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

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| In the Matter of | ) | |
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| Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership | ) | MB Docket No. 15-149 |
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| For Consent Pursuant to Sections 214 and 301(d) of the Communications Act to Transfer Control of Licenses and Authorizations | ) | |

To: The Commission

## REPLIES OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters (NAB)[1] hereby replies to the opposition of Charter Communications, Inc. (Charter), Time Warner Cable Inc. (TWC) and Advance/Newhouse Partnership (together, the Merging Parties) to NAB's petition to hold in abeyance the Merging Parties' applications to effectuate a merger of Charter, TWC and Bright House Networks, LLC (BHN) into a new entity (New Charter). NAB requested the Commission to hold its consideration of this large pay TV merger in abeyance until it complies with its statutory obligation to complete the long-delayed 2010 and 2014 quadrennial reviews of the broadcast ownership rules and modifies or eliminates those rules no longer necessary as the result of competition.[2]

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[1] The National Association of Broadcasters is a nonprofit trade association that advocates on behalf of local radio and television stations and broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the courts.

[2] Petition to Hold in Abeyance of NAB, MB Docket No. 15-149 (Oct. 12, 2015) (NAB Petition).

In responding to NAB's petition, the Merging Parties erroneously asserted that the public would benefit from reduced fees paid by New Charter for programming; failed to address questions of consumer harm stemming from cable system clustering; and inaccurately characterized changes in the video marketplace and how those changes have enhanced pay TV providers' bargaining power in retransmission consent negotiations and in their dual role as multichannel video and broadband gatekeepers. For the reasons set forth below, NAB again requests that the Commission ameliorate its policies that have warped competition in the video marketplace by placing on hold its approval of a merger contributing to unprecedented consolidation in the pay TV industry, while it modifies or eliminates broadcast ownership restrictions that hamper effective competition with concentrated pay TV providers and reduce consumer welfare.

## I. Claims of Consumer Benefit From New Charter's Increased Power In The Programming Market Are Erroneous

The Merging Parties assert that New Charter's "increased scale as a purchaser of programming" will reduce its costs for programming,[3] and claims "to the extent" that the merger "leads to fee reductions for programmers" (including broadcasters), "those reductions are public interest benefits."[4] This statement is erroneous for at least two reasons.

First, consumers would only benefit from New Charter's reductions in programming costs if the merged entity would pass those savings on by reducing the fees they charge subscribers. The Commission itself has acknowledged, on at least two occasions, that "MVPDs are not required to pass through any savings derived from lower retransmission

[3] Merging Parties' Opposition to Petitions to Deny and Response to Comments, MB Docket No. 15-149, at 58 (Nov. 2, 2015) (Opposition).

[4] *Id*. at 61.

consent fees" (or other programming fees) and that "any reductions in those fees thus might not translate to lower consumer prices for video programming service."[5] Given the cable industry's 20-year history of raising consumer prices above the rate of inflation, as demonstrated by the FCC's own reports, the Commission cannot simply assume that New Charter will pass on any cost savings to its subscribers.[6] No evidence suggests that such a result naturally flows from any claimed programming cost savings. The Commission therefore should reject the Merging Parties' claims that reductions in their own programming costs will benefit the viewing public.

Second, "to the extent" that New Charter's increased market power "leads to" retransmission consent "fee reductions,"[7] ample evidence indicates that, on balance, the public interest would be harmed. Fair and equitable retransmission consent fees are critical to the nation's systems of localized, free over-the-air television broadcasting. As NAB discussed in its Petition,[8] a 2014 study of the market for video content concluded that retransmission consent fees "accounted for 34 percent" of broadcast stations' "spending on programming" in 2013.[9] This study also found that retransmission consent compensation "led to increases in local television news and public affairs programming" and "allowed

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[5] Notice of Proposed Rulemaking, MB Docket No. 15-216, FCC 15-109, at ¶ 3 n. 21 (Sept. 2, 2015). *Accord* Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3363 (2014).

[6] *See Report on Cable Industry Prices*, DA 14-1829, at ¶ 28 (Med. Bur. Dec. 15, 2014) (from 1995-2014, expanded basic cable prices increased at a compound average annual rate of 5.9 percent, compared to a 2.4 percent compound average rate of growth in the Consumer Price index).

[7] Opposition at 61.

[8] NAB Petition at 18 & n.62.

[9] Jeffrey A. Eisenach, Ph.D., *Delivering for Television Viewers: Retransmission Consent and the U.S. Market for Video Content*, NERA Economic Consulting, at 28 (July 2014) (in absence of retransmission consent compensation, broadcasters "would have had to reduce the amount they spend producing content by more than a third").

broadcasters to retain (or regain) rights to programming, especially sports programming, that would not otherwise have been available on free over-the-air television."[10]

Without such programming on local television stations, who else is going to provide it? Pay TV operators have shown little to no interest in serving their local communities, providing almost no local news and public affairs programming. Thus, contrary to the Merging Parties' claims, New Charter's ability to reduce its programming fees, including those paid "to broadcasters and smaller independent programmers,"[11] will impact consumer welfare by reducing vital economic support for over-the-air, free-to-all programming services. Given the seemingly inexorable rise of MVPDs' subscriber fees, the maintenance of a free video option for consumers is increasingly, not less, important.

## II. The Merging Parties Fail To Adequately Address How Increased MVPD Consolidation Warps Competition In The Video Marketplace And Harms Consumers

As NAB observed in its Petition,[12] the Merging Parties' Public Interest Statement is replete with references about the merger increasing the "density of New Charter's presence in multiple regions" and leading to a more "complete," "rationalized" or "geographically aligned" "regional footprint."[13] In response to stated concerns about such regional consolidation on consumers,[14] the Merging Parties repeat that "increased local and regional density" produces "greater operating efficiencies" and increases the "competitiveness" of the merged entity "in

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[10] *Id*. at 29-30.

[11] Opposition at 61. *See also* Reply Decl. of Michael L. Katz, Exhibit B to Opposition at 69-70 (similarly asserting a lack of consumer harm from changes in parties' power in retransmission consent market).

[12] NAB Petition at 7.

[13] 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, Public Interest Statement, at 4, 33-35, 38 (June 25, 2015) (Public Interest Statement).

[14] NAB Petition at 7.

the advertising and enterprise services markets."[15] Such statements do not adequately address empirical evidence cited by NAB demonstrating that large, clustered cable companies "charge higher [consumer] prices than small, unclustered cable companies."[16] Nor do the Merging Parties' statements acknowledge the courts' similar findings that "clustering and consolidation . . . bolsters the market power of cable operators."[17]

Notably, the Merging Parties also refuse to acknowledge that massive MVPD consolidation gives the pay TV industry any enhanced negotiating leverage with broadcasters or otherwise impacts the retransmission consent marketplace. Indeed, on the theory that the best defense is a good offense regardless of the facts, the Merging Parties claim that the retransmission consent playing field is "heavily tilted in favor of broadcasters."[18] The Merging Parties, however, neglect to explain how behemoth pay TV providers, such as the combined AT&T/DIRECTV, with a market capitalization *201 times* larger than the market cap of even the largest local broadcast TV companies, lacks significant leverage when negotiating retransmission consent.[19] Admittedly, New Charter would have a market capitalization *only*

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[15] Opposition at 43; *see also* Public Interest Statement at 35-39.

[16] Philip Reny and Michael Williams, *The Deterrent Effect of Cable System Clustering on Overbuilders*, 35 Econ. Bull. 519 (Mar. 2015); *accord* Hal J. Singer, *Does Clustering by Incumbent Cable MSOs Deter Entry by Overbuilders?* (2003), available at http://ssrn.com/abstract=403720. In an apparent attempt to discount the evidence showing that cable system clustering directly impacts consumers, the Merging Parties claim that NAB erred in looking at MVPD competition at the DMA level because consumer choices depend on "what is available to them in their homes, not across town." Opposition at 42. This inapposite assertion does not even address the empirical evidence, let alone disprove the research showing that local and regional consolidation harms consumers.

[17] *Cablevision Sys. Corp. v. FCC*, 649 F.3d 695, 712 (D.C. Cir. 2011). *See also Cablevision Sys. Corp. v. FCC,* 597 F.3d 1306, 1314 (D.C. Cir. 2010) (observing that "market penetration of competitive MVPDs" is lower in areas where a "single cable company controls a clustered region"); *Time Warner Cable Inc. v. FCC*, 729 F.3d 137, 162 (2d Cir. 2013) (rejecting arguments that cable operators do not possess market power, and pointing out that "cable operators maintain significant shares in various local markets").

[18] Opposition at 77.

[19] NAB Petition at 10 and Attachment B.

*72 times* larger than some of the biggest TV stations groups,[20] but it still defies logic to suggest that New Charter will be at a competitive disadvantage when negotiating retransmission consent with local TV station groups, whether "large" by broadcast standards or small.[21]

Unsurprisingly, the Merging Parties rely on the pay TV industry's "old saw" that because cable operators no longer enjoy a complete monopoly in the MVPD marketplace, due to the emergence of other types of MVPDs since 1992, pay TV providers' negotiating leverage against broadcast TV stations has somehow automatically evaporated.[22] This argument does not hold water, as it ignores growing MVPD clustering and consolidation and the increasing disparities of scale and scope between broadcasters and the large MVPDs that control access to 94 percent of pay TV subscribers.[23]

As NAB has previously explained,[24] in years past, multiple cable systems typically operated within DMAs, each serving some fraction of the market. Today, due to unprecedented and continuing consolidation, there are often only one or two dominant MVPDs, each serving a high proportion of TV households in many local markets, as NAB showed in its Petition. Broadcast TV stations unable to form local combinations under the FCC's ownership restrictions now must often negotiate retransmission consent with dominant

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[20] *Id.*

[21] *See* NAB Petition at 11 (noting BIA/Kelsey estimate from last spring that there were 630 separate owners of the 1,785 full power and Class A television stations in the country – an average of only 3.5 stations per owner).

[22] *See* Opposition at 77.

[23] According to SNL Kagan, if the proposed merger is approved, then the top ten MPVDs will control 94 percent of the nationwide MVPD market (measured in terms of subscribers), the top four MVPDs will control 79 percent of the market, and the top three (which includes New Charter) will control two-thirds. SNL Kagan, Media Census estimates, Q2 2015.

[24] *See, e.g.*, NAB Reply Comments, MB Docket No. 15-158, at 5 (Sept. 21, 2015).

MVPDs possessing significant negotiating leverage because very substantial percentages of viewers locally, regionally and nationally subscribe to them. One cannot rationally claim that broadcasters are "heavily" favored in retransmission negotiations with pay TV providers that control 70 percent, 60 percent, 50 percent or even just 40 percent of the entire MVPD market in individual DMAs.[25] Broadcasters simply cannot afford not to be on a pay TV provider to which such large percentages of viewers subscribe, regardless of whether that pay TV provider competes with another type of MVPD. Thus, asserting the truism that there are different types of MVPDs today – unlike in 1992 when Congress determined that broadcasters should have the right to negotiate with pay TV providers that resell stations' signals for profit – in no way undercuts NAB's argument that massive mergers such as Charter/TWC/BHN are skewing the retransmission consent marketplace against broadcasters unable to take advantage of remotely similar economies of scale and scope.

Indeed, MVPDs, such as the combined Charter/TWC/BHN, today enjoy a dual gatekeeper role, both as a multichannel video and a broadband provider. According to SNL Kagan, 85.6 percent of all TV households subscribed to a multichannel video programming service in 2014, compared to only about 60 percent in 1992.[26] Thus, pay TV providers are even more powerful "bottleneck[s]"[27] today than they were when Congress first required MVPDs to obtain the consent of broadcasters before reselling their signals. As William Baer, the head of the Antitrust Division of the Department of Justice recently explained, both

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[25] If the FCC approves the proposed merger, a single MVPD would control 40 percent or more of the total MVPD market in 112 Designated Market Areas, or 53 percent of all DMAs in the country. *See* NAB Petition at 6 (detailing high shares of MVPD market that the Merging Parties possess in dozens of DMAs).

[26] Cable Television Consumer Protection and Competition Act of 1992, § 2(a)(3), 47 U.S.C. 521 nt.

[27] *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 656 (1994).

established programming networks and newer over-the-top programming providers depend on MVPDs “to deliver their content – and to enable them to sell ads or obtain subscribers.”[28] These companies thus “are essential gatekeepers to what customers watch and how they watch it.”[29] The FCC’s Chief Economist, David Waterman, would likely agree with this analysis, as he has concluded that the “long history of the cable industry and the short history of the broadband Internet industry” demonstrate that the “fundamental policy concerns from an economic perspective” stem from “the presence of horizontal market power at the MSO or ISP level,” and that “[*b]oth local and national market share*s of ISPs . . . influence this market power.”[30]

## III. Conclusion

The Commission should not be picking winners and losers in the video marketplace by preventing some market participants (broadcasters) from achieving vital economies of scale and scope, while allowing other market participants (multichannel and online video providers, including the Merging Parties) to consolidate with little limit. For all the reasons set forth above and in NAB’s Petition, the Commission should hold its consideration of the proposed Charter/TWC/BHN merger in abeyance until its modifies or eliminates broadcast-only

[28] Assistant Attorney General William Baer, Keynote Address at the Future of Video Competition and Regulation Conference, Duke Law School (Oct. 9, 2015).

[29] *Id*.

[30] David Waterman and Sujin Choi, *Non-Discrimination Rules for ISPs and Vertical Integration: Lessons from Cable Television*, 35 Telecomm. Pol’y 970 (2011) (emphasis added).

ownership restrictions that prevent effective competition with increasingly consolidated pay TV providers in today's video marketplace.

Respectfully submitted,

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November 12, 2015

## CERTIFICATE OF SERVICE

I certify that on November 12, 2015, copies of the foregoing Replies of the National Association of Broadcasters have been served by email and the United States mail on the following:

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