Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of Charter Communications, Inc.,	)	
Time Warner Cable Inc. and	)	MB Docket No. 15-149
Advance/Newhouse Partnership	)	
	)	
For Consent to Assign or Transfer	)	
Control of Licenses and Authorizations	)	

REPLY TO OPPOSITION TO PETITION TO DENY, OR IN THE ALTERNATIVE, FOR CONDITIONAL GRANT

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November 12, 1015

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SUMMARY

As Zoom showed in its Petition to Deny, there is a robust and competitive market for cable modems. Ordinarily, customers who do not wish to lease a cable modem from their cable operator can choose instead to take advantage of technological advances and realize significant savings by purchasing their own modem at retail. However, Charter has highly restrictive policies that limits its customers' access to state of the art cable modem technology. More importantly, in charging a single bundled price for cable modem leasing and Internet service, Charter significantly impairs the benefits of the competitive retail market for cable modems for its customers and also harms cable modem retailers and suppliers to those retailers. Charter has stated that it intends to apply these same restrictive policies to the Time Warner Cable (BHN) and Bright House Network (BHN) cable systems it has sought to acquire.

Zoom's challenge to these practices is Charter-specific; contrary to Charter's claims, Zoom's challenge does not address an industry-wide practice that is best considered in a rulemaking context. As Zoom has shown, Charter's peers such as Comcast, Cox, TWC and BHN freely allow certified cable modems purchased at retail to be attached to their networks and offer their cable modem leases and Internet services separately. Thus, the relief Zoom seeks is specific to Charter and the Commission can fashion relief which is specific to Charter's idiosyncratic policies.

Zoom has made plain that it has no objection to cable operators establishing reasonable certification requirements to protect their networks as is contemplated by Sections 76.1201-03 of the Commission's rules. However, Charter's uniquely restrictive and overbroad policies needlessly limit its customers' ability to purchase and attach their own cable modems by

adopting overly restrictive certification requirements. Only a few of the cable modems that Charter has certified for retail offer wireless functionality and none uses advanced 802.11ac technology. Although Charter claims that it must test wireless performance of cable modems, its argument is based in part on the flawed factual premise that cable modems "almost always" use an integrated processor for both routing and modem functions. With respect to Charter's questionable claim that wireless cable modem/routers can "cause the failure of the modem or a broader service outage," Zoom is unaware that this has ever happened, and Zoom has not received customer complaints or warranty claims about such problems.

With respect to its pricing policies, Charter insists that it does not violate Section 76.1206. Zoom reiterates that Charter does violate the Commission's rule and that, in any event Sections 201, 202 and 629 of the Communications Act and Section 706 of the 1996 Telecommunications Act each give it concurrent authority to prohibit Charter from charging a single bundled price for cable modems and Internet service. It explains that Section 629 was enacted precisely to prohibit the bundling of such prices, and that reading Section 76.1206 and Section 629 to the contrary is at odds with the goal of Section 629 of creating a vibrant national market for customer-owned equipment.

Amazingly, even though the ultimate question the Commission must consider is whether approval of the Charter/TWC/BHN transaction is consistent with the Commission's public interest standard, the phrase "public interest standard" does not appear in Charter's opposition. Even so, Charter half-heartedly makes the utterly implausible claim that Charter's customers benefit from paying a single price for cable modems and Internet service because this means they are receiving a modem "at no charge" and that this "saves customers money and gives them

greater transparency about the services they are paying for,..." But in fact Charter mislabels as "free" a cable modem that is actually bundled into the price of Charter's cable data service. And not telling customers how much they are paying for modems and how much they are paying for Internet service is the antithesis of transparency. Charter's argument that a customer is somehow better off with an overly-restricted choice of cable modem offerings, no savings for a customer-supplied cable modem and an impaired retail market; but Charter's argument is false. In addition, Charter's approach cannot be reconciled with established national policy.

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Zoom Telephonics, Inc. ("Zoom") respectfully submits this reply to the joint *Opposition to Petitions to Deny and Response to Comments*, ("Opposition or Opp.") filed on November 2, 2015 by Charter Communications, Inc. ("Charter"), Time Warner Cable Inc. ("TWC') and Advance/Newhouse Partnership ("BHN").

INTRODUCTION

In its October 13, 2015 *Petition to Deny, or in the Alternative, for Conditional Grant* ("Petition" or "Pet."), Zoom explained how TWC and BHN have facilitated the use of customer-owned cable modems and gateways ("modems") and have separately stated the charges for Internet service and for cable modem rental. By contrast, Charter has not facilitated the use of customer-owned modems, and, for a period of more than two years, from June 2012 to August 2014, publicly and prominently on its website banned many customers from providing their own modems. Moreover, Charter does not state separate charges for Internet service and cable modem rental. Zoom showed that these policies violate Section 629 and regulations promulgated thereunder, which require that customers be allowed to attach their own cable modems and that prices for cable modems must be separately stated and not subsidized. They

also contravene policies adopted pursuant to Section 706 of the Telecommunications Act of 1996, and are unjust and unreasonable practices prohibited by Sections 201 and 202 of the Communications Act. Zoom also argued that, because Charter's policies interfere with the Commission's goal of promoting competition generally, and specifically impede the growth of competition in the hardware market, approval of the transactions would violate the public interest standard of the Communications Act.[1]

Charter's disdain for its statutory obligations and the public interest standard is evidenced by the fact that its Opposition devotes only a few pages to Zoom's challenges and fails to address most of the key points Zoom made.[2] Charter barely discusses its restrictive practices for allowing modems on its network. It says little more about its pricing practices and, notably, does not speak to the ultimate question before the Commission, which is whether it is in the public interest to allow Charter to acquire cable systems currently operated by TWC and BHN and to thereby increase the number of subscribers to Charter services. Charter narrowly focuses its legal arguments on quibbling about whether its practices are proscribed by the Commission's regulations. Even if Charter were correct about that - and it is not - Charter fails to show that its practices are in compliance with Section 706 of the Telecommunications Act, Sections 201, 202 and 629 of the Communications Act and, most important of all, the public interest standard. Thus, Zoom renews its request that the Commission designate the applications for hearing or, in the alternative, condition any grant of the applications upon requirements that Charter employ reasonable certification requirements (including no testing of wireless performance and no

[1]Pet., p. 2.

[2]Although the three applicants jointly filed the Opposition, Zoom's arguments are directed only to Charter and its practices. Accordingly, in addressing the Opposition, Zoom will refer only to Charter.

requirement for Wi-Fi Alliance certification) and that it separately state the price of Charter-supplied cable modems, and that Charter not subsidize the cost of cable modems.

Charter first argues that Zoom's challenge to its cable modem attachment and pricing policies are not transaction-specific.[3] Charter does not - and could not - argue that Zoom is not harmed by the prospect of Charter extending its cable modem policies to TWC and BHN customers, but Charter nonetheless argues Zoom's challenge is somehow unrelated to the proposed acquisition. It says that by Zoom's "logic, however, any allegation of preexisting harm would be transaction specific,..."[4]

Charter fails to admit that the practices that Zoom has addressed are not general industry-wide issues but relate specifically to Charter. As Zoom showed, unlike its peers such as Comcast, Cox, TWC and BHN, Charter has imposed unreasonable certification standards for allowing customer-owned or "retail" cable modems on its systems. Because of these unreasonable standards, the fact that Charter does not offer a savings for customers who supply their own cable modems, and the fact that Charter had no certification standards for retail cable modems from June 2012 to August 2014, only a handful of Charter-certified cable modem models are sold by major brick-and-mortar retail outlets. In addition, most of the Charter-certified retail cable modems do not offer wireless functionality, and none of them includes advanced 802.11ac capability.[5] Similarly, as Zoom showed, Charter's peers such as Comcast, Cox, TWC and BHN do not bundle the price of cable modems and Internet service.[6] Thus,

[3]Opp., p. 73.
[4]Opp., p. 74.
[5]Pet., pp. 6-7.
[6]Pet., pp. 7-8.

unlike the general allegations at issue in the AT&T/DirecTV transaction to which Charter cites,[7] Zoom seeks relief which would affect only Charter and its customers.

This case is distinguishable from AT&T/DirecTV on other grounds as well. In that case, while the two filers the Commission discussed sought conditions relating to set-top boxes, neither alleged that AT&T was violating Section 629 and the Commission's rules. Public Knowledge made a general policy argument and did not even mention Section 629 or the Commission's rules.[8] TiVo, which filed "comments" that did not oppose approval of the transaction,[9] conceded that DirecTV was not currently violating Section 629 because the Commission had forborne from applying Section 629 on an industry-wide basis.[10] Thus, in calling for the Commission to rescind its forbearance, TiVo was asking for a general industry-wide remedy that the Commission considered to be more appropriately raised in a rulemaking context. Here, Zoom has alleged specific violations not only of Section 629 and the rules promulgated thereunder, but also Section 706 and the public interest standard. Moreover, Zoom has specifically alleged that Charter's practices violate Sections 201 and 202; those provisions do not relate to general industry rulemaking standards but prohibit unjust and unreasonable practice by a particular party, in this case Charter.

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[7]Opp., p. 73, citing *AT&T/DirecTV Order*, 30 FCCRcd 9131, 9228 (2015).

[8]Public Knowledge and Institute for Local Self-Reliance *Petition to Deny*, Docket 14-90, September 16, 2014.

[9]TiVo Inc. *Comments*, Docket 14-90, September 16, 2014, p. 1.

[10]*Id.*, citing *Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCC Rcd 14775 (1998).

II. CHARTER'S OVERLY RESTRICTIVE CABLE MODEM ATTACHMENT REQUIREMENTS VIOLATE THE LAW AND FCC REGULATIONS, AND ARE CONTRARY TO THE PUBLIC INTEREST.

Charter does not dispute that its cable modem attachment policies are far more restrictive than those of its peers such as Comcast, Cox, TWC and BHN. Significantly, Charter denies that its prior practice of refusing to allow customers to use their own modems violated FCC rules,[11] and accepts without challenge Zoom's assertion that

> There is no assurance that Charter will allow existing TWC and BHN customers to attach Zoom modems in the future or even to continue using Zoom modems they already possess.[12]

Charter evidences no disagreement with any of Zoom's factual allegations pertaining to the small number of modem models it has allowed on its networks, that few of them have wireless capacity, or that none of them offer 802.11ac functionality. Nor does it explain why its unique insistence on evaluating wireless performance, including its requirement of Wi-Fi Alliance certification, is justified when this is entirely unrelated to protecting Charter's network from harm.[13]

Zoom has no disagreement with the principle that cable modems must not harm the wide area networks to which they are attached, and Zoom has worked with Comcast, TWC, BHN and other MSOs to assure that its products meet any reasonable technological requirements for retail cable modems. However, as Zoom has shown, Charter's requirements are extremely overbroad and therefore violate 47 CFR §§76.1201-03, Sections 201 and 202 and 629 of the Communications Act, Section 706 of the 1996 Act and are contrary to the public interest

[11]Opp., p. 75, n. 293 ("Charter has always complied with FCC rules....")
[12]Pet., p. 5.
[13]Pet., pp. 10-11.

standard. This is underscored by the fact that Charter has certified only a small number of cable modems for attachment on its network. Moreover, the fact that many of these are antiquated models not readily available at brick-and-mortar retail stores further suggests that Charter's restrictive policies are overly restrictive.

Rather than address the substance of Zoom's allegations, Charter merely offers the unobjectionable, but non-responsive general observation that it has the right to insure that customers do not attach cable modems which would harm its network.[14] With respect to its evaluation of the performance of cable modem gateways (*i.e.*, combined modem/routers) with wireless capability, Charter says that "some integrated devices have insufficient memory, which locks up both the Internet service and the home network functionality," that an improperly functioning router "can cause problems communicating with the CMTS and, ultimately, cause the failure of the modem...."[15]

These assertions, unsupported by any sworn declaration, are clearly pretextual. Charter does not explain, nor could it, why no other major MSO finds it necessary to assess retail cable gateways' wireless performance. Thus, it is not surprising that Charter's assertions do not withstand scrutiny. The most important element of Charter's restrictions is its unyielding requirement that it must test the wireless performance of "wireless routers that are not integrated with cable modems."[16] It says that "in such integrated devices, the modem and router almost always share the same processor, which means problems on the router can cause problems for the cable modem."[17]

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[14]Opp., pp. 74-75.
[15]Opp., p. 75.
[16]Opp., 75.
[17]Opp., p. 75.

There are a number of reasons that this claim does not stand up. First, contrary to Charter's claim, it is not the case that wireless routers that are integrated with cable modems "almost always share the same processor" for their modem and router functions.[18] For example, Zoom is among the manufacturers that have designed products that use the 33843 chipset from Broadcom, one of the two primary suppliers of cable modem IC technology. This chipset uses two processors, one for the cable modem function and one for the router. Second, if Charter were truly concerned about the issue of a single processor being used for the cable modem and router functions, it would not make the blatant misrepresentation noted above. Is Charter unaware that the latest cable gateway chipsets have two processors, or is Charter just stretching to shore up its case? Third, since no other MSO of which Zoom is aware tests the wireless performance of retail gateways, it is obvious that the wireless performance of cable gateways is seldom if ever related to protecting the wide area network. Zoom notes in this regard that, in Zoom cable modem routers with a shared processor, the processor always grants highest priority to DOCSIS as opposed to router processing. This means that should any degradation in performance occur, it would affect the routing side of the device rather than the DOCSIS wide area network connection.

Charter also says that wireless routers that are integrated with cable modems can mismanage "the address resolution protocol process, which maps MAC addresses to IP addresses." This, it says, can "cause the failure of the modem as well as a broader service outage."[19] This is, at best, a highly questionable assertion; Zoom is unaware of reports that cable

[18]The factual assertions in this pleading are supported by the Declaration of Hume Vance, Attachment A hereto.

[19]Opp., p. 75.

modems have ever caused "a broader service outage" by this means. Zoom would be aware of customer complaints and warranty claims arising from such a problem, and Zoom does not know of even one such complaint or claim.

Even if Charter were truly concerned with the wireless gateway technical points it raises, this does not justify the unreasonable and overbroad policies Charter has adopted. Zoom will submit a separate confidential written *ex parte* presentation that will enumerate many of the ways in which Charter's specifications for wireless gateways are unrelated to protecting the integrity of Charter's network. Moreover, far from responding to Zoom's assertion that "expensive and time-consuming Wi-Fi Alliance certification has nothing to do with protecting the integrity of Charter's network...,"[20] Charter does not mention this question. Zoom will also discuss this in its forthcoming *ex parte* submission, as well as the fact that in at least one instance Charter's certification requirements are in conflict with the requirements for Wi-Fi Alliance certification. In other words, it is impossible to meet current Charter retail wireless gateway requirements as stated because they are self-contradictory.

III. CHARTER'S CABLE MODEM PRICING PRACTICES VIOLATE SECTION 76.1206, SECTIONS 201, 201 AND 629 OF THE COMMUNICATIONS ACT, SECTION 706 OF THE 1996 ACT AND ARE CONTRARY TO THE PUBLIC INTEREST.

Charter argues that its cable modem pricing policies do not violate 47 CFR §76.1206,[21] and that Sections 201 and 202 of the Communications Act and Section 706 of the Telecommunications Act do not "give the Commission authority to regulate cable modems."[22] Finally, it says that "[i]t is perfectly reasonable for the Commission to permit a policy that saves

[20]Pet., p. 10.
[21]Opp., p. 75
[22]Opp. p. 76.

subscribers money and gives them greater transparency."

A. Charter's Policies Contravene 47 CFR §76.1206.

Charter remains unrepentant about its bundling of cable modem and Internet service pricing, characterizing itself as "not charging its broadband customers for Charter-supplied modems...."[23] Even as euphemism, this is palpably false; if customers are paying a single price for both a cable modem and Internet service, they are being charged for their modems.

Charter contends that Section 76.1206 does not reach cable modem pricing because that rule applies only to "navigation devices subject to the provision of §76.923." However, as Zoom has explained in its petition, Charter's reading of Section 76.1206 cannot be squared with the statutory language it is designed to implement, and is best read as applying to any MVPD subject to Section 76.923, not that it applies only to specific systems where Section 76.923 is applicable.[24] It is perhaps understandable that in crafting Section 76.1206 in 1996 with a cross-reference to Section 76.923, which was adopted in 1993, the Commission was not focused on how that provision could be misconstrued to preclude bundling of cable modems and Internet service. However, in applying Section 76.1206, the Commission must look to the purpose of Section 629, which, as the Commission has said, "indicate[s] a preference that standards be market driven and that technological innovation not be impeded."[25] Charter does not offer a reply to these arguments.

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[23]Opp., p. 73 and Opp., p. 74.

[24]Pet., pp. 18-20.

[25]*Implementation of Section 304 of the Telecommunications Act of 1996,* 12 FCCRcd 5639, 5641 (1997).

B. The Commission Can Enforce Section 629 to Require Charter to Offer Cable Modems and Internet Service Separately.

Even if Charter were correct that Section 76.1206 does not reach Charter's practice of bundling its Internet service and cable modem prices, the fact remains that Charter's policies cannot be reconciled with the express language of Section 629. The text of the statute unambiguously requires that cable operators offer cable modems only "if the system operator's charges to consumers are separately stated and not subsidized by charges for any such service,"[26] at least until the Commission finds under Section 629(e) that three conditions have been met and the Section 629 requirements are sunsetted.[27]

The Commission has always regarded Section 629 as a mandate to promote competition. In the words of Commissioner Ness,

> Section 629 is far-sighted and requires the Commission to ensure that a range of consumer equipment -- including new types of set-top devices -- will be available in retail stores and through distributors other than program service providers. The legislative history makes clear that the Congress recognized consumer benefits that flowed from deregulation of telephone customer premises equipment (CPE) and enacted this provision to achieve the same ends with devices that connect to cable systems and other multichannel video programming services.[28]

In implementing Section 629, the Commission said that

> Just as the *Carterfone* decision resulted in the availability to the consumer of an expanding series of features and functions related to the use of the telephone, we believe that Section 629 is intended to result in the widest possible variety of navigation devices being commercially available to the consumer. The expansive nature of the language of Section 629 is a recognition that the future convergence

[26]The unambiguous language of Section 629 therefore controls, even in the face of legislative history which might suggest otherwise.

[27]No one has suggested that any of the three requirements set out in Section 629(e) have been met, particularly the requirement that "the market for converter boxes, and interactive communications equipment, used in conjunction with that service is fully competitive;..."

[28]*Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCCRcd 14775, 14844 (1998) (Statement of Commissioner Ness).

> of various types of equipment and services may result in technical innovations not foreseeable at this time.[29]

The legislative history of Section 629 also points to the goal of replicating the success of the residential telephone CPE market. As Representative Markey, one of the principal authors of the 1996 Act, and the principal proponent of Section 629, said Section 629

> [H]elp[s] to replicate for the interactive communications equipment market the success that manufacturers of customer premises equipment (CPE) have had in creating and selling all sorts of new phones, faxes, and other equipment subsequent to the implementation of rules unbundling CPE from common carrier networks.[30]

Notwithstanding the clear import of Section 629, in response to Zoom's assertion that Charter's practices are "in clear violation of Section 629...,"[31] Charter says - in a footnote - that Section 629 "merely directs the Commission to enact regulations."[32] But even if Section 76.1206 were not read to preclude bundling of cable modem leasing and Internet service, the Commission clearly has the authority to enforce Section 629 to insure that it fulfills the unambiguous Congressional objective of separate and unsubsidized pricing. As support for its extraordinary and crimped reading of the Commission's broad powers, Charter can only cite to tiny fragments taken out of context from two highly inapposite cases which dealt only with the effective date of a statutory requirement. Neither of these cases addressed the issue of whether the terms of a regulation could trump clear language in a statute. In *Reynolds v. United States*, 132 U.S. 975, 978 (2012), the Supreme Court considered the effective date of a statute that was to be applied retroactively and gave the Attorney General specific power to determine that date

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[29]*Id.*, 13 FCCRcd at 14785-86 (footnotes omitted).
[30]142 Cong. Rec. H1170 (1996) (Statement of Representative Markey).
[31]Pet., p. 17.
[32]Opp., p. 74, n. 290.

through issuing regulations.[33] *Sweet v. Sheahan*, 235 F.3d 80, 86-87 (2d Cir. 2000), was a dispute between two private parties in which a court construed the effective date of a statutory requirement without the benefit of any agency construction of the statute.

Charter would have Section 629 read very narrowly to preclude the Commission from addressing practices that unequivocally contravene the express statutory terms and clear Congressional objectives. Notably, Charter's emphasis on the purported limitations of Section 76.1206 suggests that it is also misreading Section 629. It is true that in implementing Section 629, the Commission paid heed to a Congressional intent that MVPDs facing effective competition might not need to be subject to the unbundling requirement, and used this intent as a basis for not applying Section 629 to DBS operators.[34] However, this should not be understood as precluding the Commission from applying the unbundling requirement to cable modems provided by cable operators.

It is certainly the case that in many specific markets, given the evolution of DBS, Verizon and AT&T offerings, the Commission has determined that there is effective competition for video services. However, the determination that there is effective competition so that local franchising authorities may no longer regulate basic cable rates has nothing whatsoever to do with the bundling of cable modems and Internet service, which has never been subject to rate

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[33]*See* 42 U.S.C. §16913(d):

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

[34]*See Implementation of Section 304 of the Telecommunications Act of 1996*, 13 FCC Rcd at 14811.

regulation.[35] Most recently, in revisiting its rules for evaluating effective competition in the context of Section 76.923, the Commission reaffirmed that the criteria for this determination are based entirely on the state of local video competition, and expressly rejected suggestions that it should take into account competitiveness in the broadband market.[36]

Charter has insisted that the market for broadband is local, not national.[37] However, this is inconsistent with the Commission's analysis in its annual broadband reports,[38] and, according to the Commission's General Counsel, not the way that the Commission staff viewed the question as it considered the Comcast/TWC proceeding.[39] Even if the broadband market itself were not national, there is little doubt that the relevant market for assessing competition in cable modem pricing is national, not local. Cable modems are sold by national brick-and-mortar retailers and online merchants based on anticipated demand, in competition primarily with each other and with the cable modems offered by cable operators, and not on the basis of local factors.

Thus, limiting Section 629's application to cable modems based on the state of local competition for video service would be irrational and contravene the purposes of Section 629. Rather, in assessing the applicability of Section 629, the Commission must look to the state of competition in the very different broadband market. In that regard, since 2010, the Commission

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[35]Indeed, the Commission has expressly forborne from such rate regulation. *Protecting and Promoting the Open Internet*, 30 FCCRcd 5601, 5841 (2015).

[36]Amendment of the Commission's Rules Concerning Effective Competition, 30 FCCRcd

[37]Opp., pp. 32-39.

[38]*Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 30 FCCRcd 1375 (2015)("*2015 Broadband Inquiry*").

[39]Speech of Jonathan Sallet to Telecommunications Policy Research Conference, September 25, 2015, at pp. 10-14, available at https://www.fcc.gov/document/speech-general-counsel-jon-sallet-lessons-recent-merger-reviews

has repeatedly concluded that broadband is not being deployed in a reasonable and timely manner, in large part because of the lack of competition for high speed broadband.[40] The Commission can and should enforce Section 629 to address this problem.

C. The Commission Has Concurrent Authority to Regulate Charter's Practices under Sections 201, 202 and 706.

Charter sloughs off Zoom's invocation of Sections 201, 202 and 706 in a single paragraph, saying that they "do not themselves impose any particular requirements related to cable modems on Charter." This statement borders on the ridiculous. Section 201 and 202 are intentionally broad and general, as they are designed to address the entire range of unjust and unreasonable practices that may be employed by carriers subject to Title II.[41] For example, Sections 201 and 202 did not specifically impose any requirements on AT&T with respect to the Carterfone, but that did not preclude the FCC from invoking Title II of the Communications Act to require AT&T to allow the Carterfone to be attached to its network.[42] Similarly, Section 706 does not refer to carrier compensation or cable systems' disclosure of practices, but that has not precluded the courts from agreeing that Section 706 is an affirmative grant of authority to the Commission.[43]

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[40] *2015 Broadband Inquiry*, 30 FCCRcd at 1382; *id.*, 30 FCCRcd at 1421-24.

[41] *Ambassador, Inc. v. U.S.*, 325 U.S. 317, 323 (1945). ("The supervisory power of the Commission is not limited to rates and to services, but the formula oft repeated in the Act to describe the Commission's range of power over the regulated companies is 'charges, practices, classifications, and regulations for and in connection with such communication service'. 48 Stat. 1070, 47 U.S.C. §201(b).")

[42] *Carterfone*, 13 FCC 2d 420, 426 (1968).

[43] *In re FCC 11-161*, 753 F.3d 1015, 1053 (10th Cir. 2014); *Verizon v. FCC*, 740 F.3d 623, 635 (D.C. Cir. 2014).

D. Charter's Cable Modem Policies Are Contrary to the Public Interest.

Amazingly, the phrase "public interest standard" does not appear in the Charter's Opposition, even though this is the ultimate standard which the Commission employs in assessing whether the proposed transaction can be approved. Even so, Charter half-heartedy concludes its discussion of Zoom's challenge with a short paragraph which straightfacedly argues that it is "illogical" to require Charter to offer unbundled pricing because its practice of "provid[ing] cable modems to its subscribers for no charge" actually "saves customers money and gives them greater transparency about the services they are paying for,..."[44] Implicitly, at least, Charter appears to be arguing that this revisionist perception of Commission policy somehow means that grant of its applications will be in the public interest.

Actually, what is "illogical" is to claim that customers benefit from a bundled price. First, offering a bundled price for two items does not necessarily consist of offering one product at full price and the second product for free. Charter cannot seriously maintain that it offers its modems "at no charge."[45] Second, as Zoom has demonstrated, Charter's peers such as Comcast, Cox, TWC and BHN separately state the price for leasing a cable modem and all afford a significant savings to their customers, so that purchase of a cable bridge modem comparable to what Charter provides its customers will typically pay for itself in under a year.[46] Third, a practice that hides the true price of the elements of the bundle, the Internet service and the cable

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[44]Opp., p. 76.

[45]Charter does not attempt to refute Zoom's citation at page 14 of the Petition, to Charter's own expert's demonstration that "Costs for CPE, including set-top boxes and cable modems, and their cost of installation, represented nearly half of Charter's capital expenditures in 2014."

[46]Petition, p. 14. Charter does not offer gateway modems, so it is impossible to calculate the payoff for such devices.

modem, is the antithesis of transparency.

Far from benefitting consumers, Charter's practices are profoundly anti-competitive and contrary to longstanding Congressional and Commission policies designed to create and nurture a robust retail market for customer-owned equipment. Indeed, the Commission's National Broadband Plan emphasized that a competitive equipment market leads to "greater choice, lower prices and more capability," and "more broadband utilization."[47] Of particular relevance here is the fact that the National Broadband Plan drew a distinction between the successful creation of the competitive market for broadband modems and the failure of the Commission's efforts to replicate that market with respect to set-top boxes.[48] It said that "Broadband modems offer an example of how to unleash competition, investment and innovation...." Thus, it declared that "Establishing an interface device for video networks that serves a similar purpose to modems could spark similar levels of competition, investment and innovation."[49] The Commission reiterated the importance and success of this policy in its inquiry into adopting the All-Vid technology:

> the operator provides a customer with an interface device such as a cable modem that performs all of the network-specific functions and connects via an Ethernet port to a multitude of competitively provided customer-premises devices including computers, printers, game consoles, digital media devices, wireless routers, and network storage devices. This approach has promoted an innovative and highly competitive retail market for devices used with broadband services. At the same time, because each operator terminates its service in an interface device that it can swap out as needed to accommodate innovations in delivery technologies, this approach has freed service providers to innovate in their networks without changing the Ethernet connection to which customers attach their devices.[50]

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[47] *National Broadband Plan*, p. 50.
[48] *Id.*
[49] *Id.*
[50] *Video Device Competition*, 25 FCCRcd 4275, 4282 (2010).

Charter suggests that the public is somehow better off with an artificially limited choice of cable modem offerings and without the price and feature competition that derives from a vibrant retail market; but this position cannot be reconciled with established national policy. The prospect of Charter extending its restrictive attachment policies and anti-competitive pricing practices is antithetical to the public interest. The Commission should forcefully reject Charter's argument and insure that the American public has access to a wide choice of cable modems in the retail marketplace, a choice that potentially offers timely access to technical advances and a good return on the customer's cable modem investment. If the Commission allows Charter to continue its practices and extend them via an acquisition of TWC and BHN, the Commission will hurt consumer choice, the retail cable market, and suppliers to that market.

CONCLUSION

Charter has failed to meet its burden of establishing that there are no substantial and material questions of fact as to whether grant of the applications would be contrary to Sections 201, 201 and 629 of the Communications Act, Section 706 of the Telecommunications Act of 1996, the public interest standard, and FCC Rules promulgated thereunder. Nor has it met the burden of showing that grant of its applications in the form submitted is in the public interest. Accordingly, Zoom renews its request that the Commission designate the applications for hearing or, in the alternative, condition any grant of the applications upon requirements that Charter employ reasonable certification requirements (including no testing of wireless performance or requiring Wi-Fi Alliance certification), that Charter separately state the price of

Charter-supplied cable modems, and that Charter not subsidize the cost of cable modems.

Respectfully submitted,

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November 12, 2015

ATTACHMENT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of Charter Communications, Inc.,	)	
Time Warner Cable Inc. and	)	MB Docket No. 15-149
Advance/Newhouse Partnership	)	
	)	
For Consent to Assign or Transfer	)	
Control of Licenses and Authorizations	)	

DECLARATION OF HUME VANCE

I am Director of Firmware Engineering of Zoom Telephonics, Inc. I have knowledge of the facts set forth in the foregoing *Reply to Opposition to Petition to Deny, or in the Alternative, for Conditional Grant.* To the best of my knowledge and belief, those facts are true and correct.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on:

November 12, 2015

Hume Vance

CERTIFICATE OF SERVICE

I certify that on November 12, 2015, copies of the foregoing *Reply to Opposition to Petition to Deny, or In the Alternative, for Conditional Grant* have been served by email and United States Mail to the following:

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