵⁹ Based upon the information available, it is impossible to distinguish between those who lack the required download speeds because they would require an “individual investment” to have access to such speeds, and those who lack the required download speeds because they would require a “community investment” to have access to such speeds. The Petitioner fails to provide the relevant data and thus does not carry its burden of proving that that no impediments to households taking service exist.

The Commission has ruled that requiring customers to purchase a satellite dish in order to receive satellite television service is not an impediment to a satellite television provider “offering” its services.⁶⁰ However, there are important differences between purchasing a satellite dish and maintaining a subscription to broadband Internet service which render analogous treatment of the two situations inappropriate. In both the satellite dish example and in similar examples discussed in the 1993 Cable Order,⁶¹ the individual investment required for a household to take the potentially competitive service was the purchase and installation of equipment. Streaming services like AT&T TV NOW, on the other hand, require the customer to have broadband Internet access service, a service which requires the customer both to purchase and install equipment and to purchase the broadband service itself, from a third party provider and in perpetuity. Rather than a “reasonable customer-provided addition[],”⁶² purchasing broadband Internet access service every month is a substantial cost, a cost likely in excess of the

⁵⁹ Petition at 12.

⁶⁰ See Charter Order, ¶ 9.

⁶¹ 1993 Cable Order, ¶¶ 30, 32 (discussing video services delivered via MMDS and direct broadcast systems).

⁶² Charter Order, ¶ 9.

cost of the service the cable operator claims to constitute effective competition, here AT&T TV NOW.⁶³ Also, unlike the examples discussed in the 1993 Cable Order, the equipment and service that customers would be required to purchase in order to take AT&T TV NOW are effectively offered only by the Petitioner in the Franchise Area.⁶⁴ As the Commission has stated, “to qualify as an entity effectively competing with a cable operator . . . the facilities [that] a multichannel distributor uses cannot be those of the operator.”⁶⁵ For these reasons, the Petitioner cannot overcome its burden of showing that requiring customers to subscribe to a separate service—broadband Internet access service—in addition to installing the equipment necessary to receive that separate service, does not constitute an impediment to households taking the AT&T TV NOW service.⁶⁶

C. Cox Has Not Shown That Potential Customers in Holland Are Reasonably Aware That They Can Purchase AT&T TV NOW.

Finally, the Petitioner has failed to show that “potential subscribers in the franchise area are reasonably aware that they may purchase the services of the multichannel video programming distributor.”⁶⁷ In making this determination, the Commission looks to whether the LEC is marketing the service in the franchise area and whether the LEC is currently providing the service to customers in the franchise area.⁶⁸ Petitioner fails to provide evidence of either. Petitioner fails to cite to a single advertisement, on any medium, promoting AT&T TV NOW,

⁶³ See *infra* Section VII.C.

⁶⁴ See *infra* Section VII.C (calculating Cox’s share of the broadband internet access services market in the Franchise Area as between [REDACTED] % and [REDACTED] %).

⁶⁵ 1993 Cable Order, ¶ 23.

⁶⁶ 47 C.F.R. § 76.905(e)(2).

⁶⁷ *Id.*

⁶⁸ See, e.g., *In re Cablevision of N.J., LLC*, 30 FCC Rcd. 7431, 7432, *Memorandum Opinion & Order* (2015).

anywhere, let alone in Holland.⁶⁹ In addition, Petitioner provides no evidence that AT&T TV NOW has any current customers in the Franchise Area.

Instead, to support its contention that potential customers in the Franchise Area are “reasonably aware” of AT&T TV NOW, Cox offers three pieces of evidence: 1) the Commission’s references to evidence of DIRECTV’s advertising of DIRECTV NOW provided by Charter in its effective-competition petition;⁷⁰ 2) evidence from AT&T’s website and some online coupon websites offering discounts on AT&T TV NOW;⁷¹ and 3) evidence of telecommunications industry journalism that mentions AT&T TV NOW.⁷² This evidence fails to meet the Commission’s established standard for petitioners attempting to meet this third part of the definition of “offer.”

First, the Petitioner cites to evidence of DIRECTV NOW advertising included in the Charter Petition as one way potential customers today would become aware of AT&T TV NOW.⁷³ This advertising has no bearing on current potential-customer awareness in Massachusetts, however, because it advertised DIRECTV NOW, not AT&T TV NOW, and because it is now up to four years old.⁷⁴ Second, the Petitioner does not reference any advertising of AT&T TV NOW at all, and instead only provides printouts from DIRECTV’s own AT&T TV

⁶⁹ The “marketing materials” appended to the Petition include printouts from AT&T TV NOW’s own website and from three websites that provide discount codes for assorted goods and services. Petition at Exh. 4.

⁷⁰ Petition at 13 & n.66 (citing Charter Order, ¶ 10 (citing *Petition of Charter Commc’ns, Inc. for a Determination of Effective Competition*, MB Docket No. 18-283 (2018) (“Charter Petition”))).

⁷¹ *Id.* at Exh. 4.

⁷² *Id.* at Exh. 6.

⁷³ *Id.* at 13.

⁷⁴ The Charter Order cited two pieces of evidence provided by Charter for the Commission’s conclusion that potential customers in the franchise areas for which Charter petitioned were aware of AT&T TV NOW. The first was Charter’s claim that “DIRECTV NOW ‘received considerable publicity since its debut’” in 2016. Charter Order, ¶ 10 & n.46. The second was a letter from the American Cable Association in support of the Charter Petition which cited a July 24, 2017 Multichannel News report. *Id.*, ¶ 10 & n.48.

NOW webpage and three online coupon websites.⁷⁵ This absence of advertising in the Petition is likely not for want of searching by Cox but rather because AT&T reportedly wound down all forms of advertising for its AT&T TV NOW service in the fall of 2019 as, analysts believe, AT&T prepares to shut down that service in the coming months.⁷⁶ Indeed, AT&T appears to have already ceased all online advertising of AT&T TV NOW.⁷⁷ This lack of advertising for AT&T TV NOW combined with AT&T's continued advertising of some or all of its remaining video services, whose names are confusingly similar to that of AT&T TV NOW—including AT&T TV, AT&T Watch TV, Max Go, HBO Go, HBO Now, HBO Max, DIRECTV, U-verse TV, etc.⁷⁸—means that potential customers are not currently “reasonably aware” that they can purchase AT&T TV NOW.⁷⁹

In sum, Cox has failed to carry its burden to prove that potential customers are reasonably aware that they can purchase AT&T TV NOW. Accordingly, for this reason also, Cox has not

⁷⁵ Petition at Exh. 2.

⁷⁶ Emily Groch, *Industry Voices—Groch: Wave goodbye to AT&T TV Now and U-verse TV in 2020*, FIERCEVIDEO, Jan. 9, 2020, <https://www.fiercevideo.com/video/industry-voices-groch-wave-goodbye-to-at-t-tv-now-and-u-verse-tv-2020>; see also *infra* Section VII.B.

⁷⁷ E-mail from Sam Gansline, Pathmatics, Inc., to Mark Merante, Counsel, MDTC (Jan. 10, 2020, 04:32 EST) (on file with author).

⁷⁸ *Hollywood Torrent: AT&T goes “all-in” on HBO Max as its TV business crumbles*, BLOOMBERG, Nov. 3, 2019, <https://www.bloomberg.com/news/newsletters/2019-11-03/at-t-goes-all-in-on-hbo-max-as-its-tv-business-crumbles>; Tara Lachapelle, *Buying HBO was the easy part for AT&T*, THE WASHINGTON POST, Aug. 22, 2019, https://www.washingtonpost.com/business/buying-hbo-was-the-easy-part-for-atandt/2019/08/22/b49b90fe-c4d4-11e9-8bf7-cde2d9e09055_story.html; Ty Pendlebury, *AT&T TV NOW review: Great interface and HBO don't make up for missing channels*, CNET, Sept. 14, 2019, <https://www.cnet.com/news/at-t-tv-now-review-great-interface-and-hbo-dont-make-up-for-missing-channels/>.

⁷⁹ See, e.g., Tara Lachapelle, *Is AT&T's Hollywood Plot too Far-Fetched*, BLOOMBERG, Nov. 8, 2019, <https://www.bloomberg.com/graphics/2019-opinion-att-hbo-hollywood-plot/>; Eli Blumenthal, *AT&T TV is live, but what is it?*, CNET, Aug. 19, 2019, <https://www.cnet.com/news/what-is-at-t-tv-here-is-what-we-know-now/>; Jon Brodtkin, *AT&T's confusing mess of online TV services even has AT&T confused*, ARS TECHNICA, Sept. 4, 2019, <https://arstechnica.com/information-technology/2019/09/atts-confusing-mess-of-online-tv-services-even-has-att-confused/> (discussing AT&T's error in its own marketing materials and technical support web page, which referred to AT&T TV NOW as AT&T TV, a different service that users access via the same app).

proven that DIRECTV “offers” AT&T TV NOW in the Franchise Area, as that term is defined by the LEC Test.

IV. DIRECTV Does Not Offer AT&T TV NOW Directly to Potential Customers.

In addition to not “offering” its service to households as that term is defined by Section 76.905(e), DIRECTV does not provide its service directly to subscribers. To establish effective competition via the LEC Test, Cox must demonstrate that a LEC offers video programming services “directly to subscribers.”⁸⁰ DIRECTV does not offer AT&T TV NOW directly to subscribers. As Cox acknowledges, DIRECTV provides AT&T TV NOW to subscribers only via the subscribers’ broadband Internet access service,⁸¹ and subject to the terms, conditions, and limitations of that service, over which DIRECTV has no control. AT&T does not provide fixed broadband Internet access service in the Franchise Area.⁸² In fact, the only fixed broadband service Cox identifies specifically is its own broadband service.⁸³ At most, then, Cox can claim only that DIRECTV provides AT&T TV NOW indirectly to subscribers, over Cox’s facilities.⁸⁴ As the D.C. District Court has stated, Internet-based video services transmit video signals “to Internet service providers, as opposed to sending them directly to the subscribers’ digital device.”⁸⁵

⁸⁰ 47 U.S.C. § 543(l)(1)(D).

⁸¹ Petition at 10-13.

⁸² See 2018 FCC Form 477 Deployment Data, *supra* note 25.

⁸³ Petition at 11.

⁸⁴ See *id.*

⁸⁵ *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 19 (D.D.C. 2015).

In addition to DIRECTV's provision of AT&T TV NOW being indirect in plain, practical terms, Black's Law Dictionary defines "direct" as "undeviating" or "[f]ree from extraneous influence."⁸⁶ DIRECTV does not provide AT&T TV NOW to subscribers undeviating or free from extraneous influence. Cox describes its network management practices for broadband Internet access service as follows:

The following describes Cox's network practices as of the date of this disclosure; it will be updated from time to time as Cox's practices change. Cox may take any appropriate measures, whether or not they are described below, in response to extraordinary levels of usage, denial of service attacks, or other exigent circumstances that have a significant effect on our customers' ability to use the Services or Cox's ability to provide the Services.

Cox is committed to the ongoing management of its network to improve its service offerings, protect customers, and create new service and feature enhancements for its customers. Cox does not shape, block or throttle Internet traffic or engage in other network practices based on the particular online content, protocols or applications a customer uses or by a customer's use of the network. Cox uses other measures to ensure the best overall experience for our CHSI customers, including, without limitation: rate limiting of email (as set forth in our email policies), email storage limits (including deletion of dormant or unchecked email), rejection or removal of "spam" or otherwise unsolicited bulk email. Cox may also employ other means to protect customers, children, and its network, including blocking access to child pornography sites (based upon lists of sites provided by a third party and an international police agency), and security measures (including identification and blocking of botnets, viruses, phishing sites, malware, and certain ports as set forth below).⁸⁷

Because Cox reasonably manages traffic on its broadband network, including AT&T TV NOW, DIRECTV does not provide AT&T TV NOW to subscribers free from extraneous influence, but rather subject to Cox's influence.⁸⁸ However nondiscriminatory that influence may

⁸⁶ *Direct*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁸⁷ COX, COX INTERNET SERVICE DISCLOSURES, <https://www.cox.com/aboutus/policies/internet-service-disclosures.html> (last visited Jan. 24, 2020). As discussed further below, it defies logic to find that Cox faces effective competition from a video provider that is reliant on Cox's infrastructure. *See supra* p. 6 (referencing the Commission's conclusion that "to qualify as an entity effectively competing with a cable operator . . . the facilities a multichannel distributor uses cannot be those of the operator."); *infra* note 104.

⁸⁸ The MDTC notes that the Commission recently ruled that broadband Internet access service providers such as Cox are no longer subject to Commission-imposed network management conduct rules such as

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

Cox declines to substantively address the requirement that video service be provided “directly to subscribers” at all in the Petition. The Commission in the Charter Order consulted pre-1996 Telecommunications Act opinions interpreting “directly to consumers” in the context of LECs’ involvement in distributing video programming.⁸⁹ Before the ban on LECs’ direct provision of video programming services to their customers was lifted, the Commission found that under certain circumstances LECs were permitted to partner with cable television providers by providing them with access to poles or other equipment in order to serve customers in the LEC’s service area, and that such a partnership would not constitute unlawful direct provision of cable service by a LEC.⁹⁰ This interpretation which was moot following the 1996 Act, is inapposite to Cox’s current situation, as the interpretation dealt with a business partnership between two companies providing services to overlapping groups of customers using some dual-use equipment. In such a situation, although the LEC might have owned some or even all of the equipment used to transmit the cable company’s service, the cable company would have a contractual relationship with the LEC under which it could assure that customers receive adequate service. It is a significant logical leap from holding that two companies are permitted to share equipment in order to offer services to customers in a jointly served geographic area to

prohibitions on blocking, throttling, or paid prioritization. *In re Restoring Internet Freedom*, 33 FCC Rcd. 311, *Declaratory Ruling, Report & Order, & Order* (2018). Accordingly, although Cox has committed to refrain from blocking or degrading lawful content or service, under Commission rules Cox is now free, upon appropriate notice, to degrade or discriminate against online streaming video services such as AT&T TV NOW if it so chooses. See COX, COX INTERNET SERVICE DISCLOSURES, <https://www.cox.com/aboutus/policies/internet-service-disclosures.html> (last visited Jan. 24, 2020).

⁸⁹ Charter Order, ¶ 12 n.53.

⁹⁰ *Id.*; *Tel. Co.-Cable Television Cross-Ownership Rule, Sections 63.54-63.58*, Third Report & Order, 10 FCC Rcd. 7887, 7887 (1995).

finding that “directly” providing services only requires that there is a billing relationship between a content provider and an end user, even though the content is received via a third party not controlled by—or even known to—the content provider.⁹¹

Finally, the word “directly” does not appear in any other effective competition test.⁹² 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.”⁹³ The statute plainly requires a LEC to *offer service directly* to subscribers, not just to bill them directly.⁹⁴ In fact, Congress used the term “directly” elsewhere in the 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.⁹⁵ DIRECTV does not provide AT&T TV NOW directly to subscribers. Accordingly, Cox has not demonstrated that it is subject to effective competition under the LEC test.

⁹¹ Charter Order, ¶¶ 11-12.

⁹² 47 U.S.C. § 543(l)(1).

⁹³ *Cable Reform Order*, 14 FCC Rcd. at 5385 (Comm’r Furchtgott-Roth, dissenting) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

⁹⁴ 47 U.S.C. § 543(l)(1)(D).

⁹⁵ 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)).

V. As the Cable Industry Has Consistently and Correctly Stated, Online Video Distributors, Such As DIRECTV Via Its AT&T TV NOW Service, Do Not Offer Channels of Video Programming.

Cox cannot demonstrate that it is subject to effective competition under the LEC Test, because DIRECTV does not offer programming that is comparable to Cox's programming. 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.⁹⁶ The Commission has made clear that "comparable programming" means "at least 12 channels of video programming, including at least one channel of non-broadcast service programming."⁹⁷ The Commission adopted this definition of "comparable programming" and affirmed its applicability to the LEC 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)."⁹⁸ Thus, to prove that DIRECTV provides comparable programming via AT&T TV NOW, Cox must prove that DIRECTV 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 Media

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

⁹⁷ 47 C.F.R. § 76.905(g); *see also* Petition at 14. Cox obliquely defends the lack of local channels by claiming that the Commission specifically rejected a local channel requirement in the LEC Test. Petition at 12 n.68. However, the Commission, when it determined that it would not adopt a separate definition of "comparable" for the LEC Test, did so with the express assumption that any operator providing effective competition would undoubtedly provide local channels. *Cable Act Reform Order*, 14 FCC Rcd. at 5308. ("We also note that the selection of which definition [of comparable] to use does not appear likely to have practical consequences in applying the LEC test in most instances. . . . In effective competition petitions filed with the Commission to date, . . . operators cited as providing effective competition to cable have all delivered some television broadcast stations[.]").

⁹⁸ 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). DIRECTV does not, through AT&T TV NOW, offer television channels or cable television channels.

Bureau has tentatively found and Cox and its trade association have repeatedly asserted, online video distributors (“OVDs”) that do not also provide this transmission path do not provide channels.⁹⁹

Cox does not and cannot prove that DIRECTV offers 12 channels of video programming as that term is defined under federal law.¹⁰⁰ DIRECTV does not offer 12 portions of the electromagnetic frequency spectrum which are used in a cable system and which are capable of delivering a television channel.¹⁰¹ Cox claims that AT&T TV NOW is a streaming video service that provides customers with access to at least 45 channels of live television.¹⁰² However, other than this conclusory statement, Cox does not attempt to carry its burden of demonstrating that DIRECTV provides channels as that term is defined.¹⁰³ In *Sky Angel*, the Media Bureau preliminarily concluded 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

⁹⁹ See *infra* note 104 and accompanying text.

¹⁰⁰ At the very least, the Commission cannot find that DIRECTV offers channels—and by extension, comparable programming—through AT&T TV 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.

¹⁰¹ See 47 U.S.C. § 522(4); 47 C.F.R. § 76.905(g).

¹⁰² Petition at 5.

¹⁰³ *Id.*

transmission path; rather, it is the subscriber's Internet service provider that provides the transmission path.¹⁰⁴

Like Sky Angel U.S., LLC, DIRECTV does not provide AT&T TV NOW subscribers with a transmission path; rather, it is each subscriber's Internet service provider that provides the transmission path.¹⁰⁵ As a result, DIRECTV does not provide subscribers with channels and thus does not provide comparable programming.

In fact, in 2015, Cox stated:

The Transmission Path Interpretation [reading the 1992 Act and 1996 Act to mean that only video programming providers that include the transmission path can be MVPDs] is grounded in the statutory definition of "channel" adopted in 1984, of which Congress is presumed to be aware when it incorporated the term into the definition of MVPD in 1992. And Congress's decision to retain the statutory definition of "channel" without modification despite the substantial statutory amendments enacted in 1992 and 1996 also is subject to a strong presumption of intentionality. Fundamental tenets of statutory construction indicate that Congress intended not only to supplant the more colloquial use of the term "channel," but also that the statutory definition would guide the Commission's reading of the Act

The legislative history of the 1992 Act further confirms this understanding; in fact, . . . the overwhelming focus of that statute was the promotion of *facilities-based* competition (*i.e.*, competition from new platforms that provide video programming over their own physical transmission pathways). Moreover, Congress's repeated reference to "networks" in the 1992 Cable Act and legislative history further confirms that Congress did not use the defined term "channel" in the definition of MVPD when it actually intended to refer to a "network."¹⁰⁶

¹⁰⁴ *In re Sky Angel U.S., LLC*, 25 FCC Rcd. 3879, 3883, *Order* (2010) (footnotes omitted).

¹⁰⁵ See Petition at 10-13 (acknowledging that households must have an Internet connection to view AT&T TV NOW). To find that Cox faces effective competition from AT&T TV NOW, a product that is reliant on Cox's infrastructure, would ignore the fact that AT&T TV NOW subscribers actually contribute to Cox's profits by subscribing to Cox's broadband service.

¹⁰⁶ *In re Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs.*, MB Docket No. 14-261, Cox Comments at 6-8 (Mar. 3, 2015) (citations omitted, italics in original) (agreeing with the Media Bureau's tentative findings in *Sky Angel*).

The Commission adopted the definition of comparable programming and affirmed its applicability to the LEC Test with full knowledge of federal law’s definition of “channel.”¹⁰⁷ 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.”¹⁰⁸ 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).”¹⁰⁹ Because DIRECTV does not, via AT&T TV NOW, provide this transmission path, it does not provide channels. Accordingly, AT&T TV NOW does not provide programming comparable to Cox’s, and Cox thus cannot meet the LEC Test.

VI. Cox 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 Franchise Area. To be a local exchange carrier, an entity must be “engaged in the provision of telephone exchange service or exchange access.”¹¹⁰ AT&T is not engaged in the provision of telephone exchange service or exchange

¹⁰⁷ See *Cable Reform Order*, 14 FCC Rcd. at 5307-08; 47 C.F.R. § 76.905(g).

¹⁰⁸ *Cable Reform Order*, 14 FCC Rcd. at 5307-08.

¹⁰⁹ 47 U.S.C. § 522(4).

¹¹⁰ *Id.* § 153(32).

access in the Franchise Area.¹¹¹ 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 local service.¹¹²

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.¹¹³ Under the statutory construction canon *noscitur a sociis*, “[a] word is given more precise content by the neighboring words with which it is associated.”¹¹⁴ 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).”¹¹⁵ 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.”¹¹⁶ Indeed, in

¹¹¹ AT&T, AT&T HOME & BUSINESS SERVICES IN THE UNITED STATES, <https://www.att.com/local/phone> (last visited Jan. 30, 2020) (listing the states in which AT&T provides telephone exchange service, and not listing Massachusetts).

¹¹² 47 U.S.C. § 153(32).

¹¹³ 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-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).

¹¹⁴ 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).

¹¹⁵ 47 U.S.C. § 543(l)(1)(D).

¹¹⁶ *In re Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd. 18,223, 18,259, *Second Report & Order* (1996).

implementing the LEC Test, the Commission specifically emphasized LECs’ “ubiquitous presence in the market” as part of Congress’s rationale in adopting the LEC Test.¹¹⁷ 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.¹¹⁸

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*.¹¹⁹

¹¹⁷ *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).

¹¹⁸ Senator Pressler explained his rationale by referencing “the technological evolution [LECs’] networks are undergoing.” (141 CONG. REC. S8243 (daily ed. June 13, 1995) (statement of Sen. Pressler). 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.

¹¹⁹ *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

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.¹²⁰ 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.¹²¹ In other words, an entity is not a common carrier with respect to its non-common-carriage activities.¹²² Likewise, then, an entity is a local exchange carrier only with respect to its provision of telephone exchange service or exchange access.¹²³ And an entity is not a local exchange carrier where it does not provide telephone exchange service. As a result, AT&T is a LEC only where it actually provides telephone exchange service or exchange access. As AT&T does not provide telephone exchange service in the Franchise Area, it is not a LEC in the Franchise Area, and Cox cannot meet the LEC Test.

VII. Granting this Petition Would Undermine the Commission’s Policy Goals.

Granting Cox’s Petition would contravene several of the Commission’s longstanding policy goals.

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).

¹²⁰ *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).

¹²¹ *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”).

¹²² *Id.* at 863-64.

¹²³ *See* 47 U.S.C. § 153(32).

A. A Finding of Effective Competition Based on a Non-Facilities-Based Streaming Video Service Would Undermine the Commission’s Policy Goal of Encouraging Facilities-Based Investment and Limiting Regulation of the Internet.

First, granting an effective-competition petition based on a non-facilities-based streaming video service would undermine the Commission’s goals of encouraging facilities-based investment and limiting regulation of the Internet. One of the Commission’s primary goals in recent years has been to make decisions that encourage investment in broadband-capable facilities.¹²⁴ A finding of effective competition based on DIRECTV’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 Cox’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.*, AT&T, Comcast, Google) that using a competitor’s broadband facilities for provision of their

¹²⁴ 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).

content rather than expanding their own is good enough for the Commission.¹²⁵ 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.¹²⁶ Given this history, granting Cox’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.¹²⁷ First, if the Media Bureau granted the Petition and thus deemed AT&T a local exchange carrier that provides video programming services, AT&T and its provision of AT&T TV 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.¹²⁸ It seems clear that this expansion of regulation to streaming online video would be contrary to the Commission’s policy goals.

¹²⁵ Although the Commission has previously found that AT&T’s U-Verse Internet Protocol television service can meet the requirements of the LEC Test, it has done so only in franchise areas in which AT&T was the LEC. *See* Charter Order, ¶ 20 n.92; *Time Warner Cable, Inc., Petitions for Determination of Effective Competition in Communities in Wisconsin*, Memorandum Opinion & Order, 31 FCC Rcd. 3400 (MB 2016); *Bright House Networks, LLC Petition for Determination of Effective Competition in Farmington, Michigan*, Memorandum Opinion & Order, 26 FCC Rcd. 7662 (MB 2011).

¹²⁶ *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.

¹²⁷ *See, e.g., In re Restoring Internet Freedom*, 33 FCC Rcd. 311, *Declaratory Ruling, Report & Order, & Order* (2018).

¹²⁸ *See* 47 U.S.C. §§ 571-573.

Additionally, if the Media Bureau finds that DIRECTV's provision of AT&T TV NOW satisfies the LEC Test, it is likely that DIRECTV's provision of online video service renders the company an MVPD with respect to such provision.¹²⁹ Although Cox appears to acknowledge that OVDs are MVPDs,¹³⁰ this is an open question at the FCC and would in fact represent a significant policy change.¹³¹ If OVDs are classified as MVPDs, the Commission's regulatory reach expands immensely, extending to online video providers like Sling TV, 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."¹³² 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."¹³³ 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.

¹²⁹ See *In re Petition for Determination of Effective Competition in 32 Mass. Cmtys. & Kauai, HI*, MB Docket No. 18-283, CSR 8965-E, MDTC Opposition at Section IV (Oct. 25, 2018). *But cf. infra* p. 4 (noting that DIRECTV is already an MVPD given its provision of satellite video service).

¹³⁰ See Petition at 5 n.20 (referring to AT&T TV NOW as "a competing telephone company MVPD").

¹³¹ See *In re Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs.*, 29 FCC Rcd. 15,995, *Notice of Proposed Rulemaking* (2014) (proposing to include OVDs within the definition of MVPDs).

¹³² *In re Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Servs.*, 29 FCC Rcd. 15,995, 16,049, *Notice of Proposed Rulemaking* (2014) (Comm'r Pai, concurring).

¹³³ *Id.*

B. Given the Uncertain Future of AT&T TV NOW, the Commission Should Not Base an Effective Competition Determination on the Service.

There is no guarantee of AT&T TV NOW's continued existence, as it has lost half of its subscribers since the Charter Petition was filed in October 2018, and it continues to experience significant subscriber losses, with its highest loss to date occurring in the fourth quarter of 2019.¹³⁴ The MDTC brought this issue to the Commission's attention in the Charter proceeding,¹³⁵ and since then the trend has continued unabated.¹³⁶ Further, AT&T TV NOW has the highest base price and the least amount of programming among the top four live TV streaming services,¹³⁷ and as discussed *supra* produces consumer confusion given the variety of similarly-named video products offered by AT&T.¹³⁸

As of January 2020, AT&T TV NOW ceased its support for service on Roku devices and Roku smart televisions,¹³⁹ which account for as much as 15.2% of all media streaming devices

¹³⁴ See Press Release, AT&T, AT&T Reports Fourth-Quarter and Full-Year Results, Jan. 29, 2020, https://about.att.com/story/2020/fourth_quarter_2019_earnings.html (showing a net loss of 219,000 subscribers in the quarter); Jess Barnes, *AT&T TV NOW Has Lost 37% of Its Customer Base in Just 12 Months*, CORD CUTTERS NEWS, Nov. 22, 2019, <https://www.cordcuttersnews.com/att-tv-now-has-lost-37-of-its-customer-base-in-just-12-months/> (discussing a third quarter 2019 net loss of 195,000 subscribers and net loss of 713,000 subscribers in a year).

¹³⁵ *In re Petition for Determination of Effective Competition in 32 Mass. Cmty. & Kauai, HI*, MB Docket No. 18-283, CSR 8965-E, MDTC Motion for Abeyance (June 17, 2019).

¹³⁶ See, e.g., Daniel Frankel, *AT&T TV Launches, Shoves AT&T NOW Aside*, BROADCASTING + CABLE, Dec. 9, 2019, <https://www.broadcastingcable.com/news/at-t-tv-launches-shoves-at-t-now-aside>; Ben Munson, *AT&T TV launches nationwide in February 2020*, FIERCEVIDEO, Dec. 12, 2019, <https://www.fiercevideo.com/cable/at-t-tv-launches-nationwide-february-2020>.

¹³⁷ See, e.g., Ty Pendlebury & David Katzmaier, *Best live TV streaming services for cord-cutters in 2020*, CNET, Dec. 29, 2019, <https://www.cnet.com/news/best-live-tv-streaming-services-for-cord-cutters-for-2020/>; Ben Moore, *AT&T TV NOW*, PCMag, Oct. 22, 2019, <https://www.pcmag.com/review/350012/directv-now>.

¹³⁸ See *supra* note 78.

¹³⁹ See, e.g., Melissa Repko, *AT&T, Roku can't agree on a streaming deal. Here's what it means for you*, DALLAS MORNING NEWS, Jan. 3, 2020, <https://www.dallasnews.com/business/technology/2020/01/03/att-roku-cant-agree-on-a-streaming-deal-heres-what-it-means-for-you/>; Ben Munson, *AT&T TV kills support for Roku devices*, FIERCEVIDEO, Jan. 3, 2020, <http://fiercevideo.com/video/at-t-tv-kills-support-for-roku-devices>; Luke Bouma, *AT&T TV NOW Ends Support for Roku Players & Roku TVs as Its Contract Ends*,

and over 30% of such devices sold in the first quarter of 2019.¹⁴⁰ This adds an additional impediment to receiving service for any customers who generally receive streaming services via a Roku device or television, as a compatible device is required to receive AT&T TV NOW.¹⁴¹ It also creates a great deal of confusion and uncertainty as to the viability of the service, as its relationships with other popular streaming device manufacturers may likewise face challenges.

The LEC test was not adopted solely because LECs are “uniquely well-funded,”¹⁴² but also because they possess local facilities that can easily be converted to serve multiple purposes as well as name recognition among their existing local customer base. In fact, as demonstrated below, the instant case of AT&T TV NOW proves the fallacy of basing the LEC Test solely on funding. However, even accepting *arguendo* that LECs’ unique financial stability was Congress’s sole basis for the LEC test, the likelihood of DIRECTV’s AT&T TV NOW service being discontinued remains a critical concern. AT&T, DIRECTV’s parent company, is a profit-seeking, publicly-traded company. If its AT&T TV NOW service does not yield a worthwhile profit to the company, the company will abandon the service in order to redirect company resources to more promising lines of business.¹⁴³ AT&T has stated, for instance, that it may fold

CORD CUTTERS NEWS, Jan. 1, 2020 <https://www.cordcuttersnews.com/att-tv-now-ends-support-for-roku-devices/>.

¹⁴⁰ Press Release, Strategy Analytics, Roku Stretches Lead as #1 Streaming TV Platform in US After Record Q1 performance (June 26, 2019), <https://news.strategyanalytics.com/press-release/intelligent-home/roku-stretches-lead-1-streaming-tv-platform-us-after-record-q1>.

¹⁴¹ Furthermore, this lack of compatibility with Roku will assuredly further reduce DIRECTV’s AT&T NOW’s subscribership in the first quarter of 2020 and beyond; as noted above, DIRECTV cannot offer its service to a household that cannot receive it. *See supra* Section III.A.

¹⁴² Charter Order, ¶ 15.

¹⁴³ *See, e.g.*, AT&T, AT&T INVESTOR UPDATE: 4TH QUARTER EARNINGS 10, 12, 13 (Jan. 29, 2020), <https://investors.att.com/~media/Files/A/ATT-IR/financial-reports/quarterly-earnings/2019/4q-2019/ATT%204Q19%20Earnings.pdf>.

AT&T TV NOW into its flagship HBO Max product, which is set to launch in May 2020.¹⁴⁴

Moreover, in AT&T's most recent earnings report slide presentation, the company divulged its plan to "simplify [its] video products" and that its video strategy is "now focused on AT&T TV and HBO Max."¹⁴⁵ The presentation did not once mention AT&T TV NOW.¹⁴⁶

Overall, there has been significant upheaval in the streaming video industry over recent months and years.¹⁴⁷ As of January 2020, electronics giant Sony discontinued its Playstation Vue streaming live video service,¹⁴⁸ after being named Wired Magazine's Best Overall TV Streaming Service as recently as October 2019.¹⁴⁹ Although many households subscribe to multiple streaming video services,¹⁵⁰ analysts and video executives agree that there is likely to be

¹⁴⁴ See, e.g., Alex Sherman, *John Stankey's challenge: Making AT&T's \$100 billion bet on Time Warner pay off*, CNBC, June 7, 2019, <https://www.cnbc.com/2019/06/07/john-stankey-warnermedia-ceo-one-year-profile-departures-silos.html>.

¹⁴⁵ AT&T, AT&T INVESTOR UPDATE: 4TH QUARTER EARNINGS 10, 12, 13 (Jan. 29, 2020), <https://investors.att.com/~media/Files/A/ATT-IR/financial-reports/quarterly-earnings/2019/4q-2019/ATT%204Q19%20Earnings.pdf>.

¹⁴⁶ *Id.*

¹⁴⁷ See, e.g., Luke Bouma, *Playstation Vue is Shutting Down After Failing to Find a Buyer*, CORD CUTTERS NEWS, Oct. 29, 2019, <https://www.cordcuttersnews.com/playstation-vue-is-shutting-down/>; Josh Stinehour, *Analysis of Hulu's Latest Valuation*, DEVONCROFT PARTNERS, Apr. 17, 2019, <https://devoncroft.com/2019/04/17/analysis-of-hulus-latest-valuation/>; David Sims, *The Demise of FilmStruck Is Part of a Bigger Pattern*, THE ATLANTIC, Oct. 31, 2018, <https://www.theatlantic.com/entertainment/archive/2018/10/filmstruck-warnermedia-att-criterion-collection-demise/574435/>; Romain Dillet, *Verizon is shutting down go90*, TECHCRUNCH, June 29, 2018, <https://techcrunch.com/2018/06/29/verizon-is-shutting-down-go90/>; Jeff Chabot, *CinemaNow movie website & platform is no more*, HDREPORT, Aug. 8, 2017, <https://hd-report.com/2017/08/08/cinemanow-movie-website-platform-is-no-more/>. Recently, analysts speculated about a DIRECTV merger with DISH Network Corp. Sarah Barry James & Stefen Joshua Rasay, *DISH/DIRECTV: A marriage made of analysts' dreams*, S&P GLOBAL MARKET INTELLIGENCE, June 13, 2019, <https://platform.mi.spglobal.com/InteractiveX/article.aspx?CDID=A-52368431-11315&KPLT=4>.

¹⁴⁸ James Leggate, *Sony's PlayStation Vue subscribers get free month as streaming service shutting down*, FOX BUSINESS, Jan. 4, 2020, <https://www.foxbusiness.com/technology/playstation-vue-subscribers-free-streaming-shutting-down>.

¹⁴⁹ Jess Grey, *The Best Live TV Streaming Services*, WIRED, Oct. 1, 2019, <https://www.wired.com/gallery/best-live-tv-apps/>.

¹⁵⁰ Press Release, Deloitte, *More Options Allow U.S. Consumers to Piece Together Personalized Entertainment Experiences* (Mar. 19, 2019), <https://www2.deloitte.com/us/en/pages/about->

substantial shrinkage in the number of streaming services in the near future.¹⁵¹ AT&T saw the most significant subscriber losses in the industry during 2019,¹⁵² and faces more and stronger competition than ever in the streaming video market following the launches of Apple TV+ and Disney+ in late 2019.¹⁵³

Simply put, in the face of this clear evidence regarding the future prospects of AT&T TV NOW, the Commission's granting of Cox's Petition on the basis of this service at this point would be short-sighted.

C. A Finding of Effective Competition Based on a Limited, Higher-Cost Service Would Be Unreasonable and Would Undermine the Commission's Policy Goal of Protecting Consumers.

Even if the Media Bureau were to disregard the plain meaning of the applicable FCC regulations, granting the Petition on the grounds that AT&T TV NOW provides competition to

deloitte/articles/press-releases/digital-media-trends-thirteenth-edition.html. This trend is an indication in itself that streaming services like AT&T TV NOW do not provide true competition to cable service.

¹⁵¹ Stephen Lovely, *Is the Death of Playstation Vue a Sign of More Streaming Closures to Come?*, THE MOTLEY FOOL, Nov. 6, 2019, <https://www.fool.com/investing/2019/11/06/death-playstation-vue-sign-streaming-closures.aspx>; Mike Reynolds, *Fox Corp. to forgo broad direct-to-consumer streaming service*, S&P GLOBAL MARKET INTELLIGENCE, May 9, 2019, <https://platform.mi.spglobal.com/web/client?auth=inherit#news/article?id=51716135>; see also Geoff Colvin, *AT&T Has Become a New Kind of Media Giant*, FORTUNE, May 21, 2019, <http://fortune.com/longform/att-media-company/>; Cynthia Littleton & Elaine Low, *Adapt or Die: Why 2020 Will Be All About Entertainment's New Streaming Battleground*, VARIETY, Dec. 2019, <https://variety.com/2019/biz/features/streaming-2020-disney-plus-netflix-hbo-max-apple-tv-amazon-1203439700/#article-comments>.

¹⁵² See MoffettNathanson, U.S. Media: What's Even Worse Than "Freaking Ugly"? 3 (Oct. 30, 2019), <https://moffettnathanson.bluematrix.com/sellside/EmailDocViewer?encrypt=eff9099d-af29-4cf9-b1b6-9a3d2d4a8fc4&mime=pdf&co=moffettnathanson&id=lshaw31@bloomberg.net&source=mail>.

¹⁵³ Brad Adgate, *Virtual MVPD Subscriber Growth is Slowing*, FORBES, Dec. 9, 2019, <https://www.forbes.com/sites/bradadgate/2019/12/09/virtual-mvpd-subscriber-growth-is-slowing> ("Heading into 2020, the streaming video marketplace is continuing to evolve, becoming more and more crowded with new entries. Consumers can choose to subscribe to SVOD providers (e.g., Netflix, Disney+), a la carte services (e.g., CBS All Access, Food Network Kitchen), streaming sports suppliers (e.g., MLB.TV, ESPN+) and news providers (e.g., Cheddar and NBC News Now). With consumers wary of rising costs for content, and studies that point out the average customer is willing to pay for between three to five streaming providers, the future success of some vMVPDs may be challenging.").

Cox’s video service is unreasonable, given the ways AT&T TV NOW differs from Cox’s video programming service, the fact that Cox controls access to AT&T TV NOW via its broadband service in the Franchise Area, and the much higher costs of obtaining AT&T TV NOW service compared with Cox’s basic tier service. For these reasons, granting the Petition would also undermine the Commission’s and the Cable Act’s related goals of fostering competition and, thereby, protecting consumers.¹⁵⁴

First, AT&T TV NOW does not provide a comparable service: for example, in the Franchise Area, AT&T TV NOW does not provide any local broadcast programming.¹⁵⁵ Second, most residents of the Franchise Area have little choice but to purchase a service from Cox, regardless of whether they choose Cox or AT&T TV NOW for their video programming services, because, as stated above, households cannot subscribe to AT&T TV NOW if they do not also subscribe to broadband service,¹⁵⁶ and for potential customers in the Franchise Area, Cox is the only terrestrial broadband provider.¹⁵⁷ Satellite broadband service does not offer a viable choice for those seeking a streaming service like AT&T TV NOW. Although satellite broadband providers may be able to provide their customers with sufficient download speeds to enable streaming video viewing, their limited monthly data allowances make streaming video

¹⁵⁴ See, e.g., 47 U.S.C. § 543(l)(1)(D); *Cable Reform Order*, 14 FCC Rcd. at 5304, ¶ 12 (“We do not believe that Congress intended for us to apply the LEC test so broadly that the protections Congress intended through the rate regulation system are lost to consumers without the prospect of competition”).

¹⁵⁵ See ATT TV, AT&T TV LOCAL CHANNEL & REGIONAL SPORTS NETWORK LOOKUP, <https://www.att.com/tv/locals/> (last visited Jan. 30, 2020).

¹⁵⁶ See Petition at 10-13. Throughout this section, “broadband” refers to service adequate to stream AT&T TV NOW, 12/1 Mbps and above.

¹⁵⁷ Although Cox claims that there are “multiple” other fixed broadband providers in Holland, the FCC broadband map to which it cites only includes Cox and the two satellite broadband providers. See Petition at 11-12 & n.56. Compare FED. COMMC’NS COMM’N, AREA SUMMARY, <https://go.usa.gov/xdbvV> (last visited Jan. 29, 2020) (area summary excluding satellite providers), with FED. COMMC’NS COMM’N, AREA SUMMARY, <https://go.usa.gov/xdbvG> (last visited Jan. 29, 2020) (area summary including satellite providers).

subscriptions impractical, particularly for households with multiple residents. Analysts estimate that watching AT&T TV NOW consumes between 360 MB/hour (for the lowest quality picture) and 2.1 GB/hour (for the highest quality picture).¹⁵⁸ Satellite provider HughesNet, for example, offers four data plans, ranging from 10 GB/month (\$59.99/month after the first six months) to 50 GB/month (\$149.99/month after the first six months).¹⁵⁹ According to Nielsen, Americans over the age of 18 watch an average of four hours of television per day.¹⁶⁰ Assuming, conservatively, that all household members watch all of their television together on one screen, a Franchise Area household consuming the average American's video programming would use up virtually the entire data allowance HughesNet offers through its largest capacity plan just by watching video via AT&T TV NOW (43.2 GB), even at the lowest possible picture quality. It is no surprise, therefore, that, as of the most recently available broadband subscription data from the FCC, the two satellite broadband providers had only [REDACTED] subscribers in the entire census tract containing Holland.¹⁶¹ Cox's share of the broadband Internet access service market is between [REDACTED]% and [REDACTED]% in the Franchise Area.¹⁶² Cox's total market dominance for fixed broadband service in

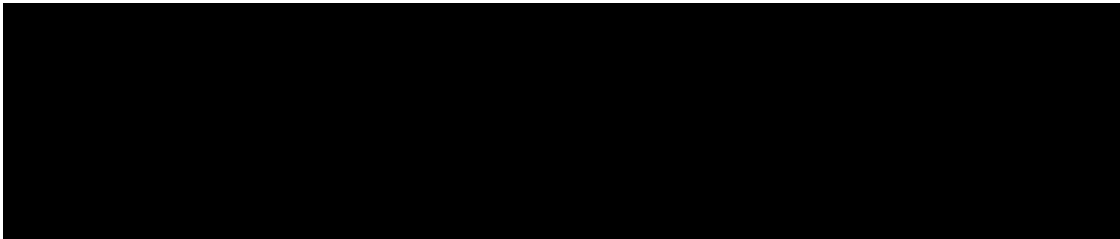
¹⁵⁸ Luke Bouma, *Can Cord Cutters Live With 1 TB Data Caps? We Take a Look . . .*, CORD CUTTERS NEWS, June 29, 2017, <https://www.cordcuttersnews.com/can-cord-cutters-live-1tb-data-caps-take-look/>.

¹⁵⁹ HUGHESNET, HUGHESNET GEN5 PLANS, <https://satelliteforinternet.com/high-speed-hughesnet-plans/> (last visited Jan. 31, 2020).

¹⁶⁰ THE NIELSEN COMPANY, THE NIELSEN TOTAL AUDIENCE REPORT (2018), <https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/q3-2018-total-audience-report.pdf>.

¹⁶¹ *See supra* note 27 and accompanying text.

¹⁶² The most recent FCC Form 477 data, from December 2017, has two apparent issues as it pertains to Cox's broadband Internet service market share, which the MDTC has incorporated into its analysis as follows.



Holland belies its claim that Holland residents can also choose comparable broadband services from “at least two other fixed broadband providers.”¹⁶³

Further, all of Cox’s purported alternatives to its existing basic tier cable service—AT&T TV NOW via one of the two satellite broadband providers, AT&T TV NOW via a mobile wireless provider, or AT&T TV NOW via Cox’s broadband service—would cost potential customers many times as much as Cox’s basic tier cable service. Cox references “competitive prices” but declines to actually compare any rates charged.¹⁶⁴ Cox glosses over the fact that the rate for AT&T TV NOW is a cost to consumers over and above the cost of obtaining broadband service with sufficient speed and data capacity to access it.

HughesNet’s only plan that is adequate to cover the average American’s television viewing time via AT&T TV NOW would cost a potential customer in the Franchise Area \$149.99 per month after a promotional period, plus the \$65 per month to receive AT&T TV NOW for a total of \$214.99 per month.¹⁶⁵ This is more than six times as much as Cox

¹⁶³ Petition at 11-12.

¹⁶⁴ *Id.* at 5.

¹⁶⁵ See Petition at Exh. 2 (printout of AT&T TV NOW’s website listing the most inexpensive AT&T TV NOW plan at \$65 per month); HUGHESNET, HUGHESNET GEN5 PLANS, <https://satelliteforinternet.com/high-speed-hughesnet-plans/> (last visited Jan. 31, 2020).

subscribers in the Franchise Area currently pay for Cox’s basic tier service.¹⁶⁶ The only terrestrial option available to a majority of potential customers of AT&T TV NOW in the Franchise Area, subscribing to AT&T TV NOW and a broadband connection through Cox, would still be over three times as expensive as Cox’s basic service tier service.¹⁶⁷

At the same time, with the deregulation of the basic service tier, rates for basic service in the Franchise Area can be expected to increase, which Commissioners have recognized will harm consumers, and will disproportionately harm the most vulnerable consumers.¹⁶⁸ A finding that AT&T TV NOW via any of the alternatives to Cox’s existing basic tier service constitutes “effective competition” would be unreasonable, therefore, even if current FCC regulations allowed for such a finding, which, as demonstrated above, they plainly do not.

In sum, the Commission has diligently fostered a regulatory environment that encourages investment in broadband facilities, does not unnecessarily regulate nascent services, and has

¹⁶⁶ Cox’s current basic tier rate in the Franchise Area is \$34/month. *See Petition of CoxCom, LLC d/b/a Cox Commc’ns New England to establish & adjust the basic serv. tier programming, equip., & installation rates for the Town of Holland*, D.T.C. Docket No. 19-3 (filed Mar. 7, 2019).

¹⁶⁷ *See* COX INTERNET SERVICE – HOME INTERNET PLANS, <https://www.cox.com/residential/internet.html> (last visited Jan. 24, 2020). Cox’s current rate in the Franchise Area for 30 Mbps broadband service, the slowest service that would ostensibly support streaming AT&T TV NOW is \$39.99; however, Cox describes this service level as sufficient only for occasional email use and instead recommends its 300 Mbps broadband service at a minimum for streaming video, at \$79.99 per month. *Id.* Customers who select AT&T TV NOW via Cox’s recommended 300 Mbps broadband service would pay over four times the current rate for Cox’s basic tier service.

¹⁶⁸ *See* Charter Order at 28 (Comm’r Starks, concurring) (“I foresee harm to vulnerable consumers from the action we take today. . . . [T]hose consumers relying on basic cable service, while they may be few, are often our most underprivileged consumers, and often are on fixed incomes. While some of these consumers were paying as little as \$12 per month for the regulated basic cable services, they may well have to spend upwards of \$100 per month—that is no small expense to someone surviving on a fixed income. These are members of the community who are retired, elderly, veterans, or simply trying to make ends meet. The Commission’s goal, our mission, should be to make service more affordable for these consumers, not more expensive. Instead, I fear this decision risks reinforcing the inequity between families with resources to pay for these services, and families without.”); *id.* at 26 (Comm’r Rosenworcel, concurring) (“[L]et me detail here what the consequences are for consumers where this agency is overriding state authority to regulate what is known as the basic cable service tier. According to the record in this proceeding, some consumers in the states affected by this proceeding can expect that rates for the basic cable service tier will double. . . . If you ask me, this is not the kind of competition that protects consumers.”); *cf. id.*, ¶ 9 n.41.

worked to encourage competition that benefits consumers with lower cost services. The Media Bureau would contravene these policy goals if it granted the Petition. The Media Bureau should deny the Petition.

VIII. Conclusion

The Media Bureau should deny the Petition because Cox is not subject to effective competition in the Franchise Area. 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 households in the franchise area. Cox 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 Area, and DIRECTV's AT&T TV NOW service does not provide channels and does not offer video programming services directly to subscribers. Accordingly, the Media Bureau should deny the Petition.

REDACTED – FOR PUBLIC INSPECTION

Respectfully submitted,

KAREN CHARLES PETERSON
COMMISSIONER

By: /s/ Rosalie Fazio-Eynullayeva
Rosalie Fazio-Eynullayeva, Counsel

/s/ Mark A. Merante
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Sean M. Carroll, General Counsel

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February 13, 2020

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 Cox’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: February 12, 2020

Michael P. Mael

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,



Sean M. Carroll

Commonwealth of Massachusetts
Department of Telecommunications and Cable
1000 Washington Street, Suite 600
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February 12, 2020

CERTIFICATE OF SERVICE

I, Shonda D. Green, do hereby certify on this 13th day of February, 2020, that a true and correct copy of the foregoing "Opposition to CoxCom, LLC's Petition for Special Relief" has been sent via U.S. mail, postage prepaid, to the following:

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