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March 6, 2015

Marlene Dortch  
Secretary,  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20001

RE: Written Ex Parte Presentation  
Docket 14-57

Dear Ms. Dortch:

On February 26, 2015 counsel for Charter Communications, Inc. (Charter) submitted a letter (February 26 Letter) reporting on an ex parte presentation made to the Comcast/Time Warner Cable/Charter Transaction Team. In that meeting, Charter not only reiterated its prior position but also made a number of new arguments. In the meeting, Charter defended its policies, under which it completely barred many of its subscribers from attaching customer-owned modems for over two years and then recently instituted rules for certification of cable modems that are unclear and in some cases overreaching. Moreover Charter has continued to maintain its position that it does not and need not separately state the monthly charge for cable modems that Charter supplies to its customers. The continuing effect of these practices has been to discourage its customers from attaching their own modems, and to make it difficult or impossible for customers to obtain state of the art features such as integrated wi-fi and 802.11ac capability, and to discourage the sale of cable modems by retail stores located in Charter's many geographic locations. Zoom Telephonics, Inc. (Zoom) submits this letter to address those new arguments.

### **Cable Modem Pricing**

With respect to Charter's practice of bundling the price of leasing a cable modem with its charge for Internet services, Charter repeats its strained construction of 47 CFR §76.1206 that the rule does not reach cable modems because they are not "navigation devices subject to the provisions of §76.923...." Zoom addressed this argument in its August 25, 2014 Petition to Deny at pages 18-21, and its December 23, 2014 Reply to Opposition to Petition to Deny at pages 6-7 and will not repeat at length its arguments here,<sup>1</sup> except to note that the best reading of Section

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<sup>1</sup>Zoom believes that the disputed phrase in Section 76.1206 is intended to identify the MSOs subject to its provisions (*i.e.*, any MSO which provides "navigation devices subject to the provisions of §76.923) rather than to serve to limit its coverage to "navigation devices subject to

76.1206 not only supports Zoom's position but also allows the regulation to be read *in pari materia* with Section 629 of the Telecommunications Act.

It bears emphasis that in its pleading and its meeting with the staff, Charter has never attempted to reconcile its reading of Section 76.1206 with the terms of Section 629, the statute it was written to implement. Ever since *Carterfone*, Commission policy has sought to allow customers to attach any non-harmful device they wish to a provider's network. Section 629 reflects a Congressional recognition of this goal. The title of Section 629(a) is "Commercial consumer availability of equipment used to access services provided by multichannel video programming distributors." The legislative history of Section 629 reflects the Congressional view that "competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality."<sup>2</sup>

Section 629 expressly directs the Commission to

adopt regulations to assure the commercial availability, to consumers of multichannel video programming *and other services* offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and *other equipment used by consumers to access multichannel video programming and other services* offered over multichannel video programming systems, from manufacturers, retailers, and other *vendors not affiliated with any multichannel video programming distributor*.

(Emphases added.) Charter does not dispute that Section 629 applies to cable modems, nor could it, since the Commission has squarely held that it does.<sup>3</sup> In so holding, the Commission emphasized that

We believe that the statutory language of Section 629 indicates that its reach is to be expansive and that Section 629 neither exempts nor limits any category of equipment used to access multichannel video programming or services offered over such systems from its coverage.<sup>4</sup>

Zoom also points to an important omission in Charter's presentation. There is an entirely separate legal basis for requiring that Charter's prices for modems must be separately stated and unsubsidized - the public interest standard. Although Zoom squarely addressed the public interest standard in its Petition to Deny and Reply to Opposition to Petition to Deny (Reply), Charter did not address the public interest standard in its September 24, 2014 Reply to Comments and Opposition to Petitions to Deny (Opposition) or in the February 24 meeting.

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the provisions of §76.923."

<sup>2</sup>Rept. No. 104-204, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess. 112 (1995).

<sup>3</sup>*In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCC Rcd 14775, 14786 (1998).

<sup>4</sup>*Id.*, 13 FCC Rcd at 14784.

Approval of applications which could result in more than five million customers being forced to pay a bundled price for cable modems and Internet service cannot possibly be in the public interest.<sup>5</sup>

Rather than address the legal authority and policy favoring competition in the customer equipment market, in the February 24 meeting Charter argued, for the first time, that its bundling practices are justified because

not charging a separate cable modem fee is good for its customers. Specifically, the policy saves subscribers money and gives them greater transparency about the services they are paying for. \*\*\*\*Charter believes this streamlined billing practice gives its customers more insight into the inherent cost of their services and reduces the potential for customer shock.”

February 26 Letter at page 3.<sup>6</sup>

Even if a bundled charge were permissible under the Commission’s rules, Charter’s claims make no sense. The form of billing does not save money for the customers, especially since Charter has been denying them the choice of a competitive supplier. It is certainly not the case that the practice promotes transparency because Charter’s customers are not allowed to know how much they are paying for the lease of their cable modems. Less detail cannot possibly give a customer more insight into the true cost of service. As to “customer shock,” the only “shock” a Charter customer might experience is the discovery that they might be able to save money by having the right to purchase, rather than lease, a modem, as is the case for customers of Comcast, Time Warner Cable and other MSOs. Much more importantly, Charter’s claim that bundled pricing will please its customers cannot trump the plain language of Section 629, its legislative history or longstanding Commission policy that the public benefits most from a competitive hardware marketplace that fosters consumer choice, lower prices and technological innovation.

### **Modem Attachment**

Charter’s presentation with respect to its modem attachment policies was extremely misleading and borders on lacking candor. It insists that “Charter has never prevented customers from attaching their own modems to Charter’s network.” This is correct only in the sense that prior to June, 2012, Charter allowed customer-owned modems, and that those

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<sup>5</sup>As Zoom noted in its Petition to Deny at pages 16-17, Section 706 of the Telecommunications Act gives the Commission additional alternative authority to require unbundled and unsubsidized pricing. Moreover, the longstanding policy in favor of competitive markets for customer equipment is also reflected in the *2005 Internet Policy Statement*. *Id.*

<sup>6</sup>Charter also repeats the claim made in its opposition, that its prices, including a bundled modem, are “in most instances lower than, the prices charged by other ISPs.” February 26 Letter at page 3. Even were this relevant, Zoom disputes this in its Reply at page 11 and Exhibit D.

customers were grandfathered under the June, 2012 policy until such time as they changed their service contract. The prohibition also applied to new customers.

In the February 26 letter at page 3, Charter made the new, and facially ludicrous claim that the June, 2012 policy was merely “an FAQ page that was erroneously included on Charter’s website in the past but was never Charter’s policy.” This contrasts with the carefully worded language in Charter’s Opposition at page 26, which was framed entirely in the present tense and made no reference to the June, 2012 policy, much less disavowed it.

Charter offers no evidence to support the rather amazing assertion that its website stated an “erroneous” policy for 26 months. Nor does it explain why Charter chose to revise its policy on the website three days prior to the deadline for filing of Petitions to Deny in this docket. In fact, Charter’s management at the highest level was well aware of the June, 2012 policy, and defended it in conversations with Zoom. Attachment A to this letter is an October 26, 2012 letter from Zoom to Robert E. Quicksilver, Executive Vice President and Chief Administrative Officer of Charter, which was written “to follow up on our recent discussions with you regarding Charter’s policy, as revised effective June 26, 2012, not to allow customers to use customer-owned modems on the Charter network.” Zoom’s letter referenced and quoted the June, 2012 policy, and focused on it in each of the first 6 paragraphs.

Zoom’s subsequent discussions with Charter were directed to Charter’s development of a reasonable certification program so that it would modify the June, 2012 policy. Zoom made significant efforts to try to help that process. However, it was obvious and implicit at all times during those discussions that Charter was adhering to the June, 2012 policy. Charter’s expressed policy on its website, in some of the discussions, and in the work on the certification process, was exactly as written on the website. Charter never disclaimed the June, 2012 policy at any time until the February 24 meeting.

Charter’s new effort to disavow its stated policy ignores the fact that it unquestionably misinformed many thousands of customers who might have considered purchasing their own modem and were dissuaded by the statement on the website. Consulting the website is generally the first step a customer would take before proceeding to purchase a modem. It is also noteworthy that Charter has not produced any evidence indicating that its website was “erroneous” rather than a statement of company policy. In that connection, Zoom asks that the Commission require Charter to provide

copies of customer service training materials and scripts, and records of internal policy discussions pertaining to customer-owned modems or gateways covering the periods between June 26, 2011 and June 26, 2012, between June 26, 2012 and August 22, 2014, and at all times since August 22, 2014.

the number of Charter subscribers using customer-owned modems or gateways on the first day of each month from June 2011 through August 2014.

the number of Charter subscribers using Charter-provided cable modems or gateways on the first day of each month from June 2011 through August 2014.

the number of Charter subscribers who switched to Charter's "New Package Pricing" after June 26, 2012, the number of those customers who used customer-owned modems or gateways at the time they changed their contracts, and the number of those customers who continued to use customer-owned modems or gateways after June 26, 2012.

the number of new Charter customers acquired and the number of those who used customer-owned modems or gateways as of the first day of each month between July 2012 and August 2014.

and

the number of existing and new Charter subscribers who used customer-owned modems on the first day of each month since September 2014.

### **Modem Certification**

With respect to Charter's modem certification process, Charter says that its certification process "is similar to those implemented by other ISPs."

This is not so. Other ISPs, including Comcast, Time Warner Cable and Cox, do not impose standards for wireless performance, nor do they require expensive and needless certification by the Wi-Fi Alliance. Such customer-side requirements are entirely unrelated to Charter's network performance or security. They improperly extend Charter's control of equipment past the network access point, the modem, into the customer's home or business.

As Zoom has documented, at pages 6-7 of its Reply and at its January 15, 2015 meeting with the Transaction Team, Charter has also specified a requirement for TR-069 functionality, something that Zoom believes is not specified by any other MSO.

Charter's February 26 Letter states that

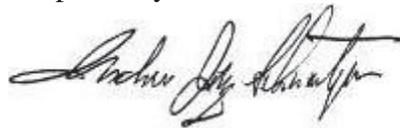
These standards, which are necessary to protect Charter's network and ensure a positive customer experience, are the same standards that other manufacturers have worked with successfully.

However, Charter can point to only one modem which has survived Charter's new certification process. Notably, this modem does not have wi-fi capability. Zoom has worked diligently and in good faith to assist Charter in developing reasonable requirements for customer-owned modems and gateways. At this point, Charter still asserts requirements that are unreasonable and that set a very dangerous precedent. Wireless and TR-069 requirements are not necessary to protect Charter's network. In the past, the Commission has properly wisely focused on

protection of the wide area network and has let market forces and information, not service providers, determine which products and functionality yield a “positive customer experience.”

Finally, Zoom stresses that, absent suitable conditions, Charter will remain free to revert to its June, 2012 policies. In light of Charter’s foot-dragging and transparently pretextual resistance to adopting reasonable standards for customer-owned modems, the Commission should take steps to insure that, in the event it chooses to approve the pending applications for assignment and transfer of control, that Charter’s customers have the right to purchase and attach their own modems and that Zoom and other hardware manufacturers should have the right to supply them. Moreover, the Commission should direct Charter to separately state an unsubsidized price for leasing of cable modems.

Respectfully submitted,



Andrew Jay Schwartzman  
Counsel for Zoom Telephonics, Inc.

cc. Kathy Berthot  
Jim Bird  
Steve Broeckaert  
Hillary Burchuk  
Bill Dever  
William D. Freedman  
Marcia Glaberman  
Tom Hastings  
Keith Ingram  
Scott Jordan  
John Kiefer  
Bill Lake  
Adam Lazaros  
Sean Mirzadegan  
Mary Beth Murphy  
Nancy Murray  
Brendan Murray  
Alison Neplokh  
Jeffrey Neumann  
Joel Rabinovitz  
Hillary DiNigro  
Matthew Warner  
Adam Copeland  
Daniel Meyerson  
Octavia Carare

Jonathan Levy  
Ty Bream  
John Adesalu  
Julie Sahnier  
William Reed  
Allen Barna  
Jade McDuffie  
Sarah Whitesell

# Attachment A



October 26, 2012

Mr. Robert E. Quicksilver  
Executive Vice President and Chief Administrative Officer  
Charter Communications, Inc.  
12405 Powerscourt Drive  
St. Louis, Missouri 63131

Dear Mr. Quicksilver:

I am writing to follow up on our recent discussions with you regarding Charter's policy, as revised effective June 26, 2012, not to allow customers to use customer-owned modems on the Charter network. Since Zoom Telephonics is a leading manufacturer of modems for the retail market, this new policy is extremely harmful to us. The purpose of this letter is to insure that Zoom understands the basis for your action and to determine whether Charter will agree to modify this policy.

Attached is a page downloaded today from this Charter page:

<http://www.myaccount.charter.com/customers/support.aspx?supportarticleid=2623>

The page's heading is "Compliant and Non Compliant Modems/Gateways on Charter's Network." Directly under the heading is this note:

Note: Effective June 26, 2012 For new Internet Customers and customers switching to our New Package Pricing, we will no longer allow customer-owned modems on our network. In order to provide our customers powerful and reliable Internet service at a great value, we will provide modems included in Internet pricing under our New Package Pricing.

Zoom has been advised that Charter's revised policy is prohibited by Section 629 of the Communications Act of 1934 and rules promulgated thereunder in Part 76, Subpart P of the Federal Communications Commission's rules. The policy is also at odds with Section 8.5(a) of the FCC's open Internet rules, which expressly prohibits Internet service providers from blocking non-harmful devices.

Section 76.1201 of the FCC Rules provides that  
No multichannel video programming distributor shall prevent the connection or use of navigation devices to or with its multichannel video programming system, except in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices may be used to assist or are intended or designed to assist in the unauthorized receipt of service.

In light of what appears to be a clear legal mandate, Zoom is at a loss to understand the basis of Charter's revised policy. Zoom's modems do not cause electronic or physical harm to your network. Zoom's modems are also not "intended or designed to assist in the unauthorized receipt of service" within the meaning of the FCC's rules.

Zoom also views Charter's policy as a form of economic discrimination, since it forces a customer to rent a Charter modem whether or not the customer wants to do that. The fact that the cost of the cable modem is bundled into Charter's monthly service fee does not change that fact.

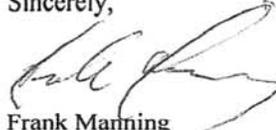
As you probably know, Comcast and Cox have for years permitted customer-owned cable modems; and Zoom Telephonics makes modems that have been certified by CableLabs, Comcast, and Cox. These companies allow a customer to choose whether to pay a cable modem lease charge from the company or instead avoid that charge by owning their own cable modem from Zoom, Motorola, or another

company with certified cable modems. You may also know that starting in November Time Warner Cable will also be offering its customers a choice of a certified customer-owned cable modem or a leased cable modem from Time Warner Cable.

In summary, the three largest cable service providers play by the rules established by t Congress and the FCC. The fourth largest cable service provider, Charter, should do the same.

We would welcome the chance to meet with you and perhaps your President and CEO, Thomas Rutledge, to understand your view and to come to a prompt, reasonable and amicable resolution of this issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Frank Manning", written over a horizontal line.

Frank Manning  
President and CEO, Zoom Telephonics  
Office: 617-753-0003



## Compliant and Non Compliant Modems/Gateways on Charter's Network

[E-mail](#) :: [Print](#)

**Note:** Effective June 26, 2012 For new Internet Customers and customers switching to our New Package Pricing, we will no longer allow customer-owned modems on our network. In order to provide our customers powerful and reliable Internet service at a great value, we will provide modems included in Internet pricing under our New Package Pricing.

### General Info

- [Compliant General Info](#)
- [Non compliant General Information](#)
- [Customer Notification](#)

### Identifying Your Equipment

- [Cable Modems](#)
- [Routers](#)
- [Gateway](#)

### Quick Links

- [Modem Replacement Program](#)
- [Restarting Your Cable Modem](#)
- [Charter WiFi](#)
- [Customer Owned Wireless Home Networking](#)

### Compliant/Supported Modems/Gateways General Information

Charter Internet subscribers are required to use a compliant device in order to use the Charter network without interruption. Devices identified as non compliant are subject to intermittent or no service due to network updates. Charter continues to provide customers with the most up-to-date equipment, compliant with our network, to ensure services work as intended.

Customers attempting to download Charter Security Suite with a non compliant modem may not be allowed to install services and may receive a message their modem is non compliant.

Any device considered non compliant must be replaced with a compliant device.

Modems and gateways identified as non compliant include devices that are phased out due to older versions of firmware that are unable to receive updates.

Charter Internet is compatible with most DOCSIS 2.0 and DOCSIS 3.0 devices. Please note that Charter's Plus, Max (Grandfathered) and Ultra Speeds require a DOCSIS 3.0 device to ensure you experience the full upload and download speeds that those packages offer.

### Non compliant/Unsupported Modems/Gateways General Information

DOCSIS 1.0, 1.1, and certain 2.0 and 3.0 modems and gateways have been found to be incompatible with our PowerBoost.

Modems and gateways installed with outdated firmware that have been identified that cannot be updated.

If you attempt a self install and our network identifies your modem or gateways to be incompatible you may not be able to complete your installation. Your device is recognized automatically by the provisioning process (<https://install.charter.com/>) and will not be provisioned. If this happens you will presented the following on-screen message:

*Activation of this device has been prohibited. Firmware on the device does not function properly with the Charter network and cannot be upgraded. Please use a different device or contact Charter at 888-567-0462.*

The non compliant device cannot be installed on the Charter network and you must install and use a more compliant modem or gateway device.

### Customer Notification

As part of our network monitoring as we identify non compliant modems and gateways we will message our customers who need to replace their equipment.

You may also be notified by a bill message on your statement.

You may receive a browser message like the example below requesting you to take action to provision compliant equipment on our network. This will require you to swap/replace your existing modem or gateway.

[Ask Charter](#) [Search](#)

[View Sample Questions](#)

[ASK](#)

### TOP FAQs

- [Internet](#)
- [Charter Security Suite](#)
- [Restart Cable Modem](#)
- [Find WiFi Name/Passw ord](#)
- [Charter Cloud Drive](#)

### COMMUNITY & HELP TOOLS

- [Community](#)
- [Changing Services / Moving](#)
- [Equipment & User Guides](#)
- [Self Help Videos and Demos](#)

### CONTACT US

Let us help you through online chat.

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Click below to have someone call you regarding your online order.

[Status of your Online Order](#)

Or call us at 1-888-438-2427