

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

In the Matter of

Charter Communications, Inc.

Petition for Determination of Effective Competition in:

32 Massachusetts Communities

MB 18-283

CSR-8965-E

**MASSACHUSETTS DEPARTMENT OF TELECOMMUNICATIONS AND CABLE
MOTION FOR ABEYANCE**

Commonwealth of Massachusetts
Department of Telecommunications and Cable

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Dated: June 17, 2019

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I. Introduction

With this Motion for Abeyance (“Motion”), the Massachusetts Department of Telecommunications and Cable (“MDTC”) requests that the Federal Communications Commission (“Commission”) hold the above-captioned proceeding in abeyance pending a stabilization of DIRECTV NOW’s declining subscriber base and resolution of its Further Notice of Proposed Rulemaking (“FNPRM”) on cable rate regulation.¹ On September 21, 2018, Charter Communications, Inc. (“Charter”) filed a Petition for Special Relief (“Petition”) claiming that the company is subject to effective competition in certain franchise areas based on DIRECTV NOW, a streaming video service.² On October 25, 2018, the MDTC opposed the Petition on both legal

¹ 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) (“FNPRM”).

² *Petition of Charter Commc’ns, Inc. for a Determination of Effective Competition*, MB Docket No. 18-283 (2018).

and policy grounds.³ The Commission has the authority to hold this proceeding in abeyance, and as discussed below, extraordinary circumstances exist to do so.⁴ If the Commission chooses to not hold this proceeding in abeyance, the Commission should deny the Petition on the merits for the reasons stated in the MDTC's Opposition. With this Motion, the MDTC respectfully suggests that the Commission simply abstain from expending further resources analyzing the Petition at this time given that the circumstances forming the basis of the Petition are subject to change in the short-term.

II. The Commission Should Hold this Proceeding in Abeyance

The Commission has broad authority to grant a motion for abeyance.⁵ The Commission holds proceedings in abeyance for judicial and administrative efficiency and to avoid a waste of resources.⁶ Additionally, the Commission holds petitions in abeyance if a petition “may be rendered moot” by rules under consideration in a related proceeding.⁷ In such case, the Commission holds the petitions in abeyance pending adoption of final rules in the related

³ *Petition of Charter Commc'ns, Inc. for a Determination of Effective Competition*, MB Docket No. 18-283, *MDTC Opposition* (Oct. 25, 2018) (“MDTC Opposition”).

⁴ *See* 47 U.S.C. § 154(i)-(j); 47 C.F.R. § 76.7(d).

⁵ 47 U.S.C. § 154(i)-(j) (affording the Commission the discretion to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice”).

⁶ *See In re Expanding the Econ. & Innovation Opportunities of Spectrum Through Incentive Auctions*, GN Docket No. 12-268, *Report & Order*, 29 FCC Rcd. 6567, 6669-70 (2014) (directing the Media Bureau to hold various petitions in abeyance); *In re Improving Pub. Safety Commc'ns in the 800 Mhz Band Supplemental Requests for Waiver of June 26, 2008 Rebanding Deadline*, WT Docket No. 02-55, *Order*, 25 FCC Rcd. 3246 (2010).

⁷ *In re Rules & Policies on Foreign Participation in the U.S. Telecom Market*, IB Docket No. 97-142, *Order & Notice of Proposed Rulemaking*, 12 FCC Rcd. 7847, 7849 n.2 (1997).

proceeding.⁸ The Commission should hold this proceeding in abeyance on each of these grounds.

A. DIRECTV NOW's Declining Subscribership

Since Charter filed the Petition, DIRECTV NOW's subscribership has been declining steadily.⁹ Market analysts and even AT&T itself expect this decline to continue.¹⁰ Absent a turnaround in the near future there is no guarantee of DIRECTV NOW's continued viability.¹¹ Recent history is littered with examples of sold, spun off, or otherwise folded streaming services.¹² The streaming video market is extremely competitive, with a Fox Corp. executive

⁸ *Id.*

⁹ *Petition of Charter Commc'ns, Inc. for a Determination of Effective Competition*, MB Docket No. 18-283, *State of Hawaii Ex Parte Letter* (Apr. 29, 2019) (citing Brian Fung, *AT&T's streaming service, DirecTV Now, has lost nearly 20 percent of its subscribers in the last 6 months*, WASHINGTON POST, Apr. 24, 2019, <https://www.washingtonpost.com/technology/2019/04/24/atts-streaming-service-directv-now-has-lost-nearly-percent-its-subscribers-last-months/>).

¹⁰ Adam Levy, *AT&T's TV Business Will Keep Losing Subscribers Throughout 2019*, THE MOTLEY FOOL, May 19, 2019, <https://www.fool.com/investing/2019/05/19/atts-tv-business-will-keep-losing-subscribers-thro.aspx>.

¹¹ See Brian Fung, *AT&T's streaming service, DirecTV Now, has lost nearly 20 percent of its subscribers in the last 6 months*, WASHINGTON POST, Apr. 24, 2019, <https://www.washingtonpost.com/technology/2019/04/24/atts-streaming-service-directv-now-has-lost-nearly-percent-its-subscribers-last-months/> ("The steep [subscriber] losses highlight the obstacles facing AT&T as it seeks to build a viable successor to its legacy TV products."); Chris Neiger, *Survey Suggests Trouble Ahead for AT&T's Streaming TV Services*, THE MOTLEY FOOL, Feb. 15, 2019, <https://www.fool.com/investing/2019/02/14/survey-trouble-tv-att-directv-services.aspx> ("As AT&T pays down debt and focuses attention [on] the ultra-competitive wireless segment, and at [sic] it becomes clearer that TV users prefer Hulu and YouTube TV, it's likely that AT&T's TV streaming services will continue to struggle.").

¹² See, e.g., 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>.

recently stating that that company does not foresee a broad, sustainable direct-to-consumer streaming offering.¹³ AT&T sees “between ten and two” subscription streaming services surviving long-term, with four or five as a likely outcome.¹⁴ And in addition to DIRECTV NOW’s declining subscribership, the service ranks lowest among pay streaming video services in terms of customer satisfaction.¹⁵ One industry analyst noted that recent changes to the service make it “far less compelling to consumers, with both of its direct competitors cheaper (YouTube TV at \$40 and Hulu Live at \$45).”¹⁶ Thus, although AT&T “think[s]” it can be one of the streaming services that survives, DIRECTV NOW’s poor customer satisfaction ratings and declining subscribership suggest that this is anything but a foregone conclusion.¹⁷

If the Commission were to take action in this proceeding prematurely and grant the Petition, it might quickly create a situation where Charter’s rates are unregulated based on an alleged competitor that no longer exists. In addition to being deficient on a policy basis, this would subject Charter to increased regulatory uncertainty, and almost certainly would prompt multiple Petitions for Recertification with the Commission.¹⁸ The Commission can avoid this

¹³ 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/>.

¹⁴ Geoff Colvin, *AT&T Has Become a New Kind of Media Giant*, FORTUNE, May 21, 2019, <http://fortune.com/longform/att-media-company/>.

¹⁵ AM. CUSTOMER SATISFACTION INDEX, ACSI TELECOMMUNICATIONS REPORT 2018-2019 9-11 (2019).

¹⁶ Todd Spangler, *DirecTV Now Prices Going Up by \$10 per Month for All Customers, AT&T Rolling Out Two New Reformatted Packages*, VARIETY, Mar. 11, 2019, <https://variety.com/2019/digital/news/directv-now-price-increases-10-dollars-new-packages-1203160152/>. The analyst’s mention of only YouTube TV and Hulu Live as DIRECTV NOW’s competitors is telling. See *id.*

¹⁷ Geoff Colvin, *AT&T Has Become a New Kind of Media Giant*, FORTUNE, May 21, 2019, <http://fortune.com/longform/att-media-company/>.

¹⁸ See 47 C.F.R. § 76.916.

unwelcome scenario, increased burden, and attendant administrative waste by holding this proceeding in abeyance pending demonstration of DIRECTV NOW's long-term viability as an AT&T entity via a stabilization of the service's subscriber base.¹⁹ This procedural step would be administratively efficient and would not necessarily burden Charter even if the Commission were to ultimately grant the Petition, because grants of effective competition can be retroactive to the date the petition was filed.²⁰

B. The Petition May Be Rendered Moot

In addition to the questions about DIRECTV NOW's long-term viability, the Commission should hold this proceeding in abeyance because Charter's Petition may be rendered moot by a related rulemaking. At its heart, Charter's Petition is an attempt to eliminate cable rate regulation.²¹ On October 23, 2018—less than one month after Charter filed the Petition—the Commission adopted an FNPRM in response to requests for elimination of the very cable rate regulations from which Charter seeks relief through its Petition.²² Depending on the outcome of the FNPRM, Charter's Petition in this proceeding may be rendered moot. In the FNPRM, the Commission took comment on replacing its rate regulation framework entirely and

¹⁹ These viability questions go to the very heart of one of the reasons the Commission should deny Charter's Petition on the merits. The very reason for the Local Exchange Carrier ("LEC") Test is the LEC's staying power in the market. *See* MDTC Opposition at 19-21. DIRECTV NOW's uncertain future is further evidence that a streaming video service with no LEC facilities is not an entity that Congress intended to satisfy the LEC test. The staying power of LECs that Congress cited was due to the presence of LECs' facilities in the relevant franchise areas—the LEC would be much less likely to exit an area in which it owned facilities. As it does not have such facilities in Massachusetts, AT&T is not tied to the Massachusetts franchise areas in any way, and DIRECTV NOW could disappear from the franchise areas overnight.

²⁰ *See In re Alert Cable T.V. of N.C., Inc. d/b/a Time Warner Cable, Memorandum Opinion & Order*, 19 FCC Rcd. 80, 81 (2004).

²¹ Petition at 1; *see also* 47 U.S.C. § 543(a)(2).

²² *In re Modernization of Media Regulation Initiative*, MB Docket No. 17-105, *Further Notice of Proposed Rulemaking & Report & Order*, FCC 18-148, ¶ 7 n.28 (Oct. 23, 2018).

on “any other proposals [it] should consider to restructure and simplify [its] existing rate regulation regime.”²³ The FNPRM thus contemplates effectively the same outcome as the Petition in this proceeding.²⁴ Consistent with Commission precedent, the Commission should finalize the rulemaking initiated by the FNPRM before wading further into determining the franchise areas in which the resultant rules will apply.²⁵

III. Conclusion

The Commission should deny Charter’s Petition on the merits. But in the interim, and in the interest of administrative efficiency, the Commission should grant this Motion and hold this proceeding in abeyance pending a stabilization of DIRECTV NOW’s subscriber base and the resolution of the Commission’s rulemaking that could render the Petition moot.

Respectfully submitted,

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²³ FNPRM, ¶¶ 7, 15.

²⁴ Compare *id.*, ¶¶ 14, 17 (proposing “[d]eregulation of [e]quipment, [s]mall [s]ystems and [c]ommercial rates” and “eliminating outdated rate regulations”), with *Petition of Charter Commc’ns, Inc. for a Determination of Effective Competition*, MB Docket No. 18-283, *Charter Reply to Oppositions* (Nov. 19, 2018) at 2, 3, 20 (asking for “deregulation of cable rates” and “eliminating cumbersome rate regulations”).

²⁵ See *In re Rules & Policies on Foreign Participation in the U.S. Telecom Market*, IB Docket No. 97-142, *Order & Notice of Proposed Rulemaking*, 12 FCC Rcd. 7847, 7849 n.2 (1997) (“Issues raised in these petitions for reconsideration may be rendered moot by the rules we adopt in this proceeding. We therefore hold these petitions in abeyance pending adoption of final rules in this proceeding.”).