BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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

REPLY COMMENTS OF ITTA – THE VOICE OF MID-SIZE COMMUNICATIONS COMPANIES

ITTA – The Voice of Mid-Size Communications Companies hereby respectfully submits its reply comments regarding the applications of Charter Communications, Inc. ("Charter"), Time Warner Cable Inc. ("TWC"), and Advance/Newhouse Partnership ("Advance/Newhouse") (collectively, the "Applicants" or "New Charter") to assign and transfer control of licenses and other authorizations[1] in accordance with the Federal Communications Commission's ("FCC" or "Commission") September 11, 2015 Public Notice seeking comment on the proposed transaction.[2]

Although interested parties have raised a wide range of concerns posed by the proposed transaction, ITTA focuses its reply comments on the anticompetitive effects of the proposed merger on the facilities-based video distribution market and the related impact on broadband

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[1] Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149 (filed June 25, 2015) ("Application"), *available at* https://transition.fcc.gov/transaction/charter-twc-bhn/charter-twc-bhn-public-interet.pdf.

[2] *In the Matter of Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations*, MB Docket No. 15-149, Public Notice, DA 15-1010 (rel. Sept. 11, 2015).

deployment and adoption. As explained below, the proposed combination would create a much larger, vertically integrated entity with considerably greater market power that has the incentive and ability to hinder facilities-based video competition, and consequently broadband competition, to the detriment of consumers and the public interest.

Specifically, the proposed merger would increase New Charter's incentive and ability to harm competition by withholding or driving up the costs of affiliated programming. The proposed merger also would enable New Charter to use its increased scale to ensure that rivals get less favorable rates, terms, and conditions for non-affiliated programming. These harms would significantly affect ITTA members' ability to compete against New Charter in the video distribution market and, equally importantly, would undermine their ability to advance the Commission's broadband deployment and adoption goals.

I. BACKGROUND

ITTA's members are mid-size, incumbent local exchange carriers that provide a variety of communications services to subscribers in predominantly rural areas in 45 states. All ITTA members provide video service to subscribers utilizing a variety of distribution platforms, including IPTV networks, coaxial cable systems, and fiber infrastructure.[3] Collectively, ITTA members pass nearly four million homes with video service and serve well over half a million video subscribers in more than 50 television markets across the United States.

In nearly all of these markets, ITTA members are new entrant multichannel video programming distributors ("MVPDs") that compete head-to-head against both DBS providers, at least one (and in some cases multiple) incumbent cable operators, and online video providers,

[3] At least two ITTA members also resell DBS service in a number of markets throughout their footprints. However, the data and information provided in this filing relates strictly to ITTA members' terrestrial-based video offerings.

such as Netflix, Hulu, Amazon Video, Apple TV, and others. The Applicants have a significant competitive presence throughout ITTA members' combined video footprint.

ITTA members and other new entrant video providers have in recent years become a growing presence in the video distribution market because consumers have increasingly come to demand the ability to subscribe to a suite of services that includes video programming bundled with data, voice, and other services. Offering a video product with numerous and diverse broadcast and non-broadcast programming options that consumers desire, including content affiliated with other MVPDs, allows ITTA members to compete in today's communications marketplace.

ITTA members' provision of video service also drives broadband adoption when it is offered as part of a bundle with other communications services. In a recent ITTA survey comparing broadband subscribership in video versus non-video markets, 100% of survey respondents indicated that they have experienced an increase in broadband adoption in the markets where they provide video service. Indeed, the broadband adoption rate in some video markets outpaces non-video markets by a ratio of nearly 2:1.

The Commission is well aware of the public interest benefits of competition from smaller, new entrant MVPDs, and has "repeatedly found… that entry by LECs and other providers of wire-based video service into various segments of the multichannel video marketplace will produce major benefits for consumers," including "lower prices, more channels, and a greater diversity of information and entertainment from more sources."[4] In reviewing the proposed merger, the Commission must carefully evaluate the threat it poses to the market for

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[4] *Exclusive Service Contracts for Providing of Video Service in Multiple Dwelling Units and Other Real Estate Developments*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, ¶ 17 (2007).

facilities-based video distribution, the continued entry and expansion by new providers like ITTA member companies, and the ability of new entrant MVPDs to advance the Commission's broadband deployment and adoption goals in connection with their provision of video service.

II. THE PROPOSED MERGER WOULD INCREASE NEW CHARTER'S INCENTIVE AND ABILITY TO HARM COMPETITION BY WITHHOLDING OR DRIVING UP THE COST OF AFFILIATED PROGRAMMING

Although Applicants maintain that "New Charter [will] have no incentive or ability to harm competition with other MVPDs" because it is not a "significant owner" of content and the "programming controlled by the merging entities is limited to various local and regional networks," they drastically understate the potential harms from vertical integration that would result from the transaction.[5] Contrary to their claims, the Applicants have significant ownership stakes in national and regional cable programming assets that are very important to competing MVPDs.

Liberty Broadband, which holds a controlling interest in Charter, has substantial ownership interests in Starz, Discovery, and other national programming networks. Advance/Newhouse also holds a significant ownership interest in national programming services provided by Discovery, and is affiliated with at least one regional sports network ("RSN"). TWC, likewise, has significant programming assets. For instance, it controls multiple RSNs in major markets in California, Hawaii, Kansas, Missouri, Nebraska, New York, Ohio, Texas, and Wisconsin.

Thus, if the merger is approved, New Charter would have significant ownership stakes in both popular national programming and numerous regional sports networks and would have

[5] Application at 52.

significant incentives to use that control to raise costs for, or deny access to, such content. For instance, New Charter would have the ability to use its increased leverage to withhold programming from competing MVPDs during negotiation impasses either temporarily or permanently. In addition, New Charter would have the ability to use uniform price increases to gain a competitive advantage over its smaller rivals by charging all distributors, including itself, a higher rate for affiliated programming than it would otherwise charge. While New Charter could treat the higher price as an internal transfer it can disregard when setting its own retail prices, competing MVPDs would be forced to increase retail rates for subscribers to recoup the increased costs, or forgo purchasing the programming altogether (and risk losing subscribers).

Unfortunately, increased retail competition from ITTA member companies and other providers in the MVPD marketplace is not enough to combat such conduct. To the contrary, the rise in the number of MVPD competitors gives vertically integrated video distributors such as New Charter additional motivation to discriminate against competitors with respect to affiliated programming. As the Commission has found, the growing presence of DBS and telco-based competition makes it even more enticing for vertically integrated cable operators to withhold critical access to unique and desired programming that they alone can offer and that other MVPDs need to compete effectively.[6] Thus, despite positive changes in the video marketplace in the form of increased retail competition among MVPDs, vertically integrated cable companies continue to have the incentive and ability to discriminate against competing MVPDs with respect to access to content.

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[6] See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992 – Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Report and Order, 22 FCC Rcd 17791, ¶ 60-61 (2007), *aff'd sub nom. Cablevision Sys. Corp., et al. v. FCC* 597 F.3d 1306 (D.C. Cir. 2010).

Unlike established cable operators, new entrant MVPDs like ITTA member companies are not in a position to take advantage of the competitive benefits of programming exclusivity by launching their own new programming networks. This is unlikely to change in the foreseeable future given that recent Commission policy dictates that telco investment be focused on deployment of broadband network infrastructure rather than innovation through the creation of new services to be provided over such networks. Simply put, there is no realistic means for new entrants and smaller video providers to replicate the unique and valuable attributes of cable-affiliated sports and popular national network programming. Foreclosing or limiting access to such networks therefore will remain attractive to New Charter for purposes of undermining smaller and new entrant MVPDs' ability to compete in the video distribution marketplace.

III. THE PROPOSED MERGER WOULD ENABLE NEW CHARTER TO USE ITS INCREASED SCALE TO ENSURE THAT RIVALS GET LESS FAVORABLE RATES, TERMS, AND CONDITIONS FOR PROGRAMMING

In addition to the vertical integration issues raised by the transaction, New Charter's increased size and geographic footprint as a result of the merger would give the merged entity further advantages over its rivals in the purchase of unaffiliated programming. New Charter would own or manage systems serving approximately 17.3 million video customers across 41 states post-transaction, making it the 3rd largest MVPD in the country. This increased scale and scope would create enormous leverage for the merged entity as a buyer of non-affiliated programming and ensure that smaller providers get less favorable rates, terms, and conditions when purchasing programming.

It is well settled that programmers charge larger MVPDs less for programming on a per-subscriber basis than smaller MVPDs through volume discounts, which are based on the number of subscribers the MVPD serves. One study found that "small and medium-sized MVPDs pay per-subscriber fees for national cable network programming that are approximately 30% higher than the fees paid by the major MSOs."[7] In the experience of ITTA member companies, fees paid for RSN programming in particular are as much as 50% higher for smaller MVPDs than for larger providers. However, program production and acquisition costs are sunk, and the transmission and administrative costs associated with delivery of programming are the same for all MVPDs, regardless of size. Thus, volume discounts or other pricing methods that favor larger or vertically integrated providers are not reflective of the cost of doing business, placing smaller providers at an unreasonable competitive disadvantage vis-à-vis their larger rivals.

New Charter's expanded footprint would give the merged entity greater negotiating power with content providers, allowing it to secure even lower per-subscriber rates than those charged to other MVPDs, and in particular, smaller competitors like ITTA member companies. Even New Charter has admitted that its increased scale would have a beneficial impact on its programming costs. As its economist notes in his declaration, "larger MVPDs generally pay lower programming fees per channel per subscriber than do smaller MVPDs,"[8] suggesting that New Charter would exploit its increased bargaining leverage to drive its programming costs as low as possible.

The Commission cannot ignore the fact that the merger would give New Charter an unfair competitive advantage over competing MVPDs, particularly smaller providers like ITTA member companies. The cost savings New Charter would enjoy with its dominant purchasing power would have to be made up elsewhere. Competing MVPDs would be forced to bear the

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[7] *See* Comments of the American Cable Association, MB Docket No. 07-269 (June 8, 2011), at 9.

[8] *See* Declaration of Dr. Michael L. Katz, attached to Opposition to Petitions to Deny and Response to Comments of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership, MB Docket No. 15-149 (filed Nov. 2, 2015), at ¶ 16.

cost, which would dramatically reduce the ability of smaller rivals, and especially new entrants, to provide meaningful competition. The result would be decreased competition in the video programming marketplace, less broadband deployment and adoption, and higher prices and fewer choices for consumers.

IV. CONCLUSION

The Commission has a statutory obligation to ensure that the proposed transaction is not detrimental to competition and the public interest. In reviewing the proposed merger, the Commission must carefully evaluate the threat the proposed merger poses to the market for facilities-based video distribution, the continued entry and expansion by new providers like ITTA member companies, and their ability to advance the Commission's broadband deployment and adoption goals in connection with their provision of video service.

Respectfully submitted,

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Declaration

I, Micah M. Caldwell, hereby declare under penalty of perjury that I have reviewed the foregoing reply comments and that they are true and correct to the best of my knowledge.

Executed: November 12, 2015

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Micah M. Caldwell

Certificate of Service

I, Micah M. Caldwell, hereby certify that on this 12th day of November, 2015, I have caused a copy of the foregoing reply comments to be served by electronic mail upon the following:

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