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Via ECFS

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

Re: *Charter Communications, Inc.'s Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011); MB Docket No. 18-283*

Dear Ms. Dortch,

AT&T Services, Inc., on behalf of its affiliate DIRECTV, LLC, hereby files this brief *ex parte* letter to provide information about its streaming video service called DIRECTV NOW.¹ In a petition filed with the Commission on September 14, 2018, Charter Communications, Inc. (Charter) asks the Commission to find that Charter is subject to effective competition in certain of its franchise areas in Massachusetts and Hawaii under the so-called local exchange carrier test (LEC test), which is set forth in section 623(l)(1)(D) of the Communications Act of 1934, as amended (Act).² Charter asserts that the effective competition LEC test is satisfied in its identified franchise areas because of the presence of an over-the-top (OTT) video service offered by an AT&T affiliate.

While AT&T takes no position on the merits of the Petition, AT&T submits the following information for the record. DIRECTV NOW is an OTT video streaming service

¹ In a November 13, 2018 public notice, the Media Bureau announced that it was treating the above-captioned proceeding as “permit-but-disclose” for *ex parte* purposes. *See Establishment of “Permit-But-Disclose” Ex Parte Procedures for Charter Communications, Inc.’s Petition for Determination of Effective Competition*, MB Docket No. 18-283, Public Notice, DA 18-1154 (rel. Nov. 13, 2018).

² Charter Communications, Inc.’s Petition for Determination of Effective Competition, MB Docket No. 18-283 (filed Sept. 14, 2018) (Petition). A cable operator may demonstrate that it is subject to effective competition pursuant to the LEC test if it can show that a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite service) in the franchise area of the unaffiliated cable operator if the video programming services are comparable to the cable operator’s video programming services in that area. 47 U.S.C. § 543(l)(1)(D).

provided by DIRECTV, LLC. DIRECTV, LLC is a subsidiary of AT&T Inc., which is a holding company. AT&T Inc. also wholly owns incumbent and competitive LECs through other subsidiaries. DIRECTV, LLC and AT&T's LECs are "affiliates" as defined in 47 U.S.C. § 153(2). No AT&T affiliate operates as an incumbent LEC in either Hawaii or Massachusetts. AT&T's affiliate AT&T Corp. provides service as a competitive LEC in Massachusetts in Verizon's service territory to residential and enterprise customers. AT&T Corp. also provides limited service as a competitive LEC in Hawaii only to existing enterprise customers. AT&T Corp. does not provide video programming services. DIRECTV NOW is available in all 50 states and the District of Columbia to any consumer with an Internet connection.³ DIRECTV NOW's program lineup can have some variation by market and is available at <https://www.directv.com/guide>.

DIRECTV, LLC does not act as a "multichannel video programming distributor" in its provision of DIRECTV NOW as that term is defined in section 602 of the Act. 47 U.S.C. § 522(13). In its 2010 *Sky Angel Standstill Denial Order*, the Media Bureau explained that the statutory definition of "channel" "include[s] a transmission path as a necessary element. . ." and, as an OTT video provider, Sky Angel provides no such transmission path to its subscribers and thus is not an MVPD.⁴ The Media Bureau need not revisit its prior findings here.

Section 623 of the Act sets forth four separate tests by which a cable operator may demonstrate that it is subject to "effective competition"⁵ and thus exempt from rate regulation. Congress established the first three tests in the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act) and it added the fourth – the LEC test – in the Telecommunications Act of 1996 (1996 Act). Two of the three tests that Congress created in the 1992 Cable Act require the cable operator to demonstrate competition in its franchise area from "multichannel video programming distributors."⁶ The 1996 Act's LEC test also requires a demonstration of competition but, importantly, Congress expressly did not require the LEC or its affiliate to be a MVPD. Courts have long applied the principle of statutory interpretation that "where Congress includes particular language in one section of a statute but omits it in another . . ., it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion."⁷

³ DIRECTV NOW suggests speeds of 12 Mbps download for optimal home viewing with a wireline or Wi-Fi connection and, for mobile wireless viewing, DIRECTV NOW suggests 150 kbps to 2.5 Mbps download for standard definition and 2.5 Mbps to 7.5 Mbps download for high definition. See <https://www.att.com/esupport/article.html#!/directv-now/KM1227443?gsi=NSDMaDY>.

⁴ *Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879, ¶ 7 (MB, 2010).

⁵ 47 U.S.C. § 543(1)(1)(A)-(D).

⁶ See *id.*, § 543 (1)(1)(B), (C). The third test, section 623(1)(1)(A), considers only the subscription rate of the cable operator in the franchise area. *Id.*, § 543(1)(1)(A) (effective competition means "fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system").

⁷ *Russello v. United States*, 464 U.S. 16, 23 (1983).

Similarly, Congress did not require the LEC or its affiliate to offer “channels” of video programming in the franchise area as part of the LEC test. Rather, to satisfy the LEC test, the LEC or its affiliate simply must offer “video programming services” in the franchise area. When the Commission adopted rules implementing the 1992 Cable Act’s effective competition tests, the Commission defined “comparable programming” as “at least 12 channels of video programming.”⁸ But, in that same order, the Commission acknowledged that its use of the term “channels” encompassed a broader definition than set forth in section 602 of the Act when it noted that “comparability” for certain video providers meant “at least twelve different *programming sources*.”⁹ In this context, the Commission reasonably concluded that it need not be bound by the statutory definition of “channels.” Likewise, any determination of the definition of “channel” in this context does not have broader applicability to section 602.

Please do not hesitate to contact me with any questions,

/s/ Cathy Carpino
Cathy Carpino

⁸ *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, ¶ 38 (1993) (*1993 Cable Rate Order*); 47 C.F.R. § 76.905(g).

⁹ *1993 Cable Rate Order* at n.130 (emphasis added). In its order implementing the 1996 Act’s LEC test, the Commission determined that it should apply the same definition of “comparable programming” across the different effective competition tests in section 623, which includes its more general interpretation of “channels.” *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, ¶ 18 (1999).