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

In the Matter of	)	
	)	
Charter Communications Inc., Time Warner Cable Pacific West, LLC, and Bresnan Communications, LLC	)	CSR-8955-Z
	)	
Petition for Declaratory Ruling, Enforcement Order, and Further Relief For Violations of Sections 76.1603 and 76.309 of the Commission's Rules	)	MB Docket No. 18-91
	)	
Charter Communications Inc., and Falcon Telecable, Time Warner Cable Pacific West, LLC, and Bresnan Communications, LLC	)	CSR-8956-Z
	)	
Petition for Declaratory Ruling, Enforcement Order, and Further Relief For Violations of Sections 76.1603 and 76.1619 of the Commission's Rules	)	MB Docket No. 18-101

AMERICAN CABLE ASSOCIATION

COMMENTS

The American Cable Association ("ACA") hereby submits these comments in response to two Petitions for Declaratory Ruling, Enforcement Order, and Further Relief filed – the first filed by the City of Yuma, Arizona, the Town of Jackson, Wyoming, and

the City of El Centro, California;[1] and the second filed by Crescent City, California[2] (collectively "the Municipalities").

The petitions in effect ask the Commission to consider whether a programmer's decision to withhold programming after a negotiating impasse constitutes a change of service that is within a cable operator's control for purposes of Sections 76.1603(b) and (c) of the Commission's rules.[3] In these comments, ACA explains that interpreting the rules in this manner would effectively require cable operators to notify customers of a potential service change 30 days prior to the expiration of every programming and retransmission consent agreement or risk violating the rules – a perverse outcome that ultimately harms consumers.

ACA is well positioned to comment on these petitions. ACA represents 750 small and medium-sized cable operators who must abide by the same rules and regulations that apply to Charter and are the subject of these petitions. ACA members each carry hundreds of national and regional programming networks and broadcast stations pursuant to dozens of program carriage and retransmission consent agreements, most of which have unique expiration dates.

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[1] *In re Charter Communications, Inc. et al.*, CSR-8955-Z, MB Docket No. 18-91, Petition for Declaratory Ruling, Enforcement Order, and Further Relief For Violations of Sections 76.1603 and 76.309 of the Commission's Rules (filed Mar. 15, 2018) ("Yuma Petition").

[2] *In re Charter Communications, Inc. et al.*, CSR-8956-Z, MB Docket No. 18-101, Petition for Declaratory Ruling, Enforcement Order, and Further Relief For Violations of Sections 76.1603 and 76.1619 of the Commission's Rules (filed Apr. 4, 2018) ("Crescent City Petition").

[3] Crescent City Petition at 8; Yuma Petition at 10. Section 76.1603(b) requires cable operators to notify subscribers thirty days prior to any change in service, including the deletion of a programming channel, if that change is within the cable operator's control. Section 76.1603(c) requires cable systems to give 30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change.

The case at hand arises from a retransmission consent dispute between Charter Communications, Inc. ("Charter") and Northwest Broadcasting, Inc. ("Northwest"). The parties were negotiating the renewal of a retransmission consent agreement that expired on January 31, 2018. As is typical in such cases, the negotiations continued right up to the expiration date, and indeed a few days beyond, after the parties agreed to a series of 24-hour extensions.[4] There is no indication from the record that either party intended for negotiations to fail, and by all accounts, it was a typical negotiation between an MVPD and broadcaster where both parties were acting in good faith. Nonetheless, negotiations broke down on February 2, 2018, and Northwest pulled its signals from Charter's cable systems.

In their petitions, the Municipalities allege that Charter violated Sections 76.1603(b) and (c) because it did not notify subscribers or local authorities that the Northwest stations would be deleted from their channel lineup thirty days before Northwest pulled its signals. Both petitions claim that "Charter was plainly in control of the deletion of Northwest's channels from its lineup," and thus violated its obligations under the rules. ACA strongly disagrees that cable operators are ever in "control" of a programmer's decision to withhold programing from the operator after an impasse in negotiations. The only way that a cable operator can "control" a programming blackout would be to accept whatever terms and conditions the programmer offers.[5]

[4] Crescent City Petition at 4; Yuma Petition at 6.

[5] Understanding that cable operators would be subject to enforcement action pursuant to the notice requirements if programming is withheld, programmers would have incentive to make unreasonable demands. This would in turn lead to higher subscriber rates, as operators seek to recover costs.

Most video programming is carried on cable systems pursuant to long-term contracts between cable operators and broadcast stations or other programming networks. Eventually, these contracts expire and must be renegotiated in order for carriage to continue. Although both parties usually anticipate that an agreement will eventually be reached, negotiations almost always continue until the final days, if not hours, of the expiring agreement. In the vast majority of cases, the parties eventually reach an agreement and carriage of the programming continues uninterrupted.[6] Unfortunately, however, programmers' and broadcasters' demands are sometimes unacceptable, and impasses do happen. When they do, cable operators must cease carriage as soon as the previous agreement expires.

If the Commission agrees with the Municipalities that cable operators are in control of a programmer's decision to withold their programming, the only way to avoid violating the rules – short of accepting unilateral terms and conditions – would be to notify all subscribers and local authorities thirty days in advance of the expiration of every programming agreement. To do otherwise would subject operators to an unreasonable risk of violating the Commission's notice requirements, which would lead to enforcement actions and forfeiture penalties.

Cable operators carry hundreds of channels pursuant to dozens of programming agreements, and every year at least a few of these agreements are up for renewal, often at different times. Thus, to comply with the rules as the Municipalities would have them interpreted, cable operators would have to send out an endless parade of notices

[6] As the National Association of Broadcasters likes to assert when arguing that the retransmission consent marketplace does not need fixing, "99 percent of all retrans deals are completed successfully." *NAB Statement on 2017 Retransmission Consent Negotiations* (Jan. 9, 2018), http://www.nab.org/documents/newsRoom/pressRelease.asp?id=4332 (last visited Apr. 26, 2018).

to subscribers and local authorities, and in the vast majority of cases these notices would be false alarms.

As the Municipalities point out, the Commission's objectives in adopting Sections 76.1603(b) and (c) were to "allow[] customers to make arrangements to secure dropped channels through alternative means, such as by changing service providers" and to "provide[] customers with the opportunity to make their voices heard before any programming changes are made."[7] Subjecting customers to notices every time an agreement is up for renewal would undermine both of these purposes.

First, a subscriber who believes that they are going to lose their favorite station or network (even though there is every reason to believe that negotiations will be successful) might switch to a competing provider only to discover later that there was no change to their original, preferred provider's channel lineup. This would be extremely frustrating for such a customer, who would have undoubtedly been inconvenienced, and may have incurred financial costs to make the switch. Second, subscribers will ultimately become inured to these notices and assume that every one is a false alarm. As with the villagers who eventually ignored the Boy Who Cried Wolf, subscribers would have no way of knowing for sure when an actual service change is likely to occur. In a sense, providing too many notices (especially false ones) has the same impact as providing no notice at all.

Moreover, such an interpretation of the rules would require cable operators to incur the costs associated with sending so many notices, which would be particularly

[7] Crescent City Petition at 8 and Yuma Petition at 9-10, *citing Time Warner Cable, a Division of Time Warner Entertainment Company, L.P.*, 21 FCC Rcd 8808, ¶ 17 (2006).

burdensome for ACA's small and medium-sized operators, who in many cases operate with small staffs, generally 10 employees or fewer, and on limited budgets. These operators would have no choice but to pass these administrative costs on to subscribers.

ACA encourages the Commission to take the concerns outlined above into account when considering the petitions alleging that Charter was in control of Northwest's decision to withhold its retransmission consent. Whatever the merits of this particular case, a determination that cable operators control a programmer's decision to black out their programming will have significant negative impacts on the video programming market, and will undermine the purpose of Sections 76.1603(b) and (c).

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April 26, 2018