

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition for Determination of Effective Competition)	MB Docket No. 18-283
in 32 Massachusetts Communities and Kauai, HI)	CSR No. 8965-E
(HI0011))	

MEMORANDUM OPINION AND ORDER

Adopted: October 25, 2019

Released: October 25, 2019

By the Commission: Chairman Pai and Commissioner O’Rielly and Carr issuing separate statements;
Commissioners Rosenworcel and Starks concurring and issuing separate statements.

I. INTRODUCTION

1. In this *Memorandum Opinion and Order*, we grant Charter’s petition seeking a determination that it faces local exchange carrier (LEC) effective competition as defined in section 623(l)(1)(D) of the Communications Act of 1934, as amended (the Act)¹ in Kauai, Hawaii and Charter’s 32 franchise areas in Massachusetts (the Franchise Areas).² We conclude that AT&T’s DIRECTV NOW service,³ delivered via existing broadband access facilities as an over-the-top (OTT) video streaming service in the Franchise Areas, satisfies the section 623(l)(1)(D) “LEC Test.” Granting the Charter Petition is consistent with both the text of the statutory provision and the reality that in today’s video marketplace consumers have a choice of multiple delivery systems to access video programming via means other than traditional cable television.⁴

II. BACKGROUND

2. In the Cable Television Consumer Protection and Competition Act of 1992 (1992 Cable Act), Congress authorized local franchising authorities to engage in cable rate regulation in limited circumstances and in a manner that reflects a “preference for competition.”⁵ Specifically, under section

¹ 47 U.S.C. § 543(l)(1)(D).

² Petition of Charter Commc’ns, Inc. for a Determination of Effective Competition, MB Docket No. 18-283, at ii, 19 (filed Sept. 14, 2018) (Charter Petition). A list of the Massachusetts and Hawaii Franchise Areas at issue are included in the Attachment.

³ AT&T’s website indicates that DIRECTV NOW has been rebranded as AT&T TV Now. *See* <https://www.att.com/att-tv-now/>. Because the pleadings in this case refer to the service as DIRECTV NOW, that is how we will refer to it herein.

⁴ *Leased Commercial Access; Modernization of Media Regulation Initiative*, Report and Order and Second Further Notice of Proposed Rulemaking, 34 FCC Rcd 4934, 4938, para. 10 (2019) (recognizing that “the marketplace has become far more competitive” and consumers today “are able to access video programming via means other than traditional broadcast and cable television, and the Internet is widely available for this purpose”); *Communications Marketplace Report*, GN Docket No. 18-231, Report, 33 FCC Rcd 12558, 12607-08, paras. 81-82 (2018); *see also* *U.S. v. AT&T*, 310 F.Supp.3d 161, 173 (D.D.C. 2018) (“Traditional programmers and distributors are experiencing increased competition from innovative, over-the-top content services, including virtual [multichannel video programming distributors (MVPDs)] and SVODs [(subscription video on demand services)].”).

⁵ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992); 47 U.S.C. § 543(a)(2)(A). Section 623 originally imposed rate regulation for all tiers of cable service, but Congress (continued....)

623(l)(1) of the Act, a franchising authority may regulate the rates for the basic cable service tier and equipment, but it may do so only if the Commission finds that the cable system is not subject to “effective competition.”⁶ The statute defines four types of effective competition, including effective competition provided by a LEC.⁷ In June 2015, the Commission adopted a rebuttable presumption that cable operators are subject to one type of effective competition, which is commonly referred to as “competing provider” effective competition.⁸ The Commission required any franchising authority that wished to remain certified to regulate rates to file a revised certification form, including an attachment rebutting the presumption of competing provider effective competition.⁹ As a result, there are few communities in which franchising authorities are currently permitted to regulate rates, and these communities are in Massachusetts and Hawaii. Another form of effective competition, LEC effective competition (i.e., the LEC Test), was added as a type of effective competition as part of the Telecommunications Act of 1996.¹⁰ The LEC Test provides that a cable system is subject to effective competition in any franchise area where

a local exchange carrier or its affiliate (or any [MVPD] using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.¹¹

3. On September 14, 2018, Charter filed its Petition for Determination of Effective Competition, asserting that it is subject to effective competition under the LEC Test in each franchise area where it is currently subject to rate regulation: Kauai, Hawaii and its 32 franchise areas in Massachusetts.¹² In support of its petition, Charter argues that it is subject to effective competition in the Franchise Areas from “AT&T’s DIRECTV NOW streaming service, which offers customers access to at least 65 channels of live television, cloud DVR services, and – in the majority of areas – additional local

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directed the Commission to end rate regulation for tiers other than the basic service tier in 1999. Specifically, the Telecommunications Act of 1996 amended section 623 to provide that after March 31, 1999, rates for the other programming tiers would not be subject to regulation. *See* Telecommunications Act of 1996, Pub. L. No. 104-104 § 301(b)(1), 110 Stat. 115 (1996) (codified as 47 U.S.C. § 543(c)(4)).

⁶ 1992 Cable Act; 47 U.S.C. § 543(a)(2)(A).

⁷ 47 U.S.C. § 543(1)(1)(A)-(D); *see also* *Modernization of Media Regulation Initiative; Revisions to Cable Television Rate Regulations*, Further Notice of Proposed Rulemaking and Report and Order, 33 FCC Rcd 10549, 10552, para. 6 (2018) (“As a consequence of the 2015 *Effective Competition Order* and the increasing competition among MVPDs, few [franchising authorities] are currently allowed to regulate [basic service tier] rates under the Act and very few cable systems remain rate regulated today.”).

⁸ *See Amendment to the Commission’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, MB Docket No. 15-53, Report and Order, 30 FCC Rcd 6574 (2015).

⁹ *Id.* at 6592, para. 27.

¹⁰ Telecommunications Act of 1996, Pub. L. No. 104-104, § 301(b)(3), 110 Stat. 56, 115 (1996).

¹¹ 47 U.S.C. § 543(1)(1)(D); *see also* 47 CFR § 76.905(b)(4) (implementing the statutory LEC Test).

¹² Charter Petition. The Charter Petition was placed on public notice. *See* Special Relief and Show Cause Petitions, Report No. 0473, Public Notice (Sept. 21, 2018). By email, the Media Bureau granted an extension pursuant to which comments were due on October 25, 2018, and replies were due on November 19, 2018. *See* https://ecfsapi.fcc.gov/file/10926247621271/RE_%20Assented%20to%20Motions%20for%20Extension%20of%20Time.pdf. Due to the potential impact of the determination of whether competition from DIRECTV NOW satisfies the LEC Test, which may have effects beyond the specific matter at issue in the Charter Petition, the Media Bureau designated the 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*, Public Notice, 33 FCC Rcd 11155 (Nov. 13, 2018).

broadcast channels.”¹³ AT&T explains that as an OTT service, “DIRECTV NOW is available in all 50 states and the District of Columbia to any consumer with an Internet connection.”¹⁴ According to AT&T’s website, the service is not subject to an annual contract, does not require a satellite dish or set-top box, and allows subscribers to stream to phone, tablets, and television sets.¹⁵ Packages range in price from \$50-\$135 per month, and as of the second quarter of this year, the service had 1.3 million subscribers nationwide.¹⁶

4. The Commission received three oppositions to the Charter Petition,¹⁷ to which Charter filed a reply.¹⁸ The opposition from the Massachusetts Attorney General included a request for discovery.¹⁹ In addition, MDTC filed a motion for abeyance on June 17, 2019,²⁰ and a “supplement” to its motion on August 5, 2019.²¹ Charter filed an opposition to MDTC’s motion for abeyance on June 27, 2019,²² and a reply to MDTC’s supplemental motion on August 14, 2019.²³ Although the Media Bureau generally resolves effective competition petitions on delegated authority, the instant proceeding involves “novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines” and is therefore properly addressed in the first instance by the full Commission.²⁴

III. DISCUSSION

5. Charter has demonstrated that it is subject to effective competition under the LEC Test in the communities at issue. At the outset, we recognize that when Congress adopted the LEC Test as part of the 1996 Act, OTT services such as DIRECTV NOW did not yet exist. Although Congress was not specifically contemplating effective competition from online video services in 1996, the language of the LEC Test nonetheless encompasses competitive offerings that were not necessarily available at that time. By stating, for example, that a competitive service can be offered “by any means,” so long as the other components of the test are satisfied, Congress provided room for the LEC Test to cover innovative video

¹³ Charter Petition at ii.

¹⁴ Letter from Cathy Carpino, Assistant Vice President, Senior Legal Counsel, AT&T Services, Inc. to Marlene Dortch, Secretary, FCC, at 2 (Dec. 7, 2018) (AT&T Ex Parte).

¹⁵ AT&T, *AT&T TV NOW: Stream Live TV + On Demand + HBO*, <https://www.att.com/att-tv-now/> (last visited Sept. 12, 2019).

¹⁶ *Id.*; Press Release, AT&T, AT&T Reports Second-Quarter Results (July 24, 2019), https://about.att.com/story/2019/att_second_quarter_earnings_2019.html.

¹⁷ Massachusetts Department of Telecommunications and Cable Opposition to Charter Communications, Inc.’s Petition for Special Relief (filed Oct. 25, 2018) (MDTC Opposition); Comments of the Commonwealth of Massachusetts Office of the Attorney General (filed Oct. 25, 2018) (MA AGO Opposition); Opposition of the State of Hawaii (filed Oct. 25, 2018) (Hawaii Opposition).

¹⁸ Charter Communications, Inc. Reply to Oppositions (filed Nov. 19, 2018) (Charter Reply).

¹⁹ MA AGO Opposition at 2.

²⁰ Massachusetts Department of Telecommunications and Cable Motion for Abeyance, MB Docket No. 18-283, at 1 (filed June 17, 2019) (MDTC Motion for Abeyance) (requesting the Commission hold this “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”).

²¹ Massachusetts Department of Telecommunications and Cable Supplement to Motion for Abeyance (Aug. 5, 2019) (MDTC Supplement to Motion for Abeyance).

²² Charter Communications, Inc. Opposition to Motion for Abeyance (June 27, 2019) (Charter Abeyance Opposition).

²³ Letter from Howard J. Symons, Counsel to Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC (Aug. 14, 2019) (Charter Response to MDTC Supplemental).

²⁴ 47 CFR § 0.283(c).

services that it could not foresee. Looking at the language of the LEC Test, we conclude that the DIRECTV NOW service satisfies each of its elements. Specifically, as explained below, we find that (i) DIRECTV NOW is provided by a “LEC affiliate” (i.e., DIRECTV, LLC, an affiliate of AT&T LECs) in the Franchise Areas, (ii) DIRECTV NOW is “offered” in the Franchise Areas, (iii) it is offered “directly to subscribers,” and (iv) DIRECTV NOW’s video programming services are “comparable to” the video programming services that Charter provides in the Franchise Areas. We also find that designation for hearing and abeyance of this proceeding are not appropriate in this instance.

A. DIRECTV NOW is provided by a “LEC affiliate”

6. We first find that DIRECTV NOW is provided by a LEC affiliate in the Franchise Areas. The LEC Test specifies that a competing video programming service must be provided by “a local exchange carrier or its affiliate.”²⁵ The Act defines an “affiliate” as an entity “that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person.”²⁶ AT&T explains in the record of this proceeding that “DIRECTV NOW is an OTT video streaming service provided by DIRECTV, LLC” and that “DIRECTV, LLC is a subsidiary of AT&T Inc., which is a holding company [that] also wholly owns incumbent and competitive LECs through other subsidiaries.”²⁷ The DIRECTV NOW service, therefore, is offered by a “LEC affiliate” because DIRECTV is affiliated with AT&T’s LECs through their common ownership by AT&T, as required by the LEC Test.

B. DIRECTV NOW is “offered” in the Franchise Areas

7. We conclude that DIRECTV NOW meets the requirement that the competing video programming service must be “offer[ed] . . . in the franchise area.”²⁸ The effective competition rules provide that a competing service is deemed “offered” if (1) the distributor is “physically able to deliver the service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service,”²⁹ and (2) “no regulatory, technical or other impediments to households taking service exist, and potential customers are reasonably aware that they will be able to purchase the service.”³⁰ When finalizing the rules implementing the LEC Test,³¹ the

²⁵ 47 U.S.C. § 543(l)(1)(D) (emphasis added).

²⁶ 47 U.S.C. § 153(2) (defining “affiliate”).

²⁷ AT&T Ex Parte at 1-2; *see also* Charter Petition at 5-6; AT&T Inc., Annual Report (Form 10-K) at Exh. 21 (Principal Subsidiaries of AT&T Inc., as of December 31, 2018) (Feb. 20, 2019), <https://otp.tools.investis.com/clients/us/atnt2/sec/sec-show.aspx?Type=html&FilingId=13241251&Cik=0000732717> (identifying DIRECTV, LLC and various AT&T Inc. LEC affiliates as subsidiaries); *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Memorandum Opinion and Order, 30 FCC Rcd 9131 (2015).

²⁸ 47 U.S.C. § 543(l)(1)(D) (emphasis added); *see generally* *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296, 5303-05, paras. 11-12 (1999) (*Cable Reform Order*) (discussing the characteristics of an offer under the LEC Test).

²⁹ 47 CFR § 76.905(e)(1).

³⁰ 47 CFR § 76.905(e)(2). The definition of “offer” in our rules refers to “competing MVPD” service. Specifically, the rule states that the “[s]ervice of a competing [MVPD] will be deemed offered: (1) When the [MVPD] is physically able to deliver the service to potential subscribers, with the addition of no or only minimal additional investment by the distributor, in order for an individual subscriber to receive service....” *Id.* This definition predates the LEC Test, and the legislative history of the LEC Test specifies that the term “offer” in the test would “have the same meaning as the definition of offer in the Commission’s rules.” *Cable Reform Order*, 14 FCC Rcd at 5303, para. 7 (citing H.R. Rep. No. 458, 104th Cong., 2d Sess. 170 (1996)). This does not mean, however, that an “offer” necessarily must be provided by an MVPD to satisfy the LEC Test. The Commission made this clear in the *Cable Reform Order*, in which it finalized the rules implementing the LEC Test, by stating that an “offer” can be

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Commission explained that in order to be considered “offered” a “LEC service [must] be both technically and actually available to households.”³² The Commission further noted that since a “competitive service can be provided ‘by any means (other than direct-to-home satellite services),’” this part of the showing under the LEC Test “will necessarily vary somewhat, depending on the means employed.”³³

8. We agree with Charter that DIRECTV offers DIRECTV NOW in the Franchise Areas, consistent with similar circumstances in which we have recognized competitive services to be offered under the LEC Test.³⁴ We find that the first part of the “offer” rule is satisfied because DIRECTV is “physically able” to deliver DIRECTV NOW to subscribers via existing broadband facilities in the Franchise Areas.³⁵ Charter reports that a sufficient Internet connection to support DIRECTV NOW is

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made either by a “LEC affiliate or an MVPD using the facilities of a LEC or its affiliate.” 14 FCC Rcd at 5303, para. 7 and note 24 (emphasis added).

³¹ See *Cable Reform Order*, 14 FCC Rcd at 5300, para. 7 (incorporating the definition of “offered” in 47 CFR § 76.905(e) into the LEC Test).

³² *Id.* at 5303, para. 11; see also *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5656-57, para. 29 (1993) (*1993 Rate Regulation Order*) (finding the service also “must be more than technically available”).

³³ *Cable Reform Order*, 14 FCC Rcd at 5305, para. 13. Commission precedent also looks to whether the competing LEC affiliate “has marketed its services in a manner that makes potential subscribers reasonably aware of its services” or “has actually begun to provide services,” among other factors. See *Subsidiaries of Cablevision Systems Corp. Petitions for Determination of Effective Competition in 101 Communities in New Jersey*, Memorandum Opinion and Order, 23 FCC Rcd 14141, 14152-53, para. 37 (MB 2008); *Cable Reform Order*, 14 FCC Rcd at 5305, para. 13 (“Basically ... the incumbent cable operator must show that the LEC is technically and actually able to provide service that substantially overlaps the incumbent cable operator’s service in the franchise area.”). We note that MDTC mischaracterizes the standard in the *Cable Reform Order* as “whether the competing services are ‘ubiquitous’ in the franchise area.” Letter from Mark A. Merante, Counsel II, MDTC, to Marlene H. Dortch, Secretary, FCC, at 2 (Oct. 18, 2019) (MDTC Oct. 18, 2019 Ex Parte). The term “ubiquitous” was merely a quotation from a commenter to the proceeding. The standard adopted by the Commission is that “the incumbent cable operator must show that the LEC is technically and actually able to provide service that substantially overlaps the incumbent cable operator’s service in the franchise area.” *Cable Reform Order*, 14 FCC Rcd at 5305, para. 13. In addition, we note that MDTC filed a redacted version of its ex parte submission to the Commission’s Electronic Comment Filing System on the eve of the Sunshine period, limiting analysis of its submission and depriving interested parties of an opportunity to fully comment. See Charter Oct. 22, 2019 Ex Parte. Further, an unredacted version of the filing was not available for staff review at the Commission’s headquarters until the day before the Commission meeting, thus depriving the Commission of timely access to the unredacted filing. In addition, MDTC has not disclosed the redacted data to Charter. See *id.* For these reasons, we did not consider the redacted information in MDTC’s filing.

³⁴ See, e.g., *Cablevision of Boston, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 4772, 4773, para. 2 (2002) (finding the competing LEC MVPD service is “offered” in the franchise area when “the LEC competitor is physically able to deliver service to potential subscribers, with the addition of no or only minimal investment, in order for a subscriber to receive service; that no regulatory, technical or other impediments to household service exist; and that the LEC is marketing its service so that potential customers are reasonably aware that the LEC’s services may be purchased.” (citing 47 CFR § 76.905(e); *Cable Reform Order*, 14 FCC Rcd at 5305, para. 13)); Charter Petition at 6-10; see also *1993 Rate Regulation Order*, 8 FCC Rcd at 5652-53, para. 23 (finding “within the scope of the effective competition test . . . a qualifying distributor need not own its own basic transmission and distribution facilities”).

³⁵ Prior determinations of effective competition have sought to ensure that the competitor is “physically able to offer” service by requiring a reasonably-timed network build-out, for example, but have not required any specific entity to provide the physical connection directly to subscribers. See, e.g., *Cablevision Systems Long Island Corp., Petition for Determination of Effective Competition in the Village of Massapequa Park, New York*, Memorandum Opinion and Order, 22 FCC Rcd 13176, 13177, para. 4 (MB 2007) (requiring a showing of a network build-out to
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already “available to virtually 100 percent of Charter’s customers in these areas,” and “customers in each state [of the Franchise Areas] can choose broadband service from at least six providers, of which Charter is only one.”³⁶ Charter also notes that “more than 80 percent of households in Massachusetts (specifically, 85.5%) and Hawaii (83.2%) had broadband subscriptions in 2016, and that number has likely risen since then.”³⁷ Because of these existing facilities, DIRECTV need not make more than a minimal capital investment in order to be able to physically deliver the service to its customers because they do not need to install physical infrastructure to reach every DIRECTV NOW subscriber.³⁸

9. Turning to the second part of the “offer” rule, we find that “no regulatory, technical or other impediments to households taking service exist” for the DIRECTV NOW service within the Franchise Areas.³⁹ There are no regulatory barriers that prevent or inhibit consumers from subscribing to DIRECTV NOW. We also find that there are no technical barriers to subscribing to this service. Because the data Charter submitted and other data demonstrate that broadband Internet access service is nearly ubiquitous in the Franchise Areas,⁴⁰ the need to have Internet access does not pose a technical barrier to consumers who want to subscribe to DIRECTV NOW.⁴¹ In addition, we find that, for purposes of the

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reach potential subscribers within a reasonable time); *Cablevision Systems of Connecticut, L.P. Petition for Determination of Effective Competition in Fairfield, CT Bridgeport, CT Stratford, CT Orange, CT Woodbridge, CT Milford, CT*, Memorandum Opinion and Order, 14 FCC Rcd 15883, 15891, para. 19 (MB 1999).

³⁶ Charter Petition at ii; Charter Reply at 19. According to AT&T, “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.” AT&T Ex Parte at 2 (citing <https://www.att.com/esupport/article.html#!/directv-now/KM1227443?gsi=NSDMaDY>). Charter submits it “provides speeds of at least 100 Mbps in all of the Franchise Areas, well in excess of the speed necessary to view DIRECTV NOW.” Charter Petition at 8; *see also* Charter Petition at ii, 5, 7, 9; Charter Reply at 19. MDTC claims that there is no showing in the record that broadband is available at enough speed (12 Mbps) for optimal viewing. MDTC Oct. 18, 2019 Ex Parte at 3. We find this argument is unsupported and contrary to this record evidence provided by Charter.

³⁷ Letter from Howard J. Symons, Counsel to Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (Dec. 21, 2018) (Charter Dec. 21, 2018 Ex Parte). We note that these figures are generally consistent with U.S. Census Bureau data for the communities at issue. *See* US Census Bureau, 2017 American Communities Survey 1-Year Estimates, Table K202801: Presence of a Computer and Type of Internet Subscription in Household (reporting that 82.2% of households in Berkshire County, MA, 78.1% of households in Hampden County, MA, 90.4% of households in Hampshire County, MA, 89% of households in Middlesex County, MA, 85.9% of households in Worcester County, MA, and 81% of households in Kauai County, HI subscribe to broadband Internet access service); *see also Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 18-238, Broadband Deployment Report, 2019 WL 2336551 at Appx. 5, Deployment of Fixed 25 Mbps/3 Mbps and Mobile LTE 5 Mbps/1 Mbps Services By State and County (Data as of December 31, 2017), at 81, 106 (May 8, 2019) (indicating availability of fixed 25 Mbps/3 Mbps service to 91.3% of the Kauai County, Hawaii population and 97.9% of the Massachusetts population).

³⁸ Transcript of AT&T Inc. Q1 2018 Earnings Conference Call, <https://www.fool.com/earnings/call-transcripts/2018/04/25/att-inc-t-q1-2018-earnings-conference-call-transcr.aspx> (noting that OTT services like DIRECTV NOW are “low touch, with significantly lower subscriber acquisition costs and less capital investment.”).

³⁹ *See Cable Reform Order*, 14 FCC Rcd at 5305, para. 13; 47 CFR § 76.905(e)(2).

⁴⁰ *See supra* n.37.

⁴¹ The Commission has made clear that the need for individual investment in order to receive a competing service does not render the service technically unavailable. *See 1993 Rate Regulation Order*, 8 FCC Rcd at 5631, para. 27 (“the nature of this additional investment should be controlling: if the additional investment is of a ‘community’ nature, i.e. necessary to serve an entire neighborhood or community, then service will be deemed not technically available; by contrast, if the additional investment is of an ‘individual’ nature, i.e. necessary to serve a single subscriber, then the service will be held technically available Therefore, the service would be technically available if the operator’s cable passed a household, but a drop was not yet installed. On the other hand, if the

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offer rule, there are no “other impediments” to consumers taking DIRECTV NOW.⁴² In so doing, we recognize that consumers must pay for broadband Internet access service if they wish to subscribe to DIRECTV NOW.⁴³ Although some consumers may not want or be able to undertake such costs, this cost is not an impediment that prevents us from finding that DIRECTV NOW is being “offered” in the Franchise Areas. Charter demonstrates that the vast majority of households in Massachusetts and Hawaii already have broadband Internet access subscriptions.⁴⁴ Moreover, we note that the Commission has found with respect to other forms of effective competition that requiring customers to purchase a satellite dish to receive satellite service is not deemed an impediment to finding that the competing service was offered in the franchise areas.⁴⁵ This illustrates that effective competition can be recognized under the

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operator must install cable trunk to reach the neighborhood in which a potential subscriber lives, this would constitute an investment common to a community. Service to the household would thus not be deemed technically available.”); *Cable Reform Order*, 14 FCC Rcd at 5303, para. 11 n.43. In addition, neither the LEC Test nor the other effective competition tests take into consideration the impact that a determination of effective competition may have on basic service tier cable rates. See Letter from Edward J. Markey, United States Senator, to Ajit Pai, Chairman, Federal Communications Commission at 1-2 (Oct. 24, 2019) (stating that “the Commission risks opening the door to increased [basic service tier] prices for consumers” through a finding of effective competition in this proceeding) (Markey Oct. 24, 2019 Letter). Instead, Congress espoused a “preference for competition” to set marketplace rates for service. 47 U.S.C. § 543(a)(2).

⁴² We reject MDTC’s allegation that DIRECTV NOW “is no longer available to residents of the franchise areas,” simply because AT&T rebranded its streaming service to AT&T NOW. MDTC Oct. 18, 2019 Ex Parte at 4; Letter from Sean M. Carroll, General Counsel, MDTC, to Marlene H. Dortch, Secretary, FCC at 1 (Oct. 11, 2019); Letter from Sean M. Carroll, General Counsel, MDTC, to Marlene H. Dortch, Secretary, FCC at 2 (Oct. 17, 2019). According to Charter, the service itself remains the same and continues to be provided to existing subscribers. Letter from Howard J. Symons, Counsel to Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC at 5 (Oct. 22, 2019) (Charter Oct. 22, 2019 Ex Parte). None of the minor changes to the service cited by MDTC convince us otherwise. See MDTC Oct. 18, 2019 Ex Parte at 4-5 (noting the replacement of the DIRECTV NOW mobile app with the AT&T TV app, and that AT&T TV Now can no longer be accessed through Microsoft’s Internet Explorer browser, but remains accessible online through the Chrome and Safari browsers); Charter Oct. 22, 2019 Ex Parte at 5-6 (noting that “none of these superficial changes alter the fact that there is a comparable video programming service offered in the Franchise Areas.”). Moreover, we are similarly unpersuaded by MDTC’s contention that potential subscribers are not aware of the AT&T NOW service. MDTC Oct. 18, 2019 Ex Parte at 5. On the contrary, as Charter points out, AT&T has continued to market the service and website searches of DIRECTV NOW redirect to AT&T NOW. Charter Oct. 22, 2019 Ex Parte at 5. We also note that reviews of online streaming services include AT&T NOW in their comparison of other live television streaming services available to consumers. See AT&T TV NOW, *Stream Live TV & On Demand, HBO Included*, <https://www.attvnow.com/> (last visited Oct. 22, 2019); Ty Pendlebury & David Katzmaier, *CNET, Best live TV streaming services for cord cutters* (Sept. 23, 2019), <https://cnet.com/news/best-live-tv-streaming-services-for-cord-cutters/>; Ben Moore & Chloe Albanesius, *PC Mag, The Best Video Streaming Services for 2019* (Oct. 21, 2019), <https://www.pcmag.com/roundup/336650/the-best-video-streaming-services>.

⁴³ MDTC Opposition at 13-14.

⁴⁴ Charter Reply at 18 (referencing Census Bureau data indicating more than 80% of households in Massachusetts and Hawaii had broadband Internet subscriptions in 2016). We do not find compelling MDTC’s assertions that not everyone in the franchise area has access to broadband speeds sufficient to support DIRECTV NOW. MDTC Oct. 18, 2019 Ex Parte at 4. Charter has provided evidence that broadband Internet service “with download speeds of at least 25 megabits per second (‘Mbps’) is available to virtually 100 percent of Charter’s customers in the Franchise Areas,” requiring an individual investment, not a community investment, to receive DIRECTV NOW. Charter Petition at 7–8. Further, we do not rely on U.S. Census Bureau data exclusively, but have also found Charter’s representation generally consistent with our own data. See *supra* para. 8, n.37.

⁴⁵ The Commission has determined, for example, that a cable system may be subject to effective competition under section 623(l)(1) of the Act, 47 U.S.C. § 543(l)(1), “from a satellite via SMATV [(satellite master antenna television)] service or television receive-only earth stations (‘TVRO’)” within the franchise area, despite the customer having to purchase a satellite dish to receive the service. *1993 Rate Regulation Order*, 8 FCC Rcd at (continued....)

LEC Test in circumstances that require reasonable customer-provided additions—such as a satellite dish or broadband Internet access service—to receive programming.

10. In completing our analysis of the “offer” rule, we find that the record reflects that “potential customers are reasonably aware that they will be able to purchase” DIRECTV NOW and DIRECTV has “begun actual commercial service.”⁴⁶ As with prior determinations of effective competition, we accept evidence of a competitor’s marketing materials to demonstrate that the competing service satisfies this component of an offering.⁴⁷ DIRECTV NOW has been marketed nationwide since its introduction in 2016 and currently is available nationwide, including within the Franchise Areas.⁴⁸ Furthermore, over one million consumers nationwide have subscribed to DIRECTV NOW, demonstrating that potential customers are reasonably aware that they can receive the service and have taken advantage of the programming option.⁴⁹

C. DIRECTV NOW is offered “directly to subscribers”

11. We next find that the DIRECTV NOW service is offered “*directly to subscribers by any means* (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area,” as required by the LEC Test.⁵⁰ The term

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5659-60, para. 31 (“We find that [MVPD] service via such SMATV/TVRO [(Satellite Master Antenna Television/receive-only earth stations)] service is technically available nationwide in all franchise areas that do not, by regulation, restrict the use of home satellite dishes. All consumers need to do to receive the service is purchase such a dish or, for multiple dwelling units, arrange for SMATV service.” (citation omitted)).

⁴⁶ Charter Petition at 6-10 (explaining that DIRECTV NOW “received considerable publicity since its debut” and detailing “several national advertising campaigns” that AT&T used to promote the service).

⁴⁷ See, e.g., *Subsidiaries of Cablevision Systems Corp. Petitions for Determination of Effective Competition in 101 Communities in New Jersey*, Memorandum Opinion and Order, 23 FCC Rcd 14141, 14152-53, 14155, paras. 37, 43 (MB 2008) (referring to evidence that the provider had “marketed its services in a manner that makes potential subscribers reasonably aware of its services” and emphasizing that a petitioner is not required to demonstrate “community-specific advertising”).

⁴⁸ Charter Petition at 9-11, Attach. E; Letter from Mary C. Lovejoy, American Cable Association, to Marlene H. Dortch, Secretary, FCC, at 2 (Nov. 19, 2018) (ACA Ex Parte) (describing how DIRECTV NOW “has clearly positioned itself in the market as a substitute for cable and DBS, using ad campaigns that specifically encourage viewers to reject traditional pay-TV service and replace it with DIRECTV NOW”) (citing Jeff Baumgartner, *AT&T Kicks Off DirecTV Now Ad Campaign*, Multichannel News (July 24, 2017), <https://www.multichannel.com/blog/at-t-kicks-directv-now-ad-campaign-414170>); Charter Petition at 9-11, Ex. E; Charter Reply at 10.

⁴⁹ See Charter Reply at 10 (“nearly two million subscribers already use DIRECTV NOW”) (citing Daniel Frankel, *DIRECTV NOW Pacing to Surpass Sling TV in Subscribers by End of Year*, Multichannel News (Aug. 8, 2018), <https://www.multichannel.com/news/directv-now-pacing-to-surpass-sling-tv-in-subscribers-by-end-of-year>, (reporting that DIRECTV NOW has acquired 1.81 million subscribers nationwide)); Georg Szalai and Etan Vlessing, *HBO Max Will Feature Live Sports Content, AT&T Boss Says*, The Hollywood Reporter (July 24, 2019), <https://www.hollywoodreporter.com/news/at-ts-directv-now-loses-168000-subscribers-warnermedia-earnings-up-1226352> (reporting that DIRECTV NOW had 1.3 million subscribers at the end of June 2019). We reject MDTC’s argument that decreasing subscribership to DIRECTV NOW should affect our analysis. See MDTC Motion for Abeyance at 3-5; Letter from Bruce A. Olcott, Counsel to the State of Hawaii, to Marlene H. Dortch, Secretary, FCC, at 1-2 (April 29, 2019) (noting DIRECTV NOW’s decreasing subscribership and arguing that should affect our analysis). We note that the LEC Test does not include any minimum subscriber penetration level. *Time Warner Cable, Inc., Petitions for Determination of Effective Competition in Communities in Wisconsin*, Memorandum Opinion and Order, 31 FCC Rcd 3400, 3401, para. 5 (MB 2016) (finding the LEC effective competition test does not require any particular penetration level”) (citing *Cable Reform Order*, 14 FCC Rcd at 5303, para. 4 (“Because the definition of ‘offer’ does not include any requirement that consumers actually purchase the service, only that the service be available, we reject arguments that we should adopt penetration standards.”)).

⁵⁰ 47 U.S.C. § 543(l)(1)(D) (emphasis added).

“directly” is not defined in the Act or our rules, and neither the legislative history of the LEC Test nor Commission precedent have clarified it. However, we agree with Charter that the best reading of the requirement that a LEC or LEC affiliate offer video programming service “directly to subscribers” is that it “must have (or offer to have) a direct customer relationship with consumers in the franchise area.”⁵¹ The context of the statutory term supports this view: the word “directly” modifies “offers video programming services . . . to subscribers,” indicating that Congress intended for there to be an unmediated relationship between the LEC affiliate and the customer.

12. As Charter explains, such a direct relationship exists here: “AT&T markets DIRECTV NOW directly to customers, customers subscribe to DIRECTV NOW (not a third party service), DIRECTV bills subscribers for this service, and customers remit payment directly to DIRECTV.”⁵² Thus, we agree that DIRECTV NOW is offered by a LEC affiliate to subscribers in an “unmediated” manner and that the offering therefore satisfies this component of the LEC Test.⁵³

D. DIRECTV NOW is a “comparable” video programming service under the LEC Test

13. The LEC Test provides that the video programming services offered in the relevant franchise areas by the LEC or its affiliate must be “comparable to the video programming services provided by the unaffiliated cable operator in that area.”⁵⁴ We agree with Charter that DIRECTV NOW is a comparable video programming service for purposes of the LEC Test and our rules.⁵⁵ Our effective competition rules contain a straightforward definition of a “comparable” video programming service: the service must have “at least 12 channels of video programming, including at least one channel of

⁵¹ Charter Reply at 14; AT&T Ex Parte at 2. AT&T’s rebranding of the DIRECTV NOW service will not change the direct nature in which the service is provided to subscribers: AT&T reportedly will directly provide the same service (both live-TV and on-demand programming) to the same subscribers. Press Release, AT&T, DIRECTV NOW Rebrands Under AT&T TV Family (July 30, 2019), https://about.att.com/newsroom/2019/directv_now_rebrands_under_att_tv.html (“Our DIRECTV NOW subscribers will simply need to re-accept the terms of service and their streaming will continue as usual without interruption”); Charter Response to MDTC Supplemental at 2.

⁵² Charter Reply at 14-15.

⁵³ See *id.* at 12, 14. Charter explains that applying the term “directly to consumers” to require a direct physical connection would be inconsistent with prior Commission precedent in which the Commission considered the entity that provided video programming “directly to subscribers” as the entity that selected and provisioned programming to customers, not the entity operating the facilities. For example, former section 613(b) of the Cable Act prohibited LECs from providing video programming “directly to subscribers.” *Telephone Company-Cable Television Cross-Ownership Rule, Sections 63.54-63.58*, Third Report and Order, 10 FCC Rcd 7887, 7887, para. 1 (1995). The Commission explained that section 613(b) “d[id] not bar a telephone company from acting as a conduit to carry video programming selected and provided by an unaffiliated party,” but it did “generally bar a telephone company from selecting (or ‘exerting editorial control over’) and providing the video programming over its wires in its local service area.” *Id.* at 7887, para. 2; see also *Chesapeake and Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181, 185, 189 (4th Cir. 1994) (providing directly to subscribers meant “offering, with editorial control, cable television services to their common carrier subscribers”), *vacated as moot*, 516 U.S. 415 (1996); see also 47 U.S.C. § 613(c)(2)(D)(iii) (directing the Commission to “clarify that . . . the terms ‘video programming distributors’ and ‘video programming providers’ include an entity that makes available directly to the end user video programming through a distribution method that uses Internet protocol”). Contrary to MDTC’s assertion, a district court’s interpretation of the compulsory license regime prescribed in section 111 of the Copyright Act of 1976 in *FilmOn X* does not require a contrary interpretation. See MDTC Opposition at 17 (citing *Fox Tel. Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 19 (D.D.C. 2015)). The case did not concern the Communications Act’s LEC Test, but instead was limited to the specific provisions of the Copyright Act at issue in that case.

⁵⁴ 47 U.S.C. § 543(l)(1)(D) (emphasis added).

⁵⁵ Charter Reply at 7 n.20.

nonbroadcast service programming.”⁵⁶ The record demonstrates that the DIRECTV NOW service satisfies both prongs of the Commission’s “comparable” definition.⁵⁷ First, it is an OTT video programming service that provides packages starting with access to 45 channels, and second, those packages include both local broadcast channels and nonbroadcast channels.⁵⁸ Because this full-service line-up is available throughout the Franchise Areas, we find that DIRECTV NOW satisfies the comparable programming prong of the LEC Test.

E. Rejection of Claims that DIRECTV NOW Does Not Meet the LEC Test

14. In this section, we reject arguments from opponents of the Petition that DIRECTV NOW does not meet the requirements of the LEC Test. First, we reject MDTC’s claim that DIRECTV NOW must itself be a LEC or provide telephone exchange service in the franchise areas at issue to satisfy the LEC Test. Second, we reject assertions that the LEC Test requires the LEC affiliate to rely on the LEC’s facilities to deliver video programming. Third, we deny claims that the LEC Test mandates that the competing video programming service at issue necessarily must provide electromagnetic “channels.” Finally, we reject assertions that the DIRECTV NOW service is not “comparable” under the LEC Test because subscribers must have a broadband connection. Each of these arguments is based on the premise that the LEC Test requires the competitive provider of video programming to be facilities based. We disagree with that premise because the LEC Test explicitly provides that the competitive video programming provider may use “any means” to offer its service.⁵⁹

⁵⁶ 47 CFR § 76.905(g). The legislative history suggests Congress intended to apply this definition to the LEC Test. H.R. Rep. No. 458, 104th Cong., 2d Sess. at 170 (1996). Specifically, the legislative history of the 1996 Telecommunications Act (which adopted the LEC Test) referred to the Commission’s existing definition of “comparable” adopted in 1993. H.R. Rep. No. 458, 104-158, 170 (1996); see *Cable Reform Order*, 14 FCC Rcd at 5308, para. 19 (discussing the legislative history and requirements of section 76.905(g) in the context of the LEC Test). Section 602(20) of the Act defines “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station,” 47 U.S.C. § 522(20). In 2010, the Commission determined that online video satisfies the statutory definition of “video programming.” See *Preserving the Open Internet*, Report and Order, 25 FCC Rcd 17905, 17976, para. 129 n.408 (2010) (citations omitted) (“Although the Commission stated nearly a decade ago that video ‘streamed’ over the Internet had ‘not yet achieved television quality’ and therefore did not constitute ‘video programming’ at that time, ... intervening improvements in streaming technology and broadband availability enable such programming to be ‘comparable to programming provided by . . . a television broadcast station,’ 47 U.S.C. § 522(20). ... This finding is consistent with our prediction more than five years ago that ‘[a]s video compression technology improves, data transfer rates increase, and media adapters that link TV to a broadband connection become more widely used, . . . video over the Internet will proliferate and improve in quality’”), *vacated and remanded on other grounds, Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

⁵⁷ See, e.g., ACA Ex Parte at 2 (“DIRECTV NOW is a substitute for traditional pay-TV services . . . designed to serve as a replacement for traditional pay-TV service.” (citation omitted)); Kris Wouk, DIGITAL TRENDS, *DirecTV Now: Everything You Need to Know* (Sept. 19, 2018), <https://www.digitaltrends.com/home-theater/what-is-directv-now/> (noting that “where some competitors aim to offer services that differentiate from cable or satellite, DirecTV Now very much aims to replace your cable or satellite subscription”); Ty Pendlebury, David Katzmaier, *DirecTV Now Review: Live TV Streamer is Stronger on Channels, Weaker on DVR* (Feb. 20, 2019), <https://www.cnet.com/reviews/directv-now-review/> (“DirecTV Now offers more channels for the money than competitors and includes local channels (ABC, CBS, Fox and NBC) for most markets [as well as] ‘cable-like’ features like swiping between channels.”).

⁵⁸ AT&T, *Watch what you want*, <https://www.att.com/att-tv-now/> (last visited Aug. 29, 2019); see also Charter Petition at ii. AT&T explains that “DIRECTV NOW’s program lineup can have some variation by market and is available at <https://www.directv.com/guide>.” AT&T Ex Parte at 2; see also Charter Petition at 11-12, Attachs. C, D; Charter Reply at 5; *Got Questions?*, <https://www.directvnow.com/> (“With just an Internet connection, DIRECTV NOW lets you watch your favorite live and on-demand shows, plus the top premium channels. No satellite or cable box required.”) (last visited July 22, 2019).

⁵⁹ 47 U.S.C. § 543(l)(1)(D).

15. *DIRECTV NOW need not itself be a LEC and AT&T need not offer telephone exchange service in the Franchise Areas.* First, we reject MDTC’s claim that DIRECTV NOW cannot meet the LEC Test because DIRECTV NOW itself is not a LEC.⁶⁰ DIRECTV NOW need not be classified as a LEC for purposes of the LEC Test. Rather, the LEC Test specifically provides that a LEC affiliate can satisfy the test.⁶¹ MDTC further argues that AT&T does not own any subsidiaries that provide telephone exchange service in the Franchise Areas. There is no requirement under the LEC Test, however, that a LEC provide telephone exchange service in the same communities as the competing video programming service. That the text of the statutory provision contains no such requirement is sufficient to reject MDTC’s argument. Indeed, their argument would require the FCC to read limiting language into the statutory text that Congress did not include.⁶² Moreover, we agree with Charter that Congress adopted the LEC test because LECs and their affiliates are “uniquely well-funded and well-established entities that would provide durable competition to cable,” and not because they were focused on facilities-based competition.⁶³ The test can be satisfied where a LEC-affiliate is offering video programming services in the franchise area, which can be provided “by any means (other than direct-to-home satellite services).” Therefore, the question of whether AT&T or any of its affiliates provides telephone exchange service in the Franchise Areas is not determinative of this issue.

16. *DIRECTV NOW need not use LEC facilities to satisfy the test.* We disagree with Hawaii that the LEC Test is “explicit in its application to LECs as *facilities-based* providers of video programming services.”⁶⁴ Although the LEC Test can be satisfied by “a local exchange carrier or its affiliate (or any [MVPD] *using the facilities of such carrier or its affiliate*),” that facilities-based phrase only applies to MVPDs using such facilities and not to LECs or LEC affiliates themselves.⁶⁵ To be sure,

⁶⁰ See MDTC Opposition at 22; see also *id.* at 23 n.94 (“If DIRECTV, LLC’s MVPD status based on its provision of direct broadcast satellite service does not attach to its provision of DIRECTV NOW, neither should AT&T’s status as a LEC outside of Massachusetts attach to its provision of unrelated video service within Massachusetts.”). MDTC’s argument ignores the specific requirement of the LEC test, which is satisfied if the competing video programming service provider is a LEC *or LEC affiliate*. 47 U.S.C. § 543(l)(1)(D).

⁶¹ As discussed further in Section C above, we note that the LEC test does not include any specification that an affiliate must operate in the same area as the LEC itself, evincing Congress’s intent not to limit findings of LEC effective competition only to the geographic areas where the LEC provides telephone exchange service. See 47 U.S.C. § 543(l)(1)(D) (allowing “a local exchange carrier *or its affiliate*” to satisfy the LEC Test (emphasis added)); see also Charter Reply at 16-17; *infra* paras. 18-19 (explaining that the LEC Test does not require the LEC or its affiliate to utilize its own facilities to distribute programming).

⁶² In particular, rather than any entity that is “a local exchange carrier or its affiliate” qualifying for purposes of the LEC test, the MDTC argument would modify the statutory text to state that only a certain subset of LECs or LEC affiliates would qualify—namely, the subset that provide telephone exchange service in a particular Franchise Area. As noted above, Congress used no such limiting language in the statute. Another problem with MDTC’s argument is that Franchise Areas and local exchange areas are not coterminous. Thus, their proposed reading of the statute (which we have rejected) creates a practical problem that ours does not. Would a LEC that has facilities covering only a fraction of the relevant Franchise Area qualify in their scenario? Would a LEC’s facilities have to cover a certain percentage of the Franchise Area? Or would a LEC’s facilities have to cover the entire Franchise Area? The fact that the statute does not provide guidance in this respect or speak to this line-drawing exercise further confirms our reading of the text, which is that Congress did not provide that the particular contours or geographic location of a LEC’s facilities are relevant to the LEC test.

⁶³ Charter Reply at 2.

⁶⁴ Hawaii Opposition at 2.

⁶⁵ Charter Feb. 1, 2019 Ex Parte at 2; Letter from Bruce A. Olcott, Counsel to the State of Hawaii, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Nov. 27, 2018) (Hawaii Nov. 27, 2018 Ex Parte) (arguing it would be “nonsensical” for the statutory LEC Test to apply a facilities requirement to an MVPD using a LEC’s facilities, but not to the LEC itself). Our reading of the provision is supported by honoring the use of the parentheses in the statute confining this requirement only to MVPDs, and also by the grammatical, last-antecedent rule, which “provides that ‘a limiting (continued....)”

the majority of LEC Test decisions in the past involved a LEC providing video programming services over its own facilities. The Cable Services Bureau (a predecessor of the Media Bureau) found, however, that LEC affiliates can satisfy the LEC Test by providing video programming through a Multichannel Multipoint Distribution Service (MMDS) provider (rather than through the LEC's own telephone facilities),⁶⁶ which shows that the Bureau did not interpret the “directly to subscribers” restriction to require the LEC affiliate to use the LEC's facilities.⁶⁷

17. Those challenging the Charter Petition also rely on the legislative history of the LEC Test, which they contend references, and therefore requires, a LEC's use of its own facilities in the relevant franchise areas for an effective competition determination.⁶⁸ Hawaii explains that “[t]he Senate version of the Telecommunications Act specified that the LEC Test applied only to LECs that provide video programming services ‘either over a common carrier video platform or as a cable operator’” while “[t]he House version of the Telecommunications Act was also limited to LECs that provide a ‘video dialtone service’ or secure a franchise for a cable television system.”⁶⁹ Opponents thus point out that both the Senate and House versions of what became the 1996 Telecommunications Act specified that the LEC Test applied only to LECs that provided video programming services over certain facilities.⁷⁰ It is also the case that, in harmonizing these two versions of the LEC Test, the Conference Committee in the Conference Report provided examples that would satisfy the LEC Test, all of which were facilities-based: “MMDS, LMDS [(Local Multipoint Distribution Service)], an open video system, or a cable system.”⁷¹

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 clause or phrase . . . should ordinarily be read as modifying only the noun or noun phrase that it immediately follows.” See *Lockhart v. U.S.*, 136 S. Ct. 958, 962 (2016) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). The associated-words canon of *noscitur a sociis* (the principle that “a word is known by the company it keeps”) does not change the meaning of the straightforward wording of the LEC Test, as MDTC argues. Charter Feb. 1, 2019 Ex Parte at 1 n.1 (citing *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 378 (2006); *U.S. v. Williams*, 553 U.S. 285, 294 (2008)); MDTC Opposition at 20 (citing *Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 740 (2017); *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Declaratory Ruling & Third Report & Order, 33 FCC Rcd 9088, 9115-16, para. 55 (2018)). We agree with Charter that the principle of *noscitur a sociis* does not apply here where “the language at issue is a self-contained phrase set off by parentheses.” Charter Feb. 1, 2019 Ex Parte at 2 n.3.

⁶⁶ *CoxCom, Inc. Petition for Determination of Effective Competition*, Order on Reconsideration, 15 FCC Rcd 728, 729-31, paras. 3, 7 (CSB 2000) (finding the incumbent cable operator was subject to effective competition under the LEC test from a MMDS provider that was affiliated with BellSouth, a LEC); *Time Warner Cable Petition for Determination of Effective Competition*, Memorandum Opinion and Order, 14 FCC Rcd 13495, 13495, 13500, paras. 1, 12 (CSB 1999) (same); see also Charter Reply at 17.

⁶⁷ Charter Reply at 16-17 (“The fact that the LEC Test can be satisfied by a LEC affiliate—not just the LEC itself—strongly indicates that the application of the LEC Test is not limited to the geographic areas where the LEC provides telephone exchange service.”); MDTC Opposition at 21 (arguing “that LECs meet the ‘local exchange carrier’ requirement in the LEC test due to their actual provision of telephone exchange service in the relevant franchise area”). We acknowledge that the cases Charter relies on in making its claim that the LEC need not have facilities in the franchise area involve situations in which the LEC affiliates provided MMDS via microwave, which requires a Commission license and thus MMDS was provided over LEC-affiliated facilities. MDTC Opposition at 22. But in the case of DIRECTV NOW, subscribers could access the service over AT&T's Commission-licensed wireless network. Furthermore, the LEC test does not contain any requirement that the LEC provide service in the areas at issue, and we see no need to read such a requirement into the Act here.

⁶⁸ MDTC Opposition at 20-21.

⁶⁹ Hawaii Opposition at 4 (citing S.652 as passed by the House of Representatives, with Amendments, October 12, 1995, § 202(h) (104th Congress)).

⁷⁰ Hawaii Opposition at 3; Charter Reply at 12 n.40.

⁷¹ S. Rep. No. 104-230 at 170 (1996) (Conference Report). We note that broadband Internet access service capable of streaming video in the manner of DIRECTV NOW did not exist at the time the LEC Test was adopted. The LEC Test was adopted in 1996, but in 2002 the Commission did not consider online video to be consistent with the Act's

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The statutory language that Congress ultimately codified, however, includes language different from the Senate or House drafts, and it contains no facilities-based test. The House and Senate versions show that Congress knew how to mandate that the service be facilities-based, and chose not to do so in the final version of the LEC Test.⁷² To satisfy the LEC Test, a LEC or its affiliate can offer video programming services “by any means,” suggesting that Congress, in the end, did not intend to dictate the way in which a LEC provides service (e.g., using its own transmission-path) and allowed for future developments in video distribution technology. Hawaii’s argument to the contrary, that “no suggestion exists in either the text of the statute or its legislative history that ‘by any means’ should be interpreted to include non-facilities based distribution methods,” is not persuasive.⁷³ Consistent with the canons of statutory construction, we must give meaning to the final language of the statute, and here the statute includes the very broad language “by any means” with only a very narrow carve out not applicable here, i.e., “other than direct-to-home satellite services.”⁷⁴

18. Similarly, we reject MDTC’s claims that broadband service must be provided by an affiliate of the LEC serving the area, as opposed to a third party, in order for a LEC affiliate to be “physically able” to deliver an OTT service, as required under the “offer” rule.⁷⁵ MDTC says, for example, that the LEC Test requires the LEC competitor to “have and provide a physical connection, whether by wire or spectrum, the entire way to the subscribing household” in order for the definition of “offer” to be satisfied.⁷⁶ We disagree. Our rule establishing what it means to “offer” a service does not require the use of the LEC competitor’s own facilities.⁷⁷ Indeed, as discussed above, the statute permits a competing video programming service to be offered “by any means (other than direct-to-home satellite services).”⁷⁸ We believe our conclusion that DIRECTV NOW may rely on third-party broadband availability for purposes of a showing under the LEC Test best effectuates this broad language used by

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definition of “video programming.” *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4834, para. 63 n.236 (2002) (stating that video streamed over the Internet was “not consistent with the definition of video programming” because it had “not yet achieved television quality.”); *see also* 47 U.S.C. § 522(20) (defining “video programming” as “programming provided by, or generally considered comparable to programming provided by, a television broadcast station.”). By 2010, however, the Commission had concluded that advancements in technology enabled video streamed over the Internet to be consistent with the Act’s definition of video programming. *See supra* n.566.

⁷² Had Congress intended to require such a showing, they clearly knew how to do so. This is demonstrated by Congress’s language in Section 271(c)(1)(A), which was also enacted as part of the Telecommunications Act of 1996. 47 U.S.C. § 271(c)(1)(A) (“Presence of a Facilities-Based Competitor”). *See also Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.”).

⁷³ Hawaii Opposition at 3-4; Hawaii Nov. 27, 2018 Ex Parte at 2.

⁷⁴ *See Town & Country Home Nursing Servs., Inc.*, 963 F.2d 1146, 1151 (9th Cir. 1991) (“As a general canon of statutory construction, where the final version of a statute deletes language contained in an earlier draft, a court may presume that the earlier draft is inconsistent with ultimate congressional intentions.”).

⁷⁵ MDTC Opposition at 12 (“Under the LEC test, the cable operator has the burden to prove that a LEC’s service is technically available by showing that a LEC is physically able to deliver service to potential subscribers.”); *see also* Letter from Mauro DePasquale, Executive Director, Worcester Community Cable Access, Inc., to Marlene H. Dortch, Secretary, FCC, at 2 (dated Nov. 14, 2018) (WCCA Ex Parte). We note that WCCA styled its letter as an opposition to the Charter Petition but because it was filed after the opposition deadline, we will consider it as an ex parte filing.

⁷⁶ MDTC Opposition at 12.

⁷⁷ *See* 47 CFR § 76.905(e).

⁷⁸ 47 U.S.C. § 543(l)(1)(D).

Congress and is consistent with its plain meaning.⁷⁹ As Charter explains, “Congress did *not* say that the LEC Test excludes the provision of video programming services via non-LEC facilities, or the provision of video programming services online.”⁸⁰ Because neither the statute nor our rules prohibits the use of third-party facilities, we find that using such facilities is consistent with the LEC Test.

19. Further, we reject claims that DIRECTV NOW must utilize its own facilities in the Franchise Areas to offer its service “directly to subscribers.”⁸¹ As we discuss above, DIRECTV NOW has a direct relationship with its subscribers and thus directly offers its service to subscribers.⁸² Contrary to suggestions that DIRECTV NOW’s service is an “indirect” offering,⁸³ the LEC Test does not require a LEC or its affiliate to use its own facilities in distributing a video programming service. Instead, it expressly provides that the competitive LEC or LEC affiliate may distribute its service “by any means.”⁸⁴

20. *The test contains no physical channel requirement.* MDTC is incorrect that the LEC Test can be satisfied only by a facilities-based video programming provider because the provider must have the ability to deliver electromagnetic channels.⁸⁵ This argument is based on a definition of “channel” that is included in the Act, but not in the LEC Test, which does not reference the term channel. The LEC Test requires a LEC or its affiliate to offer “video programming services” that are “comparable” to those offered by the cable operator;⁸⁶ it does not require the offer of “channels” as that term is defined in the Act. Indeed, applying the statutory definition of channel to the LEC Test would be irrational. The Act defines “channel” so narrowly—“a portion of the electromagnetic spectrum *that is used in a cable system* and which is capable of delivering a television channel”⁸⁷—that the LEC Test would be meaningless as a way of assessing effective competition *to cable operators* if we were to require the LEC or its affiliate to carry “channels” as the Act defines them. Although the Commission defines “comparable programming” as “at least 12 channels of video programming, including at least one channel of nonbroadcast service

⁷⁹ MDTC asserts that “[g]ranting Charter’s Petition would contravene the Commission’s goals of encouraging facilities-based investment.” MDTC Opposition at 25. It says that “to enable claims of effective competition based on non-facilities-based online video service would be a message to competitive broadband providers and content providers that also provide broadband (AT&T, Comcast, Google) that using a competitor’s broadband facilities for provision of their content rather than expanding their own is good enough for the Commission.” *Id.* Because “competitive broadband providers and content providers” are not subject to cable rate regulation rules in the first place, we do not see any link between the outcome of this proceeding and the incentives of such entities to engage in facilities-based investment. Rather, only cable operators are subject to our cable rate regulation rules and determinations of effective competition. With respect to cable operators, we believe our decision will, if anything, promote facilities-based investment. As ACA explains, for example, “small cable operators will likely reduce their investment in video services” if rate regulation applies in franchise areas where effective competition is present consistent with the LEC Test. ACA Ex Parte at 4.

⁸⁰ Charter Reply at 11.

⁸¹ MDTC Opposition at 11-13; Hawaii Opposition at 4.

⁸² See *supra* paras. 11-12.

⁸³ MDTC Opposition at 17-18.

⁸⁴ See 47 U.S.C. § 543(l)(1)(D).

⁸⁵ MDTC Opposition at 5. Section 602(4) of the Act defines channel as a “a portion of the electromagnetic spectrum . . . which is capable of delivering a television channel.” 47 U.S.C. § 522(4). MDTC argues that to meet the definition of “comparable” in our rules, “Charter must prove that AT&T offers 12 portions of the electromagnetic frequency spectrum which are used in a cable system and which are capable of delivering a television channel.” MDTC Opposition at 5. This interpretation would require DIRECTV NOW to maintain a facility capable of delivering a physical signal to its subscribers.

⁸⁶ 47 U.S.C. § 543(l)(1)(D).

⁸⁷ 47 U.S.C. § 522(4) (emphasis added).

programming,”⁸⁸ we conclude that the Commission did not intend this definition to incorporate the Act’s definition of “channel.”⁸⁹ Indeed, in adopting the definition of “comparable programming” in the *1993 Rate Regulation Order*, the Commission indicated that the term “channels” can refer to “programming sources” rather than physical channels.⁹⁰ Thus, we find that the statutory context of the LEC Test makes clear that a colloquial meaning of “channel” (i.e., a source of prescheduled video programming) applies to its use in our rule,⁹¹ consistent with Commission precedent in prior LEC Test determinations.⁹²

⁸⁸ 47 CFR § 76.905(g).

⁸⁹ In support of its argument, MDTC states that we should apply “a uniform definition to a word if the subject matter to which the word refers does not change.” Letter from Sean M. Carroll, Deputy General Counsel, MDTC, to Marlene H. Dortch, Secretary, FCC, at 1-2 (Dec. 20, 2018) (MDTC Dec. 20, 2018 Ex Parte) (citing *U.S. West Commc’ns, Inc. v. FCC*, 177 F.3d at 1059; *Cable Reform Order*, 14 FCC Rcd at 5308, para. 18 (finding “a term used repeatedly in the same connection should be given the same meaning unless different meanings are required to make the statute consistent.”)). We note that the same term may be given different meanings in different statutory contexts, however, and we note that the contexts are different in this case—so different, in fact, that Congress chose to exclude the word “channel” from the Act’s LEC Test. See, e.g., *Anglers for Christ Ministries, Inc.*, Memorandum Opinion and Order, Order, and Notice of Proposed Rulemaking, 26 FCC Rcd 14941, 14960, para. 36 n.123 (2011) (“we cannot assume that Congress intended for th[e] term [‘economically burdensome’] to have the same meaning in both [statutory] contexts” (citing *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14998-15001, paras. 16-23 (2005) (interpreting “information services” in the Communications Assistance for Law Enforcement Act differently from the interpretation of the similarly defined term in the Act), *aff’d sub nom. Am. Council on Educ. v. FCC*, 451 F.3d 226, 232-33 (D.C. Cir. 2006) (finding the Commission’s “interpretation of CALEA reasonably differs from its interpretation of the 1996 Act, given the differences between the two statutes”); *U.S. West Commc’ns, Inc. v. FCC*, 177 F.3d 1057, 1059-60 (D.C. Cir. 1999) (finding the term “provide” can bear different meanings under the Communications Act depending on the statutory context)); Charter Reply at 7; Letter from Howard J. Symons, Counsel to Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC, at 5 (Feb. 1, 2019) (Charter Feb. 1, 2019 Ex Parte).

⁹⁰ See *1993 Rate Regulation Order*, 8 FCC Rcd at 5667, para. 38 n.130 (“With respect to switched networks, we construe comparability to mean at least twelve different programming sources.”). This distinguishes the instant case from the Media Bureau’s *Sky Angel* order that MDTC cites. MDTC Opposition at 6-7; *Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879, 3882, para. 7 (MB 2010) (*Sky Angel*). As Charter explains in its Reply, *Sky Angel* focused on whether *Sky Angel*’s OTT service met the statutory definition of MVPD, which includes the term “channel”; the word “channel” does not appear in the Act’s LEC Test. Charter Reply at 8 n.24. For this reason, the *Sky Angel* precedent is inapplicable to the question of whether an OTT video distributor like DIRECTV NOW can satisfy the LEC Test. Similarly, we reject MDTC’s argument that we are subjecting AT&T to increased regulation and “expand[ing] regulation of the Internet” as a result of this Order. MDTC Opposition at 25-26. Neither the Act nor Commission precedent increases regulation applied to AT&T or the Internet, in general, as a consequence of recognizing the effective competition of DIRECTV NOW in the Franchise Areas. The LEC Test has no bearing on whether a video programming service that is affiliated with a LEC is an MVPD, and therefore we see no need to litigate that issue here. Compare 47 U.S.C. § 522(13) with 47 U.S.C. § 543(1)(1)(D). For the same reason, we reject this argument in MDTC’s Motion for Abeyance. MDTC Motion for Abeyance at 5; Charter Abeyance Opposition at 7; Charter Petition at 16.

⁹¹ Charter Petition at 11 n.45; Charter Reply at 6, 7 n.20.

⁹² See, e.g., *Time Warner Cable, Inc., Petitions for Determination of Effective Competition in Communities in Wisconsin*, Memorandum Opinion and Order, 31 FCC Rcd 3400, 3401, para. 4 (MB 2016) (finding AT&T’s multichannel video service U-verse “provides comparable programming to Time Warner” when applying a non-technical definition of “channels” under the LEC Test); *Bright House Networks, LLC Petition for Determination of Effective Competition in Farmington, Michigan*, Memorandum Opinion & Order, 26 FCC Rcd 7662, 7662-64, paras. 1-5 (MB 2011) (finding AT&T’s U-verse provides a sufficient variety of comparable programming channels under the LEC Test); MDTC Dec. 20, 2018 Ex Parte at 2 (arguing “[i]f Congress had intended a new and different use of the word channel in the context of the LEC Test’s comparable-programming requirement, it would have amended the statutory definition of the term, adopted a new, ‘as-used-in-this-section’ definition of the word, or, at

(continued....)

21. *The need for broadband access is not relevant to the test.* Finally, we reject contentions that the need for consumers to have broadband Internet access service in order to subscribe to DIRECTV NOW means that DIRECTV NOW does not pass muster under the LEC Test.⁹³ We disagree with MDTC that DIRECTV NOW service is not “physically present or effectively offered” to consumers in the Franchise Areas because a broadband connection is required to receive the service.⁹⁴ This claim is belied by the high percentage of broadband subscribership that already exists in the Franchise Areas because it demonstrates that most residents in the LFA could subscribe to DIRECTV NOW immediately, with no additional physical connections necessary to subscribe, as well as the existing subscribership to DIRECTV NOW, which demonstrates that the service is actually offered.⁹⁵ Moreover, as we have explained above, the fact that broadband Internet access constitutes a separate cost does not mean that DIRECTV NOW is not offered within the specific parameters of the statutory LEC Test.⁹⁶ Similarly, we are not persuaded by arguments that some households in the Franchise Areas cannot access DIRECTV NOW because they do not subscribe to broadband Internet access service.⁹⁷ As explained above, the record demonstrates that broadband Internet access is available throughout the Franchise Areas, at a sufficient speed to access DIRECTV NOW, and from multiple service providers.⁹⁸ We therefore find that need for a broadband connection is not a hindrance to concluding that the video programming of DIRECTV NOW in the Franchise Areas is “comparable” for purposes of the LEC Test.⁹⁹

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the very least, directed the Commission to consider promulgating an alternative definition.”); Charter Reply at 6-7; *see also* Charter Feb. 1, 2019 Ex Parte at 4-5 (“[I]t is clear that for the purposes of assessing comparability, the Commission’s focus is on programming rather than the particular physical platform over which that programming is delivered.”). Charter explains that when Congress expressly stated that the LEC Test can be satisfied “by any means,” it only excluded delivery via direct-to-home satellite. Charter Reply at 6; Charter Dec. 21, 2018 Ex Parte at 1. Had Congress intended for there to be further exclusions, for example by limiting application of the LEC Test to instances in which the video programming service provides 12 “channels” of video programming using the technical definition of channel, it would have made that exclusion similarly clear.

⁹³ *See, e.g.*, MDTC Oct. 18, 2019 Ex Parte, at 2 (arguing that “DirecTV NOW cannot be delivered to households that do not subscribe to broadband service”).

⁹⁴ *See, e.g.*, MDTC Opposition at 11-13, 16; Hawaii Opposition at 4; WCCA Ex Parte at 2.

⁹⁵ *See supra* n.37.

⁹⁶ *See supra* para. 9.

⁹⁷ *See* WCCA Ex Parte at 2; Hawaii Opposition at 5; MDTC Opposition at 12-13; *see also* Charter Reply at 10; Charter Feb 1, 2019 Ex Parte at 6; *supra* paras. 8-9. WCCA says that “the high cost of DIRECTV NOW ... combined with the lack of broadband in many affected households in the area result in a de facto lack of effective competition removing the very basis for the requested rate deregulation.” WCCA Ex Parte at 2. However, WCCA provides no evidence supporting its claim of a lack of broadband availability in the Franchise Areas, and as noted in fn. 44, the record shows otherwise.

⁹⁸ *See supra* para. 8.

⁹⁹ While not relevant to whether Charter faces effective competition under the LEC Test, we note that we agree with Charter that “the fact that DIRECTV NOW offers channels of video programming for purposes of the comparability test does not convert DIRECTV, LLC into a cable operator requiring a cable franchise.” Charter Reply at 8; *see also* MDTC Opposition at 19-25; Markey Oct. 24, 2019 Letter at 2. Section 602(5) defines a “cable operator” as a person “(A) who provides cable service over a cable system and . . . owns a significant interest in such cable system” or (B) who is responsible for operation and management of a cable system. 47 U.S.C. § 522(5). Section 602(7) defines cable system as a “facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment.” *Id.* at § 522(7). In this case, MDTC concedes that AT&T and its affiliates do not own or operate and manage facilities in the franchise areas. MDTC Opposition at 16, 20 (“a company clearly does not have a ubiquitous, facilities-based presence in a state in which it does not provide telephone exchange service or exchange access.”). And even if AT&T or its affiliates have facilities in the franchise

(continued....)

F. Requests for Discovery, Referral to an Administrative Law Judge, an Evidentiary Hearing, and Motion for Abeyance

22. *Requests for discovery or referral to an administrative law judge.* We are not persuaded that granting any of the five discovery requests from the Massachusetts Attorney General would aid our consideration of the Charter Petition. The Massachusetts Attorney General asks the Commission to issue discovery requests or refer the Petition to an administrative law judge.¹⁰⁰ Although we have the discretion to require discovery and designate issues for an administrative hearing,¹⁰¹ additional factfinding is not warranted in this instance. Charter is correct that “[n]one of these procedural steps are necessary to resolve Charter’s Petition, and denying them is well within the Commission’s discretion.”¹⁰² As Charter explains, “[a]ll of the material facts regarding DIRECTV NOW’s relationship to AT&T, the nature of the DIRECTV NOW service and its features, and the availability of broadband and wireless service in Massachusetts and Hawaii are established by the undisputed evidence in the record of this proceeding and in the public record.”¹⁰³ We agree. The record adequately informs our analysis while addressing the issues raised by all parties, and additional information is unnecessary.

23. First, the Massachusetts Attorney General “asks the Commission to issue discovery requests and require Charter to submit additional information to determine . . . the extent to which Charter is the only fixed broadband Internet service provider in the Franchise Areas.”¹⁰⁴ We find that whether there is a choice of broadband providers, fixed or otherwise, is irrelevant to the statutory test for LEC effective competition because the number of broadband providers does not affect any element of the LEC test. Rather, the test is satisfied where, as here, a LEC affiliate offers video programming services directly to subscribers *by any means*; it says nothing about subscribers needing multiple means of accessing the LEC affiliate’s video programming services.¹⁰⁵ Second, the Massachusetts Attorney General requests discovery to determine “the download-speed packages available to each of Charter’s fixed broadband Internet service customers in the Franchise Areas.”¹⁰⁶ The record already contains information about the sufficiency of broadband service available in the Franchise Areas to access DIRECTV NOW, and we already considered this record information above when determining that the DIRECTV NOW programming service is “comparable.”¹⁰⁷

24. The Massachusetts Attorney General does not provide a basis for its remaining three suggested discovery requests. The Massachusetts Attorney General suggests that we examine “whether

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areas, MDTC does not allege that those facilities occupy any public right-of-way; “a facility that serves subscribers without using any public right-of-way” is not a cable system under the Act. 47 U.S.C. § 522(7)(B).

¹⁰⁰ MA AGO Opposition at 2 (requesting discovery to determine if Charter is the only fixed broadband Internet service provider in the Franchise Areas; available download-speed packages; whether Charter’s download speeds match promised service levels; whether Charter throttles “speeds of its fixed broadband Internet customers that do not take Charter’s cable television services;” and, “the differences in rates offered for Charter’s unbundled fixed broadband Internet services and those same services bundled with cable television services or telephone services”) (citing 47 CFR § 76.7(e)(1), (g)).

¹⁰¹ *Sprint Comm’ns Co. v. FCC*, 76 F.3d 1221, 1231 (D.C. Cir. 1996) (finding the Commission’s decision to deny discovery and evidentiary hearing is “committed to agency discretion by law”).

¹⁰² Charter Reply at 22.

¹⁰³ *Id.* at 23.

¹⁰⁴ MA AGO Opposition at 2.

¹⁰⁵ *See* 47 U.S.C. § 543(l)(1)(D).

¹⁰⁶ MA AGO Opposition at 2.

¹⁰⁷ *Supra* section III.B (discussing DIRECTV NOW broadband requirements and Charter’s broadband offerings in the Franchise Areas).

Charter's fixed broadband Internet service customers are receiving the download speeds promised to them as part of Charter's fixed broadband Internet service packages, and whether Charter throttles any services for customers who do not subscribe to cable TV,¹⁰⁸ arguing that "[a] number of customers allege that they purchased Charter's 100 Mbps broadband Internet package but consistently receive much slower download speeds."¹⁰⁹ But the Massachusetts Attorney General does not allege speeds below the 12 Mbps threshold that AT&T recommends for "optimal viewing" of DIRECTV NOW,¹¹⁰ nor allege that consumers are unable to receive DIRECTV NOW due to throttling.¹¹¹ Accordingly, the Massachusetts Attorney General has failed to identify any legitimate basis for engaging in discovery on these issues. Finally, "the differences in rates offered for Charter's unbundled fixed broadband Internet services and those same services bundled with cable television services or telephone services"¹¹² is not a consideration of the LEC Test, as discussed above.¹¹³ For all of these reasons, we will not grant any of the discovery requests.

25. The Massachusetts Attorney General also requests "holding an evidentiary hearing or referring the Petition to an administrative law judge."¹¹⁴ Either is warranted, according to the Massachusetts Attorney General, "[g]iven the seriousness of Charter's Petition to avoid rate regulation in 32 Massachusetts communities, and in support of the Massachusetts DTC's position in opposition" to the Charter Petition.¹¹⁵ Under our rules, we may specify additional procedures such as an evidentiary hearing or designation to an administrative law judge at our discretion.¹¹⁶ We find neither procedure is warranted in this case. The Massachusetts Attorney General does not demonstrate that any information necessary to a finding of LEC effective competition is missing from the record, nor does it describe the potential benefits a more protracted process may warrant.¹¹⁷ The record includes the Charter Petition, in which Charter has met its evidentiary burden,¹¹⁸ and it includes multiple oppositions and the Charter Reply. Although we have discretion to specify additional procedures, including by holding a hearing or conducting discovery, we find it unnecessary to do so here.¹¹⁹ Along with various *ex parte* filings, the record in this proceeding is full and complete and it contains sufficient material to inform our decision. We therefore deny the Massachusetts Attorney General's requests for an evidentiary hearing or referral of the Petition to an administrative law judge.

¹⁰⁸ MA AGO Opposition at 2.

¹⁰⁹ *Id.* at Attachment at 2.

¹¹⁰ *See supra* n.36.

¹¹¹ To the extent someone in the future has evidence that DIRECTV NOW's service is no longer "comparable" to Charter's cable service due to throttling or for other reasons, an LFA could petition to reverse the finding of effective competition and recertify for rate regulation. 47 CFR § 76.919.

¹¹² MA AGO Opposition at 2-3.

¹¹³ *See supra* para. 9.

¹¹⁴ MA AGO Opposition at 3.

¹¹⁵ *Id.*

¹¹⁶ 47 CFR § 76.7(e), (g).

¹¹⁷ *See Procedural Streamlining of Administrative Hearings*, EB Docket No. 19-214, Notice of Proposed Rulemaking, FCC 19-86, at 1, 14-15 (Sept. 6, 2019) (noting that "trial-type hearings are costly and impose significant burdens and delays on both applicants and the agency that may not be necessary," and "courts have found that agencies may resolve factual disputes on a written record.").

¹¹⁸ *See* 47 U.S.C. § 543(l)(1)(D).

¹¹⁹ *See* 47 CFR § 76.7; *see generally Sprint Comm'n's Co. v. FCC*, 76 F.3d at 1231 (affirming the Commission's decision to deny discovery and evidentiary hearing is "committed to agency discretion by law") (quoting 5 U.S.C. § 701(a)(2) and citing *Webster v. Doe*, 486 U.S. 592 (1988)).

26. *Motion for abeyance.* The MDTC requests that the Commission “hold this proceeding in abeyance pending a stabilization of DIRECTV NOW’s subscriber base and the resolution of the Commission’s [Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services] rulemaking that could render the Petition moot.”¹²⁰ Charter opposes MDTC’s motion, suggesting we “should strike [it] as an unauthorized pleading” under our rules and, even if we were to accept the pleading, “MDTC’s arguments lack merit and are irrelevant to the Commission’s consideration of Charter’s Petition.”¹²¹ We agree with Charter that MDTC’s pleading does not address “extraordinary circumstances,” and it presents arguments that are irrelevant under the LEC Test.¹²²

27. In support of its motion for abeyance, MDTC asserts that DIRECTV NOW’s current “declining subscribership” could trigger a situation in which “Charter’s rates are unregulated based on an alleged competitor that no longer exists.”¹²³ The LEC Test does not include a subscriber penetration requirement, however, and evidence of potentially fluctuating nationwide subscribership does not indicate DIRECTV NOW is not, and will not continue to be, available within the Franchise Areas for the reasonable future.¹²⁴ Further, our analysis is based on the service that is currently available to subscribers, rather than speculative changes that could “prompt multiple Petitions for Recertification with the Commission.”¹²⁵ We therefore decline to address arguments about what may happen in the increasingly dynamic video programming marketplace, and we focus instead on service that is presently available to subscribers in the Franchise Areas, as the statutory test requires.¹²⁶

28. We fail to see how MDTC’s argument presents an “extraordinary circumstance” warranting unique relief, and we agree that there are no issues in our open rulemaking proceeding—which is focused on how to interpret the Act’s definition of “multichannel video programming distributor”—relevant to considering Charter’s petition under the LEC Test. Charter is correct that “Section 623(l) requires only that a LEC or its affiliate ‘offer[] video programming services by any means (other than direct-to-home satellite services),’ and LEC affiliate AT&T does so.”¹²⁷ The LEC Test is clear that LEC effective competition may come from an affiliated MVPD, which the Cable Services Bureau recognized previously without a rulemaking,¹²⁸ or from an affiliated video programming service that it delivers to

¹²⁰ MDTC Motion for Abeyance at 6; *see, e.g., US Sprint Communications Co. v. Bell Tel. Co. of Pa.*, Order, 5 FCC Rcd 446, 446, para. 1 (1990) (directing “proceedings be held in abeyance until such future date as will be determined by the Bureau”).

¹²¹ Charter Abeyance Opposition at 4; 47 CFR § 76.7(d) (“Except as provided in this section, or upon a showing of extraordinary circumstances, additional motions or pleadings by any party will not be accepted.”).

¹²² *See* Charter Abeyance Opposition at 3-4.

¹²³ MDTC Motion for Abeyance at 4; *see also* MDTC Supplement to Motion for Abeyance at 2 (indicating that DIRECTV NOW’s subscribership has continued to decline).

¹²⁴ MDTC Motion for Abeyance at 3-5; Charter Response to MDTC Supplemental at 1 (“Contrary to MDTC’s assertion that DIRECTV NOW ‘would be eliminated in favor of AT&T Now,’ AT&T simply rebranded DIRECTV NOW as AT&T TV NOW: It remains the same service that offers both live TV and on-demand programming to the same subscribers, albeit with a different name.” (citations omitted)).

¹²⁵ MDTC Motion for Abeyance at 4. DIRECTV NOW’s rebranding as AT&T TV NOW does not alter this analysis. *See* MDTC Supplement to Motion for Abeyance at 1-2.

¹²⁶ If an action or event leads to changed circumstances such that DIRECTV NOW becomes unavailable in the Franchise Areas, the franchising authority can petition to reverse the finding of effective competition by filing a Petition for Recertification to regulate the basic service tier. *See* 47 CFR § 76.916.

¹²⁷ Charter Petition at 16 (citing 47 U.S.C. § 543(l)(1)(D)).

¹²⁸ *Rifkin & Assocs., Inc. for Determination of Effective Competition*, Memorandum Opinion and Order, 16 FCC Rcd 2918, 2920-21, para. 8 (CSB 2001) (finding that “Rifkin has provided sufficient evidence demonstrating that BIMS is an MVPD affiliated with a LEC”); *see also* Charter Petition at 13-16; MDTC Opposition at 9.

subscribers by any means, which we recognize today to include broadband-delivered OTT service. We therefore deny MDTC's motion for abeyance, and we do not otherwise find merit in the argument that resolution of any issue in the pending NPRM may somehow alter the requirements of the LEC Test.

IV. CONCLUSION

29. We conclude that Charter has demonstrated that all elements of the LEC Test are met in the Franchise Areas, based on the DIRECTV NOW service. Accordingly, we grant Charter's request for a finding of effective competition, revoke the certifications to regulate basic cable service rates in the Franchise Areas, and deny the discovery requests, request for an evidentiary hearing or referral to an administrative law judge, and motion for abeyance filed in this docket.

V. ORDERING CLAUSES

30. Accordingly, **IT IS ORDERED** that the Charter Communications, Inc. Petition for Determination of Effective Competition **IS GRANTED**.

31. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to or on behalf of any of the Communities set forth in the Attachment **IS REVOKED**.

32. **IT IS FURTHER ORDERED** that the Massachusetts Office of the Attorney General discovery requests and request for an evidentiary hearing or referral to an administrative law judge **ARE DENIED**.

33. **IT IS FURTHER ORDERED** that the Massachusetts Department of Telecommunications and Cable Motion for Abeyance **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

ATTACHMENT

MB Docket No. 18-283, CSR No. 8965-E

COMMUNITIES SERVED BY CHARTER COMMUNICATIONS, INC.

Community	CUID
Dalton, MA	MA0027
Lee, MA	MA0009
Lenox, MA	MA0010
Pittsfield, MA	MA0028
Richmond, MA	MA0096
Stockbridge, MA	MA0011
Auburn, MA	MA0073
Brookfield, MA	MA0335
Charlton, MA	MA0309
Dudley, MA	MA0036
East Brookfield, MA	MA0312
Harvard, MA	MA0334
Holden, MA	MA0179
Paxton, MA	MA0304
Pepperell, MA	MA0281
Spencer, MA	MA0043
Sturbridge, MA	MA0209
Upton, MA	MA0242
Uxbridge, MA	MA0290
West Boylston, MA	MA0319
West Brookfield, MA	MA0305
Worcester, MA	MA0018
Belchertown, MA	MA0286
Brimfield, MA	MA0339
Chicopee, MA	MA0087
East Longmeadow, MA	MA0092
Easthampton, MA	MA0107
Hadley, MA	MA0285
Hampden, MA	MA0103
Ludlow, MA	MA0081
Southampton, MA	MA0184
Wilbraham, MA	MA0054
Kauai, HI	HI0011

**STATEMENT OF
CHAIRMAN AJIT PAI**

Re: *Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011)*, MB Docket No. 18-283 and CSR No. 8965-E.

During the previous Administration, a bipartisan majority of the FCC adopted a rebuttable presumption that cable operators are subject to effective competition. At the time, 99.7% of homes in the United States had access to multiple multi-video programming distributors, including the two major satellite carriers and at least one cable operator.¹ Subsequently, only franchising authorities in Hawaii and Massachusetts filed certified forms successfully rebutting this presumption. As a result, those franchising authorities are the only ones in the country currently authorized to regulate basic-tier cable rates.

Four years later, the market for video services has become even more competitive. Indeed, 70% of U.S. households now subscribe to at least one streaming service.² The success of these services is driven by fierce market competition, and consumers are benefiting from high-quality programming. This year, the leading three streaming services—Netflix, Hulu, and Amazon Prime—earned 184 Emmy nominations.³ And more services are coming online seemingly every month; in November, consumers will get at least two more options as Disney+ and Apple TV+ join the ranks of online video distributors. The rise of streaming services is clearly having an impact on traditional video providers. By the end of last year, for example, 33 million adult Americans had cut the cord altogether.⁴

Against this backdrop, it strains credulity to suggest that cable operators are not subject to competition in the video marketplace across the nation. And it is even odder to suggest that, in this vast land of nearly 330 million, only consumers in a handful of communities in Massachusetts and Hawaii lack competitive choices for video entertainment.

With all this in mind, today's *Order* focuses on a discrete question of statutory interpretation: Are Charter's cable systems in certain Hawaii and Massachusetts communities subject to effective competition under Section 623(l)(1)(D) of the Communications Act?

We answer this question in the affirmative, finding that the AT&T TV NOW streaming service meets the local exchange carrier test outlined in that provision. To be sure, when this statute was enacted in 1996, Congress probably didn't specifically envision the video marketplace that exists today. But it wisely established a flexible, future-oriented test, using broad language that could apply to new technologies. This item thoroughly analyzes the language of the statute, meticulously considers the arguments on both sides, and reaches the correct conclusion—one that is consistent with the statute's plain meaning.

¹ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, 3267, para. 31 (2015).

² "How Many Streaming Services Does the Average Person Subscribe To?," available at <https://www.forbes.com/sites/tonifitzgerald/2019/03/29/how-many-streaming-video-services-does-the-average-person-subscribe-to/#5e1d90316301>.

³ "HBO Dominated the 2019 Emmy Nominations, Thanks to Game of Thrones," available at <https://www.theverge.com/2019/7/16/20696484/game-of-thrones-got-emmy-nominations-actors-hbo-netflix-streaming>.

⁴ "Cord-Cutting Keeps Churning: U.S. Pay-TV Cancellers to Hit 33 Million in 2018," available at <https://variety.com/2018/digital/news/cord-cutting-2018-estimates-33-million-us-study-1202881488/>.

My thanks to the Commission staff that diligently worked through this petition. From the Media Bureau, Michelle Carey, Holly Saurer, Steve Broeckaert, Diana Sokolow, Joe Price, and Brendan Murray, and from the Office of General Counsel, Susan Aaron and David Konczal. Your work on this item certainly has earned you a good weekend of binge-watching.

**STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY**

Re: *Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011)*, MB Docket No. 18-283 and CSR No. 8965-E.

It may come as no surprise that I strongly support this Order, which addresses some of the areas that remain after the last Commission, on a bipartisan basis, changed the presumption for the effective competition test. This item rightfully acknowledges that over-the-top (OTT) video services can, and do, compete directly with traditional multichannel video programming distributors (MVPD). Consistent with the statutory test, cable subscribers in the affected communities have access to broadband and, as a result, the very real ability to choose between video providers with quality content, thus eliminating the need for rate regulation of the basic tier by every applicable local franchise authority. And, our determination here does not in any way subsume OTT services within the broken Title VI regime.

I must admit that I'm slightly surprised at the pushback we've received for rooting out the last vestiges of rate regulation when the statute and the record clearly demonstrate effective competition through the LEC prong. It proves, once again, that the desire by some to regulate and over-regulate never subsides, regardless of the facts.

**STATEMENT OF
COMMISSIONER BRENDAN CARR**

Re: *Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011)*, MB Docket No. 18-283 and CSR No. 8965-E.

Today's decision is a straightforward case of statutory interpretation. In Section 623 of the Communications Act, Congress determined that a cable system is subject to effective competition if a local exchange carrier or its affiliate offers comparable video programming services directly to subscribers by any means.

That test is plainly met in this case. DIRECTV NOW is provided by an affiliate of a LEC (AT&T). This OTT streaming service meets both prongs of the FCC's comparability test. And it is offered directly to subscribers in the relevant franchise areas over existing broadband facilities. While some argued that the statutory test is not satisfied because DIRECTV NOW may not be provided via AT&T's facilities or because AT&T does not operate LEC facilities in the particular franchise areas, Congress imposed no such requirements in the statute. Indeed, the FCC determined nearly 20 years ago that a competitor need not provide video service over a LEC's facilities to meet the statutory test. Rather, the text is clear that competing video service providers can offer their service by "any means."

In addition to the statutory analysis, today's decision also makes sense in light of the vibrant market for video services that Americans now enjoy. In addition to DIRECTV NOW, consumers have access to online, live-TV streaming services, such as Sling, Hulu, YouTube, and PlayStation Vue, not to mention to an ever-growing array of on-demand video services and content-sharing platforms. Not to be left behind, established video providers are finding innovative ways to bring their content to consumers. For instance, DISH and INCOMPAS recently announced a partnership whereby competitive network providers will offer customers DISH TV online video content and DVR equipment. And we're seeing even more competition emerging from new 5G in-home offerings, including one provider that is offering a free trial of YouTube TV with its 5G Home Internet plan. So, I am glad that today's decision also reflects the realities of the modern media marketplace.

I want to thank the Media Bureau for its work on the item. It has my support.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL
CONCURRING**

Re: *Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011)*, MB Docket No. 18-283 and CSR No. 8965-E.

Take a look at the very first line of the Cable Television Consumer Protection and Competition Act of 1992 and you'll find that Congress was very clear about what it was doing when it enacted this law. The goal was simple. It was "to provide increased consumer protection and to promote increased competition in the cable television and related markets." To ensure this was the case, Congress laid out in detail how this agency, among others, would work to help ensure that competition thrives and consumers enjoy lower prices. After all, that's what you'd expect when there is greater competition: consumer bills that go down instead of up.

Of course, this law is now more than a quarter century old—as are its guidelines for measuring effective competition. I think it's fair to acknowledge that neither the authors of this law, nor those who offered nearly unanimous support for it in Congress, nor even the Commissioners who sat here before us, could have imagined the very different realities of today's media marketplace.

The way we watch has changed. The days of huddling around a single set, basking in the glow of a favorite program on a system with a handful of linear channels has largely gone away. Must See TV now means many devices and an array of viewing opportunities headed into homes through a mix of antennae, cables, and wireless technology. Channels and content are available when we want to watch, where we want to watch, and on any screen handy. But even as our viewing choices have multiplied and the marketplace has changed, I think under the law the interests of consumers must still come first.

Congress made this abundantly clear. Their intent was to increase competition to improve consumer protection—and lower prices. To this end, in the law Congress set up a statutory test for the presence of what it considered "effective competition." Here, we have a petition from a cable company that asks us to find that a video streaming service offered by a local exchange carrier meets the criteria for effective competition. With such a finding, authorities in two states will lose authority to oversee the rates for the basic cable service tier that are charged to consumers. That's because the underlying assumption is that competition will constrain rates. It asks this agency to consider, for the first time, how a specific type of streaming service should fit within the confines of the Cable Television Consumer Protection and Competition Act of 1992.

While I acknowledge a narrow, legal reading of the law suggests that the petition before us should be granted, I think the analysis from this agency is woefully deficient.

If protecting consumers is truly our top priority, this decision should include an assessment of the likelihood of price increases in the states where this agency is concluding competition is adequate to constrain prices. But comb through the pages of this decision and you will not find one. My office asked that our economists provide such an assessment, but we were refused.

So let me detail here what the consequences are for consumers where this agency is overriding state authority to regulate what is known as the basic cable service tier. According to the record in this proceeding, some consumers in the states affected by this proceeding can expect that rates for the basic cable service tier will double. On top of that, the very streaming service that this decision relies on to demonstrate the presence of competition just last week announced price increases of \$10 and \$15 for its basic service. In short, it sure looks like rates will go up.

If you ask me, this is not the kind of competition that protects consumers. To the extent that the relief requested in the petition before us fits within the law, then the law, frankly, is showing its age.

I acknowledge the statutory construction in this case may require the result in this decision. But because our analysis fails to provide an honest assessment of the likelihood of price increase for consumers, I concur.

**STATEMENT OF
COMMISSIONER GEOFFREY STARKS
CONCURRING**

Re: *Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011)*, MB Docket No. 18-283 and CSR No. 8965-E.

On the narrow issue before us, “Charter’s Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI,” I find the reading of this order to be a reasonable reading of the LEC test, and so I must concur with this Order. Nevertheless, I foresee harm to vulnerable consumers from the action we take today.

In the narrowest reading of the LEC test, the elements of the test are met: (1) DIRECTV NOW is an affiliate of AT&T; (2) DIRECTV NOW is “offered” within the Franchise Areas; (3) it is offered “directly (albeit, via the internet) to subscribers”; and (4) DIRECTV NOW offers video programming services that are “comparable to” the video programming services offered by Charter.

However, I am very concerned with how a straightforward application of this test will impact the experience of consumers. The LEC test does not anticipate that in order to receive the OTT video service, a consumer would have to rely on the service of a competitor to provide an entirely different and, yet, necessary service. In this instance, in order for consumers in these markets to receive DIRECTV NOW, they must first purchase the internet. Assuming an internet service provider provides you with a satisfactory rate on a suitable internet service, only then can you purchase one of the several DIRECTV offerings—all of which are more expensive than the regulated basic cable service you may have originally wanted. This is not the type of competition contemplated by the LEC rule. This brings me to the core of my concern. One cannot ignore the very real impact today’s order will likely have on the consumers’ pockets. The record is clear, prices are going to go up. The party requesting this finding of effective competition has, itself, gone on record that some consumers will see their rates go up by nearly 100 percent.¹

While the Commission refused several requests for additional factfinding, anecdotal evidence strongly suggests that most internet subscribers receive their services “bundled” with cable services, in order to receive a cheaper total price for internet and cable services, rather than just receiving internet service alone. Unfortunately, we do not take on that issue today.

Finally, those consumers relying on basic cable service, while they may be few, are often our most underprivileged consumers, and often are on fixed incomes. Where some of these consumers were paying as little as \$12 per month for the regulated basic cable services, they may well have to spend upwards of \$100 per month—that is no small expense to someone surviving on a fixed income. These are members of the community who are retired, elderly, veterans, or simply trying to make ends meet. The Commission’s goal, our mission, should be to make service more affordable for these consumers, not more expensive. Instead, I fear this decision risks reinforcing the inequity between families with resources to pay for these services, and families without.

Regardless of my concerns about the impacts of this item, I would like to take a moment to thank the Media Bureau staff for their work on this item.

¹ See, *In re Petition of Charter Commc’ns, Inc. for a Determination of Effective Competition*, MB Docket No. 18-283, *Charter Notice of Ex Parte Presentation* (Mar. 7, 2019) (describing Charter’s planned rate increases); *In re Petition of Charter Commc’ns, Inc. for a Determination of Effective Competition*, MB Docket No. 18-283, *MDTC Notice of Ex Parte Presentation* (Mar. 11, 2019).