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REDACTED - FOR PUBLIC INSPECTION

October 18, 2019

Ex Parte Letter -- Filed Via Electronic Filing

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

Re: *In re Charter Communications, Inc. Petition for Determination of Effective Competition,*
MB Docket No. 18-283

Dear Ms. Dortch:

Enclosed for filing please find the attached redacted version of the confidential ex parte letter the Massachusetts Department of Telecommunications and Cable submitted in the above-referenced docket today via overnight delivery. The attached redacted public copy has been marked "**REDACTED – FOR PUBLIC INSPECTION.**"

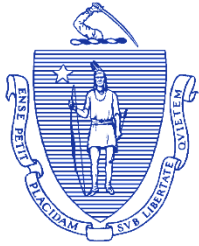
Please let me know if you have any questions.

Respectfully submitted,

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Re: *In re Charter Communications, Inc. Petition for Determination of Effective Competition*,
MB Docket No. 18-283

Dear Ms. Dortch:

The Massachusetts Department of Telecommunications and Cable ("MDTC") respectfully submits this *ex parte* letter to explain the irrelevance of the broadband subscription data provided by Charter Communications ("Charter") in the above-captioned proceeding and to provide facts related to the elimination of DirecTV NOW on July 31, 2019.

In order to meet the requirements for a finding of effective competition, Charter has the burden of showing that AT&T or an affiliate "offer[s]" a video programming service, which Charter's Petition alleges to be DirecTV NOW,¹ in its franchise areas.² For purposes of this section, 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",³ and 2) "no regulatory, technical or other impediments to households taking

¹ Petition of Charter Commc'ns, Inc. for a Determination of Effective Competition, MB Docket No. 18-283 at ii (Sept. 14, 2018) ("Petition").

² 47 U.S.C. §543(l)(1)(D); *see generally Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296 at ¶¶ 11-12 (1999) ("Cable Reform Order").

³ 47 C.F.R. § 76.905(e)(1) (emphasis added).

service exist, and potential customers are reasonably aware that they will be able to purchase the service.”⁴

Charter has failed to meet its burden to prove that DirecTV NOW is offered in Charter’s Massachusetts franchise areas. First, the data Charter provides as evidence that AT&T offers DirecTV NOW does not address the offer rule contained in Section 76.905(e)(1) and (2). Second, AT&T and DirecTV, LLC no longer offer DirecTV NOW at all.

I. Charter’s data does not prove that AT&T or DirecTV, LLC “offer[s]” DirecTV NOW.

First, Charter has failed to prove that DirecTV NOW meets either part of the offer rule. The first part of the offer rule requires that a LEC be physically able to deliver the service to potential customers, all potential customers in the franchise area, not just to Charter’s customers.⁵ DirecTV NOW cannot be delivered to households that do not subscribe to broadband service, and Charter provides no data on the relevant metric: the subscription of all potential subscribers in the franchise areas to an internet connection that would allow them to subscribe to DirecTV NOW, whether or not they are current Charter subscribers. In other words, simply, AT&T is not physically able to deliver the service to households who do not subscribe to broadband, regardless of whether those households may be able to subscribe to broadband.

In determining whether allegedly competing services have met the LEC test, the FCC looks to whether the competing services are “ubiquitous” in the franchise area.⁶ Here, although Charter may have shown that Charter’s existing broadband subscribers in the franchise area could have physically accessed DirecTV NOW, it has provided no evidence of the number of total households in the franchise area to which AT&T could have physically delivered DirecTV NOW. In actuality, as detailed below, when it was still offering DirecTV NOW, AT&T could

⁴ *Id.* § 76.905(e)(2).

⁵ Note that this is not a minimum subscription requirement to the competing service itself; here we are talking about the competitor’s ability to actually provide the service.

⁶ *Cable Reform Order*, ¶ 9. 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 wasn’t at the time of the petition, given franchise or similarly binding obligations to build-out throughout the franchise area as well as a showing that the LEC has both the ability and intent to complete such a build-out. Here, where the **distributor**, AT&T, did not offer the broadband internet access service that was required for a potential subscriber to physically access DirecTV NOW, there was no chance, much less assurance, that the distributor, AT&T, could or intended to expand the broadband internet access service throughout the franchise area in the future. *See, Paragon Commc’ns*, Memorandum Opinion and Order, 12 FCC Rcd. 20964, 1997 WL 120055 at 11 (Mar. 18, 1997) (finding that franchise agreement obligations and competing cable service provider’s financial capacity and intent to build-out services throughout the franchise area satisfies the offer rule); *Cablevision of Boston, Inc.*, Memorandum Opinion and Order, 16 FCC Rcd. 14056, 2001 WL 816452 at 15 (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.*, Memorandum Opinion and Order, 22 FCC Rcd. 13176, 2007 WL 2066488 at ¶ 7 (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 rule).

not have physically provided DirecTV NOW to more than [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of the households in the franchise areas, on average, and in at least one franchise area AT&T could not have provided DirecTV NOW to [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of the households.

All of the other data points that Charter cites as evidence that DirecTV NOW meets the offer rule reflect statewide broadband subscription figures, not data about the franchise areas, specifically.⁷ Charter’s burden of showing that AT&T is “physically able to deliver the service to potential subscribers” is specific to a showing of such ability in the franchise areas, not statewide or nationwide. Although Massachusetts enjoys high broadband subscription rates overall, Charter’s franchise areas in Massachusetts are entirely in the more rural, central and western part of the state, where broadband subscriptions are less prevalent.

The latest available broadband subscription data from the FCC shows that more than [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] of households in the franchise areas do not have a broadband internet access service adequate for AT&T to physically deliver its DirecTV NOW service. In one franchise area, [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL] lacked such service.⁸

Even further, the statewide data from the U.S. Census Bureau which Charter cites as evidence that AT&T is physically able to deliver the service to potential subscribers, measures the wrong broadband service, a measure of broadband inapplicable to DirecTV NOW availability. Charter argues that Census Bureau data shows that 85.5% of Massachusetts households had broadband internet subscriptions in 2016.⁹ But this data does not calculate the percentage of households that had a broadband internet subscription adequate to receive DirecTV NOW. According to AT&T, when it still offered DirecTV NOW, that service required subscribers to have wireline broadband download speeds of at least 12 Mbps for optimal viewing.¹⁰ The Census Bureau data Charter relies on does not measure the percentage of households that subscribe to these broadband services. Instead, the Census Bureau data measures the percentage of households that had any broadband service of any download speed “other than a dial-up subscription”.¹¹ Charter inappropriately relies on the Census Bureau’s

⁷ See, e.g., Letter from Howard J. Symons, Counsel to Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC at 1 (Dec. 21, 2018); Charter Communications, Inc. Reply to Oppositions, MB Docket No. 18-283, CSR-8965-E at 18 (Nov. 19, 2018) (“*Charter Reply*”).

⁸ FCC, Fixed Broadband Deployment Data: Jun, 2018 Status V1, <https://opendata.fcc.gov/Wireline/Fixed-Broadband-Deployment-Data-Jun-2018-Status-V1/ehbi-rr4z>.

⁹ *Charter Reply* at 12 n. 40.

¹⁰ Letter from Cathy Carpino, Assistant Vice President, Senior Legal Counsel, AT&T Services, Inc. to Marlene Dortch, Secretary, FCC, at 2 (Dec. 7, 2018).

¹¹ Camille Ryan, American Community Survey Reports, U.S. Census Bureau, “*Computer and Internet Use in the United States: 2016*,” (issued Aug. 2017) at note 2, <https://www.census.gov/content/dam/Census/library/publications/2018/acs/ACS-39.pdf>.

inapplicable broadband subscription rate data to satisfy the first part of the offer rule for the franchise areas.

Charter provides no evidence that the **distributor**, AT&T, “with the addition of no or only minimal additional investment” could have physically delivered DirecTV NOW to these potential subscribers who currently lack broadband internet access service.¹²

Second, Charter relies on these inapplicable data points to satisfy the second part of the offer rule, that there are no “technical or other impediments to households taking” DirecTV NOW. Here again, these data points are not on point.

Charter cites statewide subscription data to attempt to demonstrate that the broadband prerequisite is not an impediment to households taking DirecTV NOW.¹³ Although the MDTC believes such data is not relevant to the LEC test, in order to rely on such data to make that claim, the data must be precise and reliable. As demonstrated above, it is not.

Finally, the FCC finds this second part of the offer rule is met even if an “individual investment,” such as installing a drop from an existing street trunk to a home, is required for a household to obtain service, but not if a “community investment,” such as installing a cable trunk to the street, is required.¹⁴ Charter does not identify how many households in the franchise areas identified as having “broadband” by the Census Bureau lack the necessary download speeds required for DirecTV NOW service. But, the Census Bureau data fails to distinguish between those who lack the required download speeds because they would require an “individual investment” to have access to such speeds, from those who lack the required download speeds because they would require a “community investment” to have access to such speeds. Charter does not provide data as to how many potential subscribers to DirecTV NOW in the franchise areas could obtain the needed broadband internet access service solely by making an individual investment. The only broadband data that Charter provides to meet its burden of showing that AT&T offers DirecTV NOW in the franchise areas fails to satisfy either part of the “offer rule.”

II. AT&T and DirecTV, LLC no longer “offer” DirecTV NOW.

Second, and more fundamentally, Charter fails to prove that DirecTV NOW is offered in the franchise areas, because DirecTV NOW is no longer available to residents of the franchise areas. On July 31, 2019, AT&T reorganized its entire menu of satellite and OTT services in the face of subscriber losses at its DirecTV and DirecTV NOW services. After that date, AT&T began offering a new OTT service, which it calls AT&T TV NOW.¹⁵

¹² 47 C.F.R. § 76.905(e)(1).

¹³ *Charter Reply* at 18.

¹⁴ *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631 at ¶27 (1993).

¹⁵ See Press Release, AT&T, DirecTV NOW rebrands Under AT&T TV Family (July 30, 2019) https://about.att.com/newsroom/2019/directv_now_rebrands_under_att_tv.html.

Although AT&T advertised this change as merely a rebranding, this change was more than just a change of name. Unlike DirecTV NOW, AT&T TV NOW cannot be accessed through Microsoft's Internet Explorer browser, for example. Instead, AT&T TV NOW can only be accessed on-line through the Chrome or Safari browsers.¹⁶ AT&T also changed the application formerly required to access DirecTV NOW on mobile devices, replacing the DirecTV NOW app with a new app for use by subscribers both of AT&T TV NOW and a new service, called AT&T TV. The new AT&T TV NOW subscriber app is titled "AT&T TV."¹⁷ Customer reviews suggest that the new AT&T TV NOW app operates very differently, and less successfully, than did the DirecTV NOW app.¹⁸ AT&T also required former DirecTV NOW subscribers to accept new terms and conditions in order to subscribe to the new AT&T TV NOW service.¹⁹ This requires former DirecTV NOW subscribers to enter into a new license agreement to access the new AT&T TV NOW service.²⁰ Although AT&T's press statements minimized its elimination of DirecTV NOW by calling it merely a "rebranding," it is clear that both legally and technologically this was the closure of its existing service, DirecTV NOW and the creation of a new service aimed at DirecTV NOW's former subscribers.

Under the LEC test, "potential subscribers in the franchise area [must be] reasonably aware that they may purchase" [the competitive services]."²¹ The past marketing of DirecTV NOW that Charter identifies to show that potential subscribers are reasonably aware that they may purchase the competing service is irrelevant now that DirecTV NOW is no longer offered.²² As of July 31, 2019, AT&T no longer markets or offers DirecTV NOW. Although former DirecTV NOW subscribers could be transferred to AT&T TV NOW (subject to the conditions mentioned above), the requirement is one of *potential* subscribers, not existing subscribers.²³ In short, Charter has not carried its burden of proving that *potential* subscribers are reasonably aware that they may purchase AT&T TV NOW. In fact, there is no evidence in the record that any potential customers would have any way of being aware of AT&T TV NOW.

¹⁶ <https://www.atttvnow.com/accounts/BrowserNotSupported.html>.

¹⁷ https://about.att.com/newsroom/2019/directv_now_rebrands_under_att_tv.html.

¹⁸ https://play.google.com/store/apps/details?id=com.att.tv&hl=en_US&showAllReviews=true.

¹⁹ https://about.att.com/newsroom/2019/directv_now_rebrands_under_att_tv.html.

²⁰ <https://www.atttvnow.com/terms-and-conditions>.

²¹ 47 C.F.R. § 76.905(e)(2); see also, e.g., *Subsidiaries of Cablevision Systems Corp. Petitions for Determination of Effective Competition in 101 Communities in New Jersey*, Memorandum Opinion and Order, 23 FCC Rcd 14141, 14152-53, 14155, ¶¶ 37, 43 (MB 2008).

²² See Petition at 9-11 and Attachments B and E.

²³ 47 C.F.R. § 76.905(e)(2).

Pursuant to section 1.1206 of the Commission's rules, a confidential version of this letter is being filed in hardcopy and a public version is being filed electronically via ECFS with your office. Please do not hesitate to contact me should you have any questions.

Respectfully,

A handwritten signature in blue ink, appearing to read 'Mark A. Merante', with a stylized flourish at the end.

/s/ Mark A. Merante

Mark A. Merante

Counsel II