

October 22, 2019

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VIA ECFS

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20054

**Re: Notice of *Ex Parte* Presentation**

**Petition of Charter Communications, Inc., for a Determination of Effective  
Competition in 32 Massachusetts Communities and Kauai, HI**

**MB Docket No. 18-283; CSR No. 8965-E**

Dear Ms. Dortch:

Charter Communications, Inc. (“Charter”) hereby replies to the *ex parte* letter submitted by the Massachusetts Department of Telecommunications and Cable (“MDTC”) on October 18, 2019.<sup>1</sup>

MDTC’s eleventh-hour submission provides no basis for the Commission to depart from the conclusions in its draft Memorandum Opinion and Order.<sup>2</sup> Relying in part on redacted data that has not been disclosed to Charter, MDTC urges the Commission to disregard substantial record evidence that DIRECTV NOW is available to consumers in Charter’s Franchise Area, and impose new evidentiary demands before finding that a LEC “offers” service. MDTC offers no explanation as to why it could not have provided this data prior to the last day for public filings in this proceeding. In the absence of any meaningful opportunity for review, this information cannot form the basis of the Commission’s decision.

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<sup>1</sup> Letter from Mark A. Merante, Counsel II, Massachusetts Department of Telecommunications and Cable, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket 18-283, CSR-8965-E (Oct. 18, 2019) (“*MDTC Ex Parte*”). Because MDTC filed its *ex parte* on October 18, 2019, the same day as the Commission released the Sunshine notice in this proceeding, Charter’s reply is timely filed. 47 C.F.R. § 1.1206(b)(2)(iv).

<sup>2</sup> See *In re Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011)*, MB Docket No. 18-283, CSR-8965-E, FCC-CIRC1910-04 (2019) (Draft Memorandum Opinion and Order).

MDTC also rehashes its erroneous claim that AT&T's rebranding of DIRECTV NOW as "AT&T TV NOW" should affect the outcome of this matter—despite the fact that the service AT&T offers has remained the same. Neither of MDTC's arguments alter the fact that Charter is subject to effective competition under the Local Exchange Carrier ("LEC") Test.<sup>3</sup> Accordingly, the Commission should adopt the conclusions set forth in its draft Memorandum Opinion and Order, and grant Charter's Petition for Effective Competition in the Franchise Areas.<sup>4</sup>

**I. MDTC's Last-Minute Claims Regarding the Availability of DIRECTV NOW Are Wholly Unsupported.**

As an initial matter, MDTC's reliance on redacted data that is not available to Charter raises fundamental fairness concerns.<sup>5</sup> Although MDTC has had over a year to come forward with any information that it claims should bear on the Commission's decision,<sup>6</sup> it waited until the day the Commission released the Sunshine notice to file its redacted *ex parte* letter, leaving Charter with only two business days to respond and no opportunity to gain access to the redacted portions of the letter. Reliance by the Commission on such data under these circumstances would run afoul of the Administrative Procedures Act.<sup>7</sup> The extreme lateness of this submission also deprives the Commission of sufficient time to evaluate it, and the Commission is therefore free to disregard it.<sup>8</sup>

In any event, MDTC's claims regarding evidence of the availability of broadband in the Franchise Areas are wholly unsupported and irrelevant. MDTC ignores the fact that Charter cited data from the Commission's 2018 Broadband Deployment Report to show that the availability of

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<sup>3</sup> See 47 U.S.C. § 543(l)(1)(D).

<sup>4</sup> See Petition of Charter Communications, Inc. for A Determination of Effective Competition, MB Docket 18-283, CSR-8965-E (Sept. 14, 2018) ("Charter Petition").

<sup>5</sup> Assuming that the redacted data is FCC Form 477 subscriber data, it is unlikely that Charter would ever be able to access the redacted data because it is the highly competitive data of other providers.

<sup>6</sup> Charter filed its Petition for Effective Competition on September 14, 2018. *Id.*

<sup>7</sup> See *Am. Radio Relay League, Inc. v. F.C.C.*, 524 F.3d 227, 236 (D.C. Cir. 2008); *Nat'l Ass'n of Regulatory Util. Comm'rs v. F.C.C.*, 737 F.2d 1095, 1121 (D.C. Cir. 1984) (an agency's denial of a fair opportunity to comment on key evidence "may fatally taint the agency's decisional process"); *Delta Data Sys. Corp. v. Webster*, 744 F.2d 197, 203 (D.C. Cir. 1984) (agency's failure to give adversary opportunity to comment on *ex parte* information would constitute "an abuse of discretion").

<sup>8</sup> 47 C.F.R. § 1.1206 (granting parties two business days to file written replies to *ex parte* filings made on the day that a Sunshine notice is released); see generally *Verizon v. FCC*, 770 F.3d 961, 968 (D.C. Cir. 2014) (upholding the Commission's decision to decline to consider a proposal in an *ex parte* filed "so late . . . it had insufficient time to evaluate it" and stating that "the FCC is not obliged to consider late-filed proposals").

fixed terrestrial 25 Mbps/3 Mbps service in the Franchise Areas ranged from 86.3% to 98.3%.<sup>9</sup> Relying on the Commission's Broadband Map, Charter also noted that all consumers in the Massachusetts Franchise Areas have access to at least two fixed broadband providers offering 25 Mbps/3 Mbps service, and between 86.46% to 98.64% of consumers have access to at least 3 such providers.<sup>10</sup> This data sufficiently demonstrates that high-speed broadband is already available to the vast majority of consumers in the Franchise Areas.

MDTC also misconstrues the "offer" requirement of the LEC Test. MDTC claims that DIRECTV NOW does not meet the first prong of the "offer test" because some potential subscribers in the Franchise Areas do not subscribe to broadband.<sup>11</sup> But rather than focusing on this type of consumer investment, the test is whether the "the distributor" can deliver service with "no or only minimal investment."<sup>12</sup> Because broadband internet service is made *available* throughout Charter's service footprint in the Franchise Areas by several providers (including by Charter, with download speeds of at least 25 Mbps<sup>13</sup>), all potential subscribers whose residences are passed by Charter's network in the Franchise Areas are able to purchase broadband internet, and thus are able to access AT&T's video service.

MDTC argues that DIRECTV NOW is not "ubiquitous" in the Franchise Areas because AT&T cannot offer service to customers that do not have broadband Internet service.<sup>14</sup> But the LEC Test does not include a "ubiquity" requirement. Rather, the Commission has explained that in order to meet the "offer test," an incumbent cable provider must show only that the LEC must have "begun actual commercial service" in an area that "substantially overlaps the incumbent cable operator's service in the franchise area."<sup>15</sup> In any event, there is no dispute that broadband service itself is ubiquitously available in the Franchise Areas. As explained above, even if not every household subscribes to broadband,<sup>16</sup> this does not render DIRECTV NOW unavailable or show

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<sup>9</sup> See Charter Reply at 19 n.69 (citing *In re Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2018 Broadband Deployment Report, 33 FCC Rcd 1660, Appendix F1 (2018)).

<sup>10</sup> *Id.* n.70.

<sup>11</sup> MDTC *Ex Parte* at 2.

<sup>12</sup> 47 C.F.R. § 76.905(e)(1).

<sup>13</sup> See Charter Petition at 7.

<sup>14</sup> MDTC *Ex Parte* at 2.

<sup>15</sup> *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296, 5305 ¶ 13 (1999) (*Cable Reform Order*).

<sup>16</sup> This is presumably what the redacted data in MDTC's filing purports to show.

that AT&T is not “physically able to deliver the service to potential subscribers, with the addition of no or only minimal additional investment by the distributor.”

Finally, MDTC argues Charter has not shown that DIRECTV NOW meets the second prong of the “offer test” because a “community investment” might be necessary to provide broadband download speeds of at least 25 Mbps.<sup>17</sup> But that claim is mooted by the FCC’s own data, cited by Charter, which demonstrates that those speeds are available, from multiple providers, to nearly every household in the Franchise Areas. Moreover, the “offer test” only requires an incumbent provider to demonstrate that the LEC has “begun actual commercial service” in an area that “substantially overlaps the incumbent cable operator’s service in the franchise area.”<sup>18</sup> Contrary to MDTC’s argument,<sup>19</sup> the Commission’s standard does not require Charter to show that AT&T offers the DIRECTV NOW service *everywhere* in the Franchise Area.

## **II. AT&T Continues to Offer a Comparable Video Programming Service Notwithstanding the Rebranding of DIRECTV NOW.**

MDTC rehashes an argument that it previously made and that the draft Memorandum Opinion and Order rejected: It claims that there is no effective competition in the Massachusetts Franchise Areas because DIRECTV NOW has been rebranded as “AT&T TV NOW.”<sup>20</sup> AT&T’s decision to rebrand DIRECTV NOW still has no bearing on the availability of a competitive alternative. The service continues to offer comparable video programming in Massachusetts, satisfying all of the requirements of the LEC Test.

In its *ex parte*, MDTC does not dispute that DIRECTV NOW began actual commercial service in the Franchise Areas,<sup>21</sup> or that consumers in the Franchise Areas were “reasonably aware”<sup>22</sup> of DIRECTV NOW for the purposes of the LEC Test.<sup>23</sup> And as the Commission

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<sup>17</sup> MDTC *Ex Parte* at 4.

<sup>18</sup> *Cable Reform Order*, 14 FCC Rcd at 5305 ¶ 13.

<sup>19</sup> MDTC *Ex Parte* at 2.

<sup>20</sup> MDTC *Ex Parte* at 4; *id.* at 5 (“there is no evidence in the record that *any potential customers* would have any way of being aware of AT&T TV NOW”). See Massachusetts Department of Telecommunications and Cable, Supplement to Motion for Abeyance, MB Docket 18-283, CSR-8965-E at 2 (Aug. 5, 2019) (“MDTC Supplement”) (making same argument); Draft Memorandum Opinion and Order ¶¶ 10, 27 (“our analysis is based on the service that is currently available to subscribers, rather than speculative changes” that could prompt petitions for recertification) & n.122 (noting that the rebranding of DIRECTV NOW does not change the Commission’s analysis).

<sup>21</sup> Draft Memorandum Opinion and Order ¶ 10.

<sup>22</sup> 47 C.F.R. § 76.905(e)(2).

<sup>23</sup> See MDTC *Ex Parte* at 4-6. Indeed, the Commission’s draft Memorandum Opinion and Order shows why this is beyond any reasonable dispute. As the Commission points out, DIRECTV NOW has “begun actual commercial

correctly points out in its draft Memorandum Opinion and Order, “DIRECTV NOW’s rebranding as AT&T TV NOW does not alter this analysis.”<sup>24</sup> Although AT&T rebranded the DIRECTV NOW service as “AT&T TV NOW” in July 2019,<sup>25</sup> the service itself remains the same—and (regardless of name) it continues to provide live TV and on-demand programming to *the same subscribers*.<sup>26</sup> In fact, in order to transition from DIRECTV NOW to AT&T TV NOW, subscribers did not have to take any action beyond accepting the terms of service again.<sup>27</sup>

Information about this LEC-affiliated service remains readily available to consumers. The DIRECTV NOW website now redirects to the website for AT&T TV NOW;<sup>28</sup> a simple Google search of “DIRECTV NOW” provides AT&T TV NOW’s website as the top result;<sup>29</sup> and, AT&T has continued to market the service.<sup>30</sup> As it did prior to rebranding, the service continues to have over a million subscribers nationwide.<sup>31</sup> Put simply, the service formerly known as “DIRECTV

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service.” Draft Memorandum Opinion and Order ¶ 10 & n.45 (noting that opponents of Charter’s petition do not dispute that DIRECTV had begun actual commercial service through its DIRECTV NOW service). *Id.* ¶ 10 & n.47 (DIRECTV NOW has been marketed nationwide since 2016 and is available both in the Franchise Areas and nationwide). *Id.* ¶ 10 & n.48 (DIRECTV NOW had over one million subscribers nationwide). These factors demonstrate that “potential customers are reasonably aware that they can receive the service and have taken advantage of the programming option.” *Id.* ¶ 10.

<sup>24</sup> *Id.* ¶ 27 & n. 122.

<sup>25</sup> 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](https://about.att.com/newsroom/2019/directv_now_rebrands_under_att_tv.html) (“Our DIRECTV NOW subscribers will simply need to re-accept the terms of service and their streaming will continue as usual without interruption”); see also Chris Gates, *AT&T TV vs. AT&T TV NOW vs. HBO Max and More: AT&T Streaming Services Explained*, DIGITAL TRENDS (Aug. 7, 2019), <https://www.digitaltrends.com/home-theater/att-tv-vs-att-tv-now-vs-hbo-max-vs-hbo-now-vs-hbo-go-vsdc-universe/> (explaining that AT&T TV NOW is a Live TV service “formerly known as DIRECTV NOW”).

<sup>26</sup> See *supra* note 6.

<sup>27</sup> 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](https://about.att.com/newsroom/2019/directv_now_rebrands_under_att_tv.html) (“Our DIRECTV NOW subscribers will simply need to re-accept the terms of service and their streaming will continue as usual without interruption”).

<sup>28</sup> See <http://www.directvnow.com>

<sup>29</sup> See [https://www.google.com/search?ei=TVKuXbKJGsPQ-gTL4p\\_wCA&q=DIRECTV+NOW&oq=DIRECTV+NOW&gs\\_l=psy-ab.3..0i67j0l3j0i67j0l2j0i67j0l2.25707.27622..27941...0.2..1.210.1096.9j1j1....3..0....1..gws-wiz...0i71j0i131.3tQ3xcUSOjw&ved=0ahUKEwjy49f60q7lAhVDqJ4KHUvxB44Q4dUDCAs&uact=5](https://www.google.com/search?ei=TVKuXbKJGsPQ-gTL4p_wCA&q=DIRECTV+NOW&oq=DIRECTV+NOW&gs_l=psy-ab.3..0i67j0l3j0i67j0l2j0i67j0l2.25707.27622..27941...0.2..1.210.1096.9j1j1....3..0....1..gws-wiz...0i71j0i131.3tQ3xcUSOjw&ved=0ahUKEwjy49f60q7lAhVDqJ4KHUvxB44Q4dUDCAs&uact=5).

<sup>30</sup> See *supra* note 12; <https://www.attvnow.com>.

<sup>31</sup> See Press Release, AT&T, AT&T Reports Second-Quarter Results (July 24, 2019), [https://about.att.com/story/2019/att\\_second\\_quarter\\_earnings\\_2019.html](https://about.att.com/story/2019/att_second_quarter_earnings_2019.html). MDTC provides no authority for its strained assertion that the Commission should ignore the multi-year history of nationwide advertising and the fact that the service has garnered over a million subscribers (including in the Franchise Area), in favor of a narrow focus on “potential subscribers,” in assessing whether consumers in the Franchise Area are reasonably aware of the service. See MDTC *ex parte* at 5. It

NOW” has not disappeared from the Franchise Areas, and it continues to offer comparable programming in those areas.

MDTC’s view seems to be that a petition for effective competition must be denied if the allegedly comparable video programming service changes its name. That is, of course, absurd, and MDTC’s attempt to bolster its argument by pointing to a handful of superficial changes to the service now known as AT&T TV NOW is unavailing. MDTC cites the fact that subscribers were required to accept the terms of service again as evidence that the rebranding of DIRECTV NOW in fact signaled “the creation of a new service aimed at DirecTV NOW’s former subscribers.”<sup>32</sup> In reality, this only shows how easy it has been for existing DIRECTV NOW subscribers to continue their service.

None of the other examples MDTC cites fare any better. For example, MDTC suggests that changing the name of the DIRECTV NOW app to “AT&T TV NOW” means that AT&T TV NOW is a completely different service from DIRECTV NOW. MDTC also points to changes to the browsers that AT&T’s service supports as evidence that AT&T TV NOW was cut from whole cloth. None of these superficial changes alter the fact that there is a comparable video programming service offered in the Franchise Areas, nor do they give any reason to doubt that consumers in the Franchise Areas are reasonably aware of AT&T TV NOW—just as they were reasonably aware of DIRECTV NOW.

MDTC’s argument that rebranding suffices to defeat a petition for effective competition is not a serious one, nor is it based on the LEC Test’s requirements. It is just another desperate attempt by MDTC to find some reason—any reason—to keep burdensome and unnecessary rate regulation in place in Massachusetts. Furthermore, if DIRECTV NOW—now under the guise of “AT&T TV NOW”—stops providing comparable video programming in Massachusetts some day in the future, MDTC will have the opportunity to seek certification to reestablish rate regulation.

Sincerely,

/s/ *Howard J. Symons*

Howard J. Symons

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is difficult to imagine clearer proof that consumers are aware of the service’s availability than the fact that they actually purchased it.

<sup>32</sup> *MDTC Ex Parte* at 5.