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April 12, 2019

Notice of Ex Parte -- Filed Via ECFS

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Ms. Dortch:

Pursuant to section 1.1206 of the Federal Communications Commission's ("Commission") rules, the Massachusetts Department of Telecommunications and Cable ("MDTC") hereby provides notice that on April 11, 2019, the undersigned met separately with Alexander Sanjenis, Acting Media Advisor for Chairman Pai; Joel Miller, Chief of Staff and Media Legal Advisor for Commissioner O'Rielly; Michael Scurato, Acting Legal Advisor for Media and Consumer Protection for Commissioner Starks; Kate Black, Policy Advisor, Media for Commissioner Rosenworcel; and Evan Swarztrauber, Policy Advisor for Commissioner Carr.

During these meetings, I reiterated the MDTC's position that Charter has not met its burden of demonstrating that it is subject to effective competition based on DIRECTV NOW.¹ I stated that the MDTC is not claiming that streaming services can never provide any competition to cable; merely that any competition DIRECTV NOW may provide simply does not meet the congressional standard for effective competition based on the Local Exchange Carrier ("LEC") Test.²

Also in the meetings I emphasized the underlying facilities-based, physical connectivity thrust of the LEC Test, and specifically included one or more of the following points:

- A grant of Charter's petition would result in significant unintended consequences and regulatory uncertainty throughout the video services industry. As discussed below, for the Commission to grant the petition it must determine that DIRECTV NOW offers channels. If

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

² 47 U.S.C. § 543(l)(1)(D).

the Commission reverses its prior rulings and makes that finding, it would open the door for claims that all streaming video providers are multichannel video programming distributors (“MVPD”).³ While strictly speaking, the LEC Test does not invoke the term “MVPD,” if the Commission were to grant Charter’s petition, it would provide the elemental framework necessary for stakeholders to make these claims. Specifically, a grant would permit broadcasters to impose the retransmission consent regime on streaming services, and would permit streaming services to impose nondiscriminatory program access requirements on cable operators.⁴

- The underlying theme of the Telecommunications Act of 1996 and everything Congress and the Commission have ever said about the LEC Test confirm that the test is meant for facilities-based LECs with physical connections to the subscriber.
- AT&T is not a LEC in the communities at issue. A LEC provides telephone exchange service, and telephone exchange service is service within a telephone exchange.⁵ Charter has not demonstrated that AT&T provides telephone exchange service within the franchise areas’ exchanges.
- DirecTV does not offer DIRECTV NOW directly to subscribers in the franchise areas, because the service requires a subscriber to have a broadband connection.⁶ At best, DIRECTV NOW is offered indirectly, via that broadband connection.
- Under the LEC Test, a competitor must be *physically able* to deliver the service all the way to subscribers, not merely *able*.⁷ There is a meaningful difference between *physical* ability, which is required, and ability. DirecTV is not physically able to deliver DIRECTV NOW to subscribers; DirecTV can physically deliver the service only as far as a subscriber’s Internet service provider, which in this case—ironically and in contrast to the nature of competition—is Charter. The Commission included the “physically” requirement due to the facilities-based thrust of the LEC Test, and this word cannot be ignored.
- Charter has not satisfied the Commission’s requirement that there can be no impediments of any kind to a subscriber taking DIRECTV NOW.⁸ The prerequisite of a broadband connection is an impediment, both technical and otherwise. The Commission has stated that costs can be an impediment, and, not including taxes and fees a consumer will have to pay at least \$94.99 for DIRECTV NOW, but, on average, only \$16.57 for Charter’s basic service tier in the franchise areas. This cost is clearly an impediment to a consumer subscribing to DIRECTV NOW. While Charter cites county-level broadband subscription rates in Massachusetts as evidence that the required broadband connection is not an impediment, the Commission’s standard does not say that the impediment must affect all potential subscribers; only that there can be no impediments of any kind.

³ *Id.* § 522(4), (13).

⁴ *See id.* §§ 325(b), 548.

⁵ *Id.* § 153(32), (54).

⁶ *See id.* § 543(l)(1)(D).

⁷ *See In re Implementation of Cable Act Reform Provisions of the Telecomms. Act of 1996*, 14 FCC Rcd. 5296, 5300, Report & Order (1999) (“Cable Reform Order”).

⁸ *See id.*

- Under the LEC Test, a cable operator must show that the competitor offers 12 channels of programming, and the Commission has said that online video distributors do not offer channels.⁹ As a result, DIRECTV NOW does not provide channels and thus does not provide comparable programming to Charter. Although Charter relies heavily on the “by any means” phrase in the statute, that phrase is subject to the comparable programming conditional phrase at the end of the LEC Test. As there is no comparable programming, there is no effective competition.
- According to the Commission’s recent marketplace competition report, basic service tier cable rates are 50% higher in unregulated communities than they are in regulated communities.¹⁰
- The price of cable is the most frequent complaint that the MDTC’s Consumer Division receives.

Finally, I noted that the Commission has a pending Further Notice of Proposed Rulemaking (“FNPRM”) on cable rates, in response to which the MDTC has proposed easing cable operators’ regulatory burdens.¹¹ Through this FNPRM, the Commission has a direct path to reduced regulatory burdens that will not result in the regulatory uncertainty described above. The Commission should thus turn its attention to that proceeding and, for the reasons discussed above, deny Charter’s petition for effective competition.

Pursuant to section 1.1206 of the Commission’s rules, this notice is being filed electronically via ECFS with your office. Please do not hesitate to contact me should you have any questions.

Respectfully,

/s/ Sean M. Carroll

Sean M. Carroll

Deputy General Counsel

cc: Alexander Sanjenis
Joel Miller
Evan Swarztrauber
Kate Black
Michael Scurato

⁹ 47 C.F.R. § 76.905(g); *In re Sky Angel U.S., LLC*, 25 FCC Rcd. 3879, 3883, *Order* (2010).

¹⁰ *In re Commc’ns Marketplace Report*, GN Docket No. 18-231, *Report*, FCC 18-181, ¶ 72 (Dec. 26, 2018).

¹¹ *See In re Modernization of Media Regulation Initiative*, MB Docket No. 17-105, *Further Notice of Proposed Rulemaking & Report & Order*, FCC 18-148 (Oct. 23, 2018); *In re Modernization of Media Regulation Initiative*, MB Docket No. 17-105, MDTC Comments at 12-13 (Jan. 10, 2019); *In re Modernization of Media Regulation Initiative*, MB Docket No. 17-105, MDTC *Ex Parte* Letter at 3 (Apr. 12, 2019).