

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

In the Matter of

Petition for Determination of
Effective Competition
in 32 Massachusetts Communities
and Kauai, HI (HI0011)

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) MB 18-283
) CSR-8965-E
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**CHARTER COMMUNICATIONS, INC.
OPPOSITION TO MOTION FOR ABEYANCE**

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Charter Communications, Inc. (“Charter”), by its attorneys and on behalf of its subsidiaries and affiliates, hereby submits its opposition to the Motion for Abeyance filed by the Massachusetts Department of Telecommunications and Cable (“MDTC”) in the above-captioned proceeding.¹ The Federal Communications Commission (“Commission”) should strike MDTC’s Motion for Abeyance as an unauthorized pleading under 47 C.F.R. § 76.7(d) because MDTC has failed to argue or demonstrate that “extraordinary circumstances” exist. Procedural failings aside, MDTC’s arguments do not alter the fact that Charter is subject to effective competition under the Local Exchange Carrier (“LEC”) Test² from AT&T’s DIRECTV NOW streaming service. Accordingly, the Commission should reject MDTC’s Motion for Abeyance and proceed to grant Charter’s Petition for Effective Competition in this proceeding.³

¹ See Massachusetts Department of Telecommunications and Cable Motion for Abeyance, MB Docket 18-283, CSR-8965-E (June 17, 2019) (“MDTC Motion”).

² See 47 U.S.C. § 543(l)(1)(D).

³ Petition of Charter Communications, Inc. for A Determination of Effective Competition, MB Docket 18-283, CSR-8965-E (Sept. 14, 2018) (“Charter Petition”).

I. MDTC Has Failed to Demonstrate that Extraordinary Circumstances Exist for Its Motion Under 47 C.F.R. § 76.7(d).

As MDTC acknowledges,⁴ this proceeding is governed by section 76.7 of the Commission's rules, which applies to petitions for special relief.⁵ Section 76.7 limits interested parties' filings in such proceedings to a single opposition or answer,⁶ with additional motions or pleadings accepted only upon a showing of "extraordinary circumstances."⁷ Having filed its Opposition to Charter's Petition on October 25, 2018,⁸ MDTC must therefore demonstrate that "extraordinary circumstances" exist in order for the Commission to also accept the instant motion. MDTC's Motion utterly fails to satisfy this burden. Despite its summary assertion that "extraordinary circumstances exist" to warrant holding the proceeding in abeyance,⁹ neither of the grounds MDTC advances meets that heavy burden. MDTC's Motion should therefore be dismissed.

MDTC's claim that old press reports regarding fluctuations in DIRECTV NOW's subscribership¹⁰ and the Commission's cable rate regulation reform proceeding that commenced last October¹¹ constitute "extraordinary circumstances" stands in stark contrast to the rare cases in

⁴ MDTC Motion at 2, n.4.

⁵ 47 C.F.R. § 76.7.

⁶ 47 C.F.R. § 76.7(b).

⁷ 47 C.F.R. § 76.7(d).

⁸ See Massachusetts Department of Telecommunications and Cable Opposition to Charter Communications, Inc.'s Petition for Special Relief, MB Docket 18-283, CSR-8965-E (Oct. 25, 2019) ("MDTC Opposition").

⁹ MDTC Motion at 2.

¹⁰ *Id.* at 3, 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/>.

¹¹ *Id.* at 5, citing *In re Modernization of Media Regulation Initiative*, Further Notice of Proposed Rulemaking, 2018 WL 5295936 (2018) ("Cable Rate Regulation NPRM").

which the Commission has found that such circumstances exist.¹² In those cases, the extraordinary circumstances involved newly discovered material facts that could not have been addressed in the normal pleading cycle.¹³ Conversely, the Commission regularly denies motions filed under section 76.7(d) that “do[] little more than restate positions that the [filer] has already stated”¹⁴ or that are based on “information which is speculative and conclusory.”¹⁵ MDTC’s Motion falls squarely in the latter category.

Even assuming *arguendo* that the supposedly declining subscribership numbers and the rate regulation reform rulemaking were relevant to Charter’s Petition, which as demonstrated below they are not, they clearly do not present extraordinary circumstances justifying the acceptance of an irregular filing like the MDTC Motion because neither claim presents new or material information that is essential to this proceeding. First, although MDTC’s argument about DIRECTV NOW’s subscribers relies on subscriber numbers released after MDTC filed its Opposition, this information is speculative and immaterial because the LEC Test does not have a penetration requirement.¹⁶ It is also duplicative of information contained in an *ex parte* filing that the Hawaii Department of Commerce and Consumer Affairs (“DCCA”) submitted nearly two

¹² See *In re Time Warner Cable Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 16307 ¶ 2 (MB 2013) (finding that “extraordinary circumstances” existed where there were “complex facts that emerged late in the proceeding,” and the pleading “add[ed] new material facts to and observations to the record.”); *In re Time Warner Entertainment-Advance Newhouse Partnership*, 26 FCC Rcd 3840, 3841 ¶ 4 (MB Docket 2011) (finding that “extraordinary circumstances” existed where “the numerical research in [the] case was extraordinarily complex” and the pleading in question was “limited to refutations of specific claims ... made for the first time in its Reply”); *In re Dan Reynolds v. TCA Cable Partners D/B/A Cox Communications*, Memorandum Opinion and Order, CSR-6230-M, 2003 WL 22998816 (MB 2003).

¹³ *Id.*

¹⁴ *In re Charter Communications*, 26 FCC Rcd 5076 ¶ 3.

¹⁵ *Id.*

¹⁶ See *infra* at 5.

months ago in this proceeding.¹⁷ Second, MDTC submitted its Opposition to Charter's Petition *after* the Commission adopted the *Cable Rate Regulation NPRM*, and thus could have included its mootness argument in that submission. Given MDTC's failure to demonstrate the required "extraordinary circumstances," the Commission should deem MDTC's Motion to be unauthorized and strike it from the record.¹⁸

II. MDTC's Claims Are Irrelevant to Charter's Petition.

Even if the Commission were to accept MDTC's unauthorized pleading as an *ex parte* or other filing, which it should not, MDTC's arguments lack merit and are irrelevant to the Commission's consideration of Charter's Petition. MDTC does not dispute the facts set forth in Charter's Petition, and its arguments do not alter the fact that DIRECTV NOW meets the requirements of the LEC Test and thus warrant a finding of effective competition.

A. MDTC's Reliance on Subscriber Numbers Misconstrues the Facts and the Law.

MDTC argues that the Commission should hold Charter's Petition in abeyance because DIRECTV NOW's subscribership has been declining steadily and "there is no guarantee of DIRECTV NOW's continued viability."¹⁹ This argument misrepresents the facts and attempts to impute a penetration requirement on the LEC Test, in contravention of the statute.

First, MDTC's assertions about the supposed decline in subscribership are of no relevance. Fluctuations in subscriber numbers are a common occurrence for video providers offering service

¹⁷ See Letter from Brue A. Olcott, Counsel to DCCA, to Marlene H. Dortch, Secretary, FCC, MB Docket 18-283 (Apr. 29, 2019).

¹⁸ See *In re Charter Communications Entertainment I LLC*, Memorandum Opinion and Order, 26 FCC Rcd 5975, 5076 ¶ 3 (MB 2011) (*In re Charter Communications*) (finding that because a supplemental pleading filed under 47 C.F.R. § 76.7 did not show extraordinary circumstances, it was an "unauthorized pleading" and was stricken from the record).

¹⁹ MDTC Motion at 3.

in today's competitive video marketplace and do not portend certain failure, especially for a service owned by a "media giant" like AT&T.²⁰ Indeed, AT&T itself has explained that it expected to temporarily lose subscribers over the relevant period due to adjustments to promotions and lower content costs, but still anticipates continued subscriber growth as it modifies its product offerings to suit consumer needs and expects increased profitability from the DIRECTV NOW service.²¹ AT&T demonstrated its commitment to DIRECTV NOW in its most recent Annual Report released in February 2019, noting that AT&T has invested in DIRECTV NOW and has "worked diligently to get [this] offering just right since introducing DIRECTV NOW in 2016, from managing content costs to optimizing pricing to match customer value."²²

Second, MDTC's focus on DIRECTV NOW's subscribership is yet another attempt by the opponents of Charter's Petition to read into the LEC Test a penetration requirement that Congress and the Commission explicitly rejected. As Charter has previously explained, the LEC Test recognizes that LECs and their affiliates are powerful competitors in the marketplace for video programming.²³ Accordingly, Congress recognized that the offering of comparable video programming services directly to subscribers by a LEC or LEC affiliate automatically satisfies the

²⁰ See Geoff Colvin, "AT&T Has Become a New Kind of Media Giant," *Fortune* (May 21, 2019), <http://fortune.com/longform/att-media-company/>.

²¹ Luke Bouma, "AT&T Expects DIRECTV NOW to Lose Subscribers," *Cord Cutters News* (Nov. 30, 2018), <https://www.cordcuttersnews.com/att-expects-directv-now-to-lose-subscribers/>.

²² AT&T, Inc., Annual Report (Form 10-K) at 6 (Feb. 20, 2019).

²³ 141 Cong. Rec. S8243 (daily ed. June 13, 1995) (statement of Sen. Pressler) (noting the "competitive threat" posed by LECs in the video marketplace because of, *inter alia*, "their specific identities" and "their financial strength and staying power"); *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296, 5301 ¶ 9 & n.38 (1999) ("1999 Implementation Order") (explaining that Congress expected LECs to be "robust competitors of cable operators because of their financial and technical ability").

effective competition test, without the need for a specific availability or penetration test, regardless of the means used by the LEC affiliate to offer those services.²⁴

Finally, even if MDTC's speculative predictions about AT&T no longer offering the DIRECTV NOW service were to come true, the Commission's rules provide MDTC with a remedy to ensure that Charter's rates will be regulated if it is not subject to competition from another provider. If the Commission grants Charter's Petition, and DIRECTV NOW later ceases to compete in Massachusetts and Hawaii, MDTC and the Hawaii DCCA may seek certification to again regulate Charter's basic service tier and associated equipment.²⁵ Under the Commission's rules, MDTC and DCCA would simply be required to file revised versions of Form 328 and make a demonstration rebutting the presumption of effective competition; the certification would become effective 30 days later.²⁶ In effect, MDTC is asking the Commission to forgo recognition of present-day effective competition on the *chance* that a viable competitor may at some point in the *future* stop offering a competitive video service. Such an action is directly contrary to the Cable Act.²⁷

B. The Cable Rate Regulation FNPRM Will Not Render Charter's Petition Moot.

MDTC also argues that the *Cable Rate Regulation FNPRM* may render Charter's petition moot because the "FNPRM ... contemplates effectively the same outcome as the Petition in this proceeding."²⁸ While it is true that the Petition and the *Cable Rate Regulation FNPRM* both share

²⁴ See Charter Reply at 15.

²⁵ 47 C.F.R. 76.910; see also *In re Matter of Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574, 6587-88 ¶¶ 18-19 (2015).

²⁶ *Id.*

²⁷ See 47 U.S.C. § 543(a)(2).

²⁸ MDTC Motion at 6.

a deregulatory goal, it is not true that Commission action on the FNPRM would “moot” Charter’s petition. If anything, the opposite is true: Charter’s Petition would minimize the need for future changes to the cable rate regulation rules in communities at issue in this proceeding.

Moreover, adoption of any of the reform options proposed in the *Cable Rate Regulation FNPRM* would not affect the ability of the Commission to grant the relief that Charter seeks in its Petition. The *Cable Rate Regulation FNPRM* does not propose to amend the LEC Test and ultimately would not change that Charter is currently entitled to a finding of effective competition in Massachusetts and Hawaii given that DIRECTV NOW (an AT&T affiliate) offers a comparable video programming service directly to subscribers in areas that substantially overlap with Charter’s franchise areas.

CONCLUSION

For the foregoing reasons, the Commission should deny MDTC’s Motion for Abeyance and proceed expeditiously with its consideration of Charter’s Petition.

Respectfully submitted,



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June 27, 2019

CERTIFICATE OF SERVICE

I, Beth Gulden, hereby certify that on this 27th day of June, 2019, a copy of the foregoing OPPOSITION TO MOTION FOR ABEYANCE was filed electronically with the Commission by using the ECFS system and that a copy of the foregoing was served by first-class mail, postage prepaid to the following:

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Beth Gulden