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February 15, 2018

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Electronic Delivery of MVPD Communications*, MB Docket No. 17-317

Dear Ms. Dortch:

Charter Communications, Inc. ("Charter") hereby submits these letter comments in the above-captioned proceeding, respectfully urging the Commission to use this opportunity to clarify the "advance notice" rule applicable to changes in cable rates, programming services, or channel positions.[1] The clarifications proposed by Charter below are timely because they would ensure that the required notifications, in whatever form provided, present relevant information to subscribers fairly and without skewing negotiations between cable operators and programmers or broadcasters.[2]

Section 76.1603(b) – Notice to Subscribers. Section 76.1603(b) requires customers to be notified of any changes in rates, programming services or channel positions "as soon as possible," but additionally requires notice to be "given to subscribers a minimum of thirty (30) days in advance of such changes if the change is *within the control* of the cable operator."[3]

The Commission last examined this rule in 2006 when the Media Bureau ("Bureau") evaluated Time Warner Cable's decision to discontinue carriage of the NFL Network on its newly acquired cable systems after carriage negotiations broke down less than a week before the

[1] 47 C.F.R. § 76.1603(b).

[2] Thus, Charter respectfully requests that the Commission adopt its proposals herein, notwithstanding its stated intent to address proposals to eliminate or revise these requirements in a "subsequent proceeding." *See In re Electronic Delivery of MVPD Communications*, Notice of Proposed Rulemaking, 32 FCC Rcd 10,755, 10,765 ¶ 22 n.70 (2017).

[3] 47 C.F.R. § 76.1603(b) (emphasis added).

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then-current carriage agreement was to expire.[4] In that instance, the Bureau found that Time Warner Cable violated the advance notice rule because the NFL Network "'offered to allow Time Warner to continue to carry [it] on pre-existing terms and conditions' for 30 days."[5] In light of the NFL Network's offer, the Bureau found that Time Warner Cable's decision to reject the offer and drop the Network constituted "control" within the meaning of the rule.[6]

Negotiations between cable operators and programmers or broadcasters usually come down to the final 30 days of an agreement—indeed, often down to the final day or hours. The vast majority of those negotiations—as many as 99 percent—end successfully,[7] but a few do not. The *NFL Network Reconsideration Order* implies that the fate of those negotiations is often "within the control" of the cable operator, but this is in fact not *a priori* the case. The increased distribution options available to programmers and broadcasters, including multiple MVPDs and online distribution, give them substantial leverage in carriage negotiations, on top of the leverage that they already have through their control of must-have programming. As a result, those negotiations are often tough and hard-fought, and it is unfair and inaccurate to suggest that an impasse in negotiations should always be laid at the feet of the cable operator.[8] This is

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[4] *In re Time Warner Cable*, Order on Reconsideration, 21 FCC Rcd 9016 (MB 2006) ("*NFL Network Reconsideration Order*").

[5] *Id.* at 9021 ¶ 17 (citation omitted).

[6] *See id.* In the recent dispute between Starz Entertainment, LLC ("Starz") and Altice USA, Inc., Cablevision Systems Corporation, and CSC Holdings, LLC (collectively, "Altice"), Starz likewise argued that Altice should have complied with the 30-day requirement because Starz allegedly offered Altice an extension of their agreement, which Altice purportedly refused—thus supposedly placing the decision to drop Starz within Altice's control. *See In re Altice USA, Inc., Cablevision Systems Corporation, and CSC Holdings, LLC Emergency Petition for Injunctive Relief*, MB Docket No. 18-9, Emergency Petition for Injunctive Relief at 12-13 (filed Jan. 17, 2018) ("Starz Emergency Petition"). Altice claimed that Starz actually rejected either a short-term carriage deal with a retroactive true-up or a one-year extension of their agreement on existing terms. *See In re Altice USA, Inc., Cablevision Systems Corporation, and CSC Holdings, LLC Emergency Petition for Injunctive Relief*, MB Docket No. 18-9, Opposition of Altice USA, Inc. to Emergency Petition of Starz Entertainment, LLC for Injunctive Relief at 8 (filed Jan. 23, 2018) ("Altice Opposition").

[7] *See* Phil Kurz, *Alliance Cries Foul Over TV Retrans Blackouts*, TVNewsCheck (Jan. 9, 2018) http://www.tvtechnology.com/news/0002/alliance-cries-foul-over-tv-retrans-blackouts/282527.

[8] Starz pointed to the definition of "normal operating conditions" in Section 76.309(c)(4)(ii) of the Commission's rules to bolster its argument that a mutual failure in carriage negotiations should be deemed to be "within the control" of the cable operator alone, apparently because failed negotiations is not in the list of conditions not within the operator's control. *See* Starz Emergency Petition at 10-11. Even assuming *arguendo* that this definition is relevant to the advance notice rule, that list is expressly non-exclusive ("Those conditions which are not within the

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especially true given that the crux of these negotiations is almost always the cost of the programming, with standoffs arising because cable operators resist programmer or broadcaster demands for substantial increases in carriage fees—typically double-digit percentage increases which can run as much as 80 percent higher than current fees—that will end up being passed through to subscribers.

Interpreting the notice provision to require that cable operators must provide a 30-day advance notice to subscribers *any time* negotiations over the carriage of a channel enter the final month of an agreement solely because the channel *might* be dropped harms consumers and disserves the public interest in ensuring fair bargaining. Indeed, in many if not most instances it is the programmer or broadcaster who is willing to walk away from the negotiating table, with cable operators more interested in extending negotiations in order to reach a fair price for both cable operators and consumers. A premature notice could create significant subscriber confusion, leading subscribers to unnecessarily change their cable provider, which could be costly for consumers and result in pushing them to their second or third choice of distributor. It also is subject to mischaracterization in public forums by the programmer seeking additional leverage in the negotiations, and misunderstanding by the public and the media reporting on the negotiations.[9]

To avoid these results, Charter proposes that the Commission clarify that the 30-day advance notice requirement does not apply when a cable operator and a programmer or a broadcaster remain in carriage negotiations, even during the final 30 days of an agreement. If those negotiations fail and the channel goes dark as a result, the cable operator would be required

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control of the cable operator *include, but are not limited to*. . . " (emphasis added)), and the type of events deemed within the operator's control, as Starz itself notes, are those "'generally scheduled by the cable operator . . . or [that] the operator knows the schedule reasonably well in advance of the event (e.g., special promotions or pay-per-view events)).'" *Id.* (citations omitted). The ultimate failure of negotiations carried on during the last month of a contract though are neither "generally scheduled" nor "know[n] reasonabl[y] well in advance," unlike a scheduled promotion or event.

[9] Some cable operators may decide to provide advance warning even if negotiations are ongoing, but other operators may give greater weight to avoiding potential customer confusion. The advance notice rule should be sufficiently flexible to allow each operator to exercise its own business judgment regarding the potential impact of providing a premature notice or warnings. By contrast, applying the advance notice requirement to every carriage negotiation that has not reached a successful conclusion 30 days prior to the expiration of the existing agreement would give programmers additional leverage when negotiating with a cable operator who would prefer to avoid the confusion created by giving advance notice in those circumstances.

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to provide notice to subscribers "as soon as possible."[10] As under the *NFL Network Reconsideration Order*, if a programmer or broadcaster offers at least a 30-day extension of the expiring agreement on the same terms and conditions as that agreement, the operator would be required to provide 30-day advance notice running through the first 30 days of the extension period.[11] The offer of an extension on different terms and conditions would not trigger the requirement, however.[12]

Charter is also not proposing to eliminate the 30-day notice requirement in cases where a cable operator has decided in advance to drop a channel rather than extend the carriage contract, or if carriage negotiations have ceased by mutual agreement prior to the last 30 days before the expiration of a contract. Thus, contrary to the Bureau's characterization of Time Warner Cable's position in the *NFL Network Reconsideration Order*, Charter's proposal would *not* mean "that any time a programming contract expired, the cable operator could drop the programming at issue without any notice to subscribers."[13] Rather, Charter's proposal correctly recognizes that in the final stage of carriage negotiations the outcome is not wholly within the control of either party.

Charter's proposed clarification of the advance notice rule is both consistent with the *NFL Network Reconsideration Order* and would better fit the changed market conditions faced

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[10] 47 C.F.R. § 76.1603(b).

[11] The Bureau expressly relied on this fact in finding that the blackout of the NFL Network was "within the control" of Time Warner Cable. *See NFL Network Reconsideration Order*, 21 FCC Rcd at 9021 ¶ 17 ("Had the NFL been unwilling to provide Time Warner with the legal right to continue to carry its programming, this might well be a different case. Here, however, it is undisputed that the NFL Network 'offered to allow Time Warner to continue to carry the network on pre-existing terms and conditions' for 30 days and that Time Warner refused this offer." (citation omitted)). Even under these circumstances, of course, the operator would only have to provide a single notice. Mandating a continuing series of notices every 30 days if negotiations continue beyond the first 30-day extension would be needlessly confusing, and unnecessary after the initial notice informs customers of the possibility of a blackout.

[12] *Cf. id.* ¶ 17 n.31 (suggesting that "continued carriage at 'patently unreasonable' rates for 30 days unlawfully [could] deprive a cable operator, as a practical matter, of control over the decision to drop a programming service for purposes of the rule"). An approach that would require inquiry into whether extension terms that vary from those in the expiring agreement are "patently unreasonable" and would quickly bog down in disputes over whether the terms under consideration in a pending negotiation were reasonable or not. By contrast, Charter's proposed bright-line rule, applying the advance notice requirement to extension periods if the proffered terms and conditions are identical to the expiring agreement, would avoid such an inquiry while maintaining the *status quo ante* for both parties.

[13] *Cf. id.* ¶ 17.

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by cable operators. In that case, the Bureau explained that one of the "principal purposes" of Section 76.1603 was to provide consumers with the ability "to make alternative arrangements to view programming that is dropped *by a cable provider*"[14]—not where a blackout is the result of a programmer's or broadcaster's refusal to agree to reasonable terms or provide an extension on existing terms. It also noted that the notification requirements under Section 76.1603(b) were intended to ensure that a cable operator's customers were "able to make their voices heard," as well as allow the operator to receive "additional valuable input from its soon-to-be customers."[15]

Today, however, those goals do not require the unilateral imposition of the 30-day advance notice rule while negotiations remain ongoing. First, as noted above, such a policy would disserve subscribers by giving programmers and operators even more leverage in those negotiations. This additional leverage could result in pressure on cable operators to accede to double-digit percentage increases, potentially as high as 80 percent, leading to higher bills for consumers.

Second, advance notice is no longer necessary for cable customers to make alternative arrangements in the event of a blackout. Cable subscribers now have a multitude of resources to access programming and register their concerns that extend far beyond the services offered by their cable providers. Consumers today can view programming in a matter of minutes through a programmer's app; an online video distributor, such as Netflix, Apple's iTunes, Amazon Prime, or Hulu; or potentially even an MVPD's online product. Obtaining access to these alternatives takes just minutes, not days or weeks. Moreover, as proposed above, subscribers would get 30-days' advance notice if upon expiration of an existing agreement the programmer or broadcaster agreed to a 30-day extension of the agreement on the pre-existing terms and conditions.

Nor do cable customers and potential subscribers need 30-day advance notice from their cable operator to "make their voices heard" during a carriage dispute in the age of Twitter, Facebook, Instagram, and various other social media outlets. For example, in Altice's carriage dispute with Starz, Curtis Jackson, known as 50 Cent, who is an executive producer of and an actor in Starz's series, *Power*, posted a video of himself on Instagram expressing his frustration with the Starz/Altice dispute.[16] Several other celebrities starring in a multitude of Starz's series

[14] *Id.* at 9023 ¶ 23 (emphasis added).

[15] *Id.* ¶ 20.

[16] *See* Altice Opposition at 15.

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also vented their frustrations on Twitter.[17] As a result of these efforts and others, Altice's cable customers and other members of the public received a plethora of information about the ongoing carriage dispute, and responded in kind by voicing their concerns to Altice.[18] In this case, and other such carriage disputes, a 30-day advance notice from a cable operator regarding possible changes in programming services would have been superfluous given the widespread dissemination of information via social media and other traditional media outlets.

Sections 76.1603(c) and (d) – Duplicative Notice to Subscribers and Franchising Authorities. In addition to clarifying Section 76.1603(b), the Commission should take this opportunity to eliminate Sections 76.1603(c) and (d). Paragraph (c) imposes a duplicative notice requirement on cable operators, "[i]n addition to the requirement of paragraph (b) of this section . . . ," to provide 30 days written notice "to both subscribers and local franchising authorities before implementing any rate or service change."[19] Similarly, paragraph (d) mandates a cable operator to "provide written notice to a subscriber of any increase in the price to be charged for the basic service tier or associated equipment at least 30 days before any proposed increase is effective."[20] Both rules are a vestige of the rate regulation scheme adopted pursuant to the 1992 Cable Act that has since been repealed and superseded. Accordingly, these rules no longer serve any purpose and should be eliminated as "outdated, unnecessary [and] unduly burdensome."[21]

In adopting Sections 76.964 and 76.932, the predecessors to 76.1603(c) and (d), respectively, the Commission explicitly sought to facilitate both franchising authorities' and subscribers' authority under the 1992 Cable Act to file rate complaints.[22] The tie to the 1992 Act

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[17] *See id*. at Attachment A.

[18] *See id*. at 15-16.

[19] 47 C.F.R. § 76.1603(c).

[20] 47 C.F.R. § 76.1603(d).

[21] *See Commission Launches Modernization of Media Regulation Initiative*, Public Notice, 32 FCC Rcd 4406, 4406 (2017).

[22] *See In re Implementation of Sections 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, 5713, 5841 ¶¶ 124, 333 n.819 (1993) ("We shall require, as we proposed in the Notice, that a cable operator notify subscribers in writing of a proposed increase in the rates for the basic service tier and accompanying equipment at approximately the same time it notifies the franchising authority—that is, at the billing cycle that is at least 30 days before any proposed increase is effective. . . . Since franchising authorities, like subscribers, may file cable programming service rate complaints pursuant to Section 623(c)(1)(B), we will adopt a similar requirement that

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rate regulation regime is made manifest by paragraph (c)'s requirement that the operator "briefly explain in readily understandable fashion the cause of the rate change (e.g., inflation, change in external costs or the addition/deletion of channels),"[23] corresponding to rate adjustment factors under that regime. Likewise, paragraph (d) requires notice regarding charges for the regulated "basic service tier [and] associated equipment."[24] But rate regulation of tiers other than the basic tier was repealed effective on April 1, 1999,[25] and in 2015 the Commission established a nationwide presumption that cable operators are subject to effective competition, generally eliminating rate regulation of all cable services.[26] Consequently, Sections 76.1603(c) and (d) are therefore no longer warranted—in any format, paper or electronic—and should be repealed.

For the foregoing reasons, the Commission at its earliest opportunity should clarify the current framework for applying Section 76.1603(b), as Charter has proposed. Charter's proposed clarification will ensure that negotiations are not unfairly skewed, customers are not needlessly confused, and that the application of the rule reflects today's competitive video marketplace. The Commission also should repeal Sections 76.1603(c) and (d) as they are a relic of a bygone regulatory scheme.

Sincerely,

/s/ Maureen O'Connell

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cable operators give a minimum of 30 days advance written notice to the franchising authority of any changes in rates for cable programming service.").

[23] 47 C.F.R. § 76.1603(c).

[24] 47 C.F.R. § 76.1603(d).

[25] *See* 47 U.S.C. § 543(c)(4).

[26] *See In re Amendment to the Commission's Rules Concerning Effective Competition*, Report and Order, 30 FCC Rcd 6574, 6574-75 ¶ 1 (2015) ("[W]e presume that cable operators are subject to [effective competition] . . . [a]s a result, each franchising authority will be prohibited from regulating basic cable rates unless it successfully demonstrates that the cable system is not subject to [effective competition].").