

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Conditions Imposed in the)	WC Docket No.16-197
Charter Communications-Time Warner)	
Cable-Bright House Networks Order)	

PETITION TO DENY

Mark DeVitre
Executive Vice President and General Counsel
Entertainment Studios Networks
1925 Century Park East, 10th Floor
Los Angeles, CA 90067
(310) 277-3500

David R. Goodfriend
Meagan M. Sunn
The Goodfriend Group
208 I St. NE
Washington, D.C. 20002
(202) 549-5612

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Entertainment Studios Networks (“ESN”) hereby submits its comments in the above-captioned proceeding. ESN opposes the petition of Charter Communications, Inc. (“Charter”) for early relief from the conditions established by the Commission’s order granting Charter’s merger with Time Warner Cable and Bright House Networks.¹

I. INTRODUCTION AND SUMMARY.

ESN, like other companies within the Allen Media Group (“AMG”), was founded by comedian, producer, media entrepreneur, and philanthropist Byron Allen. ESN and the other companies under AMG constitute a multi-platform media enterprise, including: TheGrio, a digital video-centric news community platform devoted to providing African-Americans with compelling stories and perspectives currently underrepresented in existing national news outlets; LocalNow, an over-the-top (“OTT”) streaming service powered by The Weather Channel and content partners, which delivers real-time, hyper-local news, weather, traffic, sports, and lifestyle information; nine 24-hour HD television networks (The Weather Channel, Comedy.TV, Cars.TV, ES.TV, JusticeCentral.TV, MyDestination.TV, Pets.TV, Recipe.TV, and The Weather Channel en Español); a television syndication and production company with over 64 shows in

¹ Petition of Charter Communications, Inc., WC Docket No. 16-197, (filed June 18, 2020) (“Petition”).

production and/or distribution and a library of over 5,000 hours of owned content across multiple genres, providing video content to broadcast television stations, cable television networks, mobile devices, multimedia platforms, and the World Wide Web; a full-service, theatrical motion picture distribution company specializing in wide release commercial content; a premiere multi-platform independent film distributor with direct partnerships across all major cable, digital and streaming platforms; and a broadcast television station ownership group, with 15 Big-Four network affiliated stations across the U.S. Mr. Allen retains sole ownership of ESN and the other AMG companies, making AMG the only 100% African American-owned multi-platform media organization in the U.S.

For reasons detailed below, the Commission should reject Charter's petition for early relief from the data cap, usage-based pricing, and interconnection merger conditions. The conditions were designed to prevent anti-competitive and anti-consumer economic discrimination. ESN distributes digital content online and increasingly will do so in the future. Broadband providers' data caps, usage based pricing, and interconnection agreements therefore can have a direct impact on ESN's ability to compete.

Charter, left to its own devices absent the merger conditions, not only would have the incentive and ability to thwart competition and harm consumers through economic discrimination, it has displayed a dangerous propensity to discriminate in other ways, as well. ESN faced racial discrimination from Charter, which argued in the Ninth Circuit Court of Appeals, in defending a Civil Rights Claim brought by ESN, that it should have a right under the First Amendment to make editorial decisions based on race, regardless of the Civil Rights Act, an argument rejected by the courts. ESN believes that such breathtaking claims in court reveal

Charter's propensity to discriminate against minority-owned businesses of all kinds, which should call into question any attempt to afford Charter greater latitude to discriminate in its data and interconnection practices.

The Commission's early commencement of this comment cycle violates the timeframe established in the Merger Order and hinders ESN's ability to provide the most complete information on the record possible. ESN believes that the final outcome of this proceeding could be rendered void by the Commission's needless and unsubstantiated circumvention of its own order's timeframe for commencing this proceeding.

II. CHARTER'S INCENTIVE AND ABILITY TO FAVOR SOME EDGE PROVIDERS OVER OTHERS AND ITS SELF-PROFESSED DESIRE TO DISCRIMINATE BASED ON RACE SHOULD PREVENT THE COMMISSION FROM LIFTING MERGER CONDITIONS.

A. The Commission established the merger conditions to prevent Charter from engaging in anti-competitive economic discrimination.

The Merger Order conditions² from which Charter seeks relief generally address Charter's incentive and ability to discriminate against third party competitors, to the detriment of consumers. The Commission was concerned that Charter could "hamper or prevent its current and future online video rivals from expanding, becoming more competitive, or starting up in the first place."³ To guard against Charter thwarting competition and consumer welfare by imposing discriminatory rates, terms, and conditions in anticompetitive ways, the Commission (1) prohibited Charter from imposing data caps and usage-based pricing mechanisms; and (2) required Charter to offer to connect its Internet protocol ("IP") network to any qualifying entity

² Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 15-149, Memorandum Opinion and Order, 31 FCC Rcd. 6327 (2016) ("*Merger Order*").

³ *Merger Order*, 31 FCC Rcd at 6329, para. 5.

free of charge and on standardized terms.⁴

Stated another way, the Commission told Charter that it could not establish data caps or usage-based pricing that would allow it to discriminate against some edge providers, and could not offer different interconnection rates, terms and conditions in different ways, to different parties. Thus, the Commission prohibited Charter from discriminating based on economics.

B. Charter's statements in federal district and appellate court reveal its desire to discriminate based on race.

ESN has been, and continues to be directly impacted by Charter's discriminatory practices, making the issues before the Commission in this docket particularly important to ESN. After repeated, failed efforts to enter an affiliation agreement with Charter, ESN filed a claim in United States District Court for the Central District of California against Charter under the Civil Rights Act of 1866, 42 U.S.C. § 1981, alleging racial discrimination.⁵ To support its claim of Charter's racial bias, ESN cited statements by a former Charter Senior Vice President of Programming, who told African-American protesters outside Charter's headquarters "to get off welfare" and accused them of looking for "handouts."⁶ ESN also alleged that Charter's CEO refused to engage with ESN's African American CEO, Byron Allen, referring to Allen as "Boy" and telling Allen that he needed to change his behavior.⁷

In response to these and other assertions, Charter made a breathtaking claim that its editorial rights under the First Amendment gave Charter immunity from racial discrimination laws and permitted it to discriminate, in this case, against ESN and its African American owner.⁸

⁴ *Merger Order*, 31 FCC Red at 6543-49, Appx. B, Conditions.

⁵ *National Association of African American-Owned Media, et al. v. Charter Communications, Inc.*, Case No. 2:16-cv-00609-GW-FFM (C.D. Cal.) ("*Charter*").

⁶ *Id.* (ECF Dkt. No. 150 at ¶ 8).

⁷ *Id.* (ECF Dkt. No. 150 at ¶ 11).

⁸ *See id.* (ECF Dkt. Nos. 48, 69, 151).

Fortunately, the District Court (Hon. George H. Wu) and the Ninth Circuit rejected this argument.⁹ Charter asked the Supreme Court to reverse the Ninth Circuit on this issue, but the Supreme Court declined to review that aspect of the Ninth Circuit’s decision.¹⁰

Charter’s on-the-record argument in federal court that the First Amendment granted it authority to discriminate, not only for content or economic reasons, but even for overtly racial reasons, is very troubling. It shows that the company, its executives, and its board of directors believe that they should be able to discriminate however they please, regardless of who gets hurt, if they thought doing so served their own interests. Such a company should not be granted greater discretion to play favorites.

C. Lifting the merger conditions likely would harm ESN, other minority-owned businesses, and minority consumers.

Charter’s incentive and ability to engage in economic discrimination through data caps, usage based pricing, and with respect to interconnection agreements would be exacerbated for ESN and other minority-owned businesses in their contract negotiations with Charter. In establishing the merger conditions, the Commission reasoned that Charter likely would “hamper or prevent its current and future online video rivals from expanding, becoming more competitive, or starting up in the first place.”¹¹ The Commission’s concern regarding Charter’s post-merger ability to engage in economic discrimination is compounded by Charter’s stated desire to make programming decisions based at least in part on race, as demonstrated by its failed First

⁹*National Association of African American-Owned Media, et al. v. Charter Communications, Inc.*, Appeal Case No. 17-55723 (9th Cir.) (Dkt. Entry No. 66).

¹⁰ The Supreme Court granted Charter’s cert petition and remanded the case for further proceedings consistent with its decision in *Comcast Corp. v. National Assn. of African American-Owned Media*, 589 U.S. ___ (2020). The *Comcast* decision involved only the causation standard under 42 U.S.C. § 1981. It did not touch upon the First Amendment.

¹¹ *Merger Order*, 31 FCC Rcd at 6329, para. 5.

Amendment arguments in the Ninth Circuit.¹² Absent the merger conditions, not only could Charter favor some edge providers or interconnection partners over others, as described in detail by other commenters, but it could do so for non-economic reasons, as well, likely imposing a disproportionately detrimental impact on ESN and other minority-owned businesses wishing to contract with Charter.¹³

ESN is a digital content producer that relies on Charter and other broadband providers to make its content available to consumers on non-discriminatory terms. ESN creates and disseminates digital content, and intends to increase its digital distribution of video and other content in the future. This means that Charter's approach to data caps, usage-based pricing, and interconnection directly impacts ESN and its audiences. ESN and other AMG companies produce and distribute a wide range of digital content, including:

- **TheGrio**, a digital content service aimed at the African-American audience, with news, commentary, features, and video content that are more timely and in-demand than at any other point in the site's history, with an astounding 10.5 million monthly active users. It is critical to TheGrio's mission that African American audiences have unfettered, affordable access to the site's content and community.
- **LocalNow**, one of the leading local news streaming apps, with over 2.3 million monthly active users, bringing much-needed local news, weather, and feature programming to the online, streaming audience.
- **Linear video programming networks**, including The Weather Channel, Comedy.TV, Cars.TV, ES.TV, JusticeCentral.TV, MyDestination.TV, Pets.TV, Recipe.TV, and The Weather Channel en Español (launching in 2020), making much of that content available online, to the extent allowed in its affiliation agreements. ESN would like to make more content available online in order to compete in the future and participate in the OTT revolution.
- **15 Big-Four network-affiliated broadcast TV stations**, all of which create content for online distribution and constantly are exploring ways to make more of their local news, weather, sports, and other content available online.

¹² Charter, ECF Dkt. Nos. 48, 69, 151.

¹³ See e.g. Opposition to Petition to by Charter Communications of Public Knowledge and Sports Fans Coalition, MB Docket No. 16-197, at 11 (filed Jul. 22, 2020).

- A full-service, **theatrical motion picture distribution** company specializing in wide release, commercial content with a premiere multi-platform distributor, including direct partnerships across all major cable, digital and streaming platforms.

Charter could threaten ESN's digital content distribution. Were the Commission to lift the merger conditions, Charter could tell its customers that using any of the aforementioned services would count towards a data cap, while use of other services would not, hobbling ESN's ability to compete. Charter could charge usage-based prices when its subscribers use ESN's digital services, but waive such fees for other content providers, increasing costs to ESN's audiences and hindering ESN's ability to compete. In theory, given recent Commission action,¹⁴ Charter even could block its users from accessing ESN content at all.

In all of these examples, Charter could impose such a policy for purely economic reasons, or additionally for racial reasons. Based on Charter's actions and statements before the courts, ESN believes that Charter is likely to abuse any discretion afforded to it through early termination of merger conditions, not only in anti-competitive ways, but in ways directly hindering the growth and vitality of African-American owned businesses.

Charter's arguments fall short. Charter asserts that the proliferation of Over-the-Top ("OTT") providers proves that the merger conditions no longer need apply.¹⁵ However, the dearth of minority-owned businesses in the current video streaming boom tells a different story. None of the OTT providers Charter lists in its petition¹⁶ are minority-owned, while nationwide, the percentage of content companies that are minority-owned or controlled is well below the

¹⁴ See *In re Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018).

¹⁵ Petition at 3-5.

¹⁶ Petition at 13-14.

percentage of minorities in the general population or, for that matter, the percentage of minority cable or broadband subscribers.¹⁷

Moreover, in the traditional, linear video space, minority-owned programmers are under-represented due in part to the terms and conditions imposed by distributors like Charter on small, independent programmers. These include Most-Favored-Nation (“MFN”) and Alternative Distribution Method (“ADM”)¹⁸ clauses that smaller programmers are forced to accept, in contrast to larger, conglomerate programmers. Today, only 6 percent of independent networks are minority-owned.¹⁹

The Department of Justice Antitrust Division was fully aware of the anti-competitive risks of such contract terms and, in its consent decree with Charter, prohibited Charter from entering into or enforcing any agreement with a programmer that forbids, limits or creates incentives to limit the programmer’s provision of content to one or more Online Video Distributors (OVD), and prohibited Charter from availing itself of other distributors’ most favored nation (MFN) provisions if they are inconsistent with this prohibition.²⁰

Thus, independent, minority video programmers have been thwarted by burdensome terms and conditions in distribution agreements. As minority programmers move into digital

¹⁷ Glenn H. Burkins, *Where Have All the Black Digital Publishers Gone?*, Columbia Journalism Review, https://www.cjr.org/local_news/where-have-all-the-black-digital-publishers-gone.php (last visited Jul. 22, 2019).

¹⁸ Most Favored Nation Clauses (MFN) entitle an MVPD to more favorable contract terms than a video programming vendor has provided to another video programming distributor. An Alternative Distribution Mechanism (ADM) provision restricts a video programmer from distributing its programming on alternative, non-traditional video distribution platforms (e.g., online platforms) for a specified period of time after its original linear airing, or until certain conditions are met. See *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Notice of Proposed Rulemaking, 31 FCC Rcd. 11352 at n. 1 (2016).

¹⁹ Roger Caldwell, *Building Powerful Black Media Based on Human Rights*, Greater Diversity, Mar. 6, 2020, <http://greaterdiversity.com/building-powerful-black-media-based-human-rights/> (last visited Jul. 20, 2020).

²⁰ See *Final Judgment, United States v. Charter Communications, Inc., et. al.*, Case No. 1:16-cv-00759 (D.D.C. Sept. 9, 2016), available at <https://www.justice.gov/atr/file/891506/download>.

markets, it is reasonable to conclude that Charter's statements in court and behavior in the video programming realm does not bode well for minority-owned businesses.

Charter cites its \$13 million Spectrum Community Investment Loan Fund, along with its partnership with the National Urban League and the National Action Network, as evidence of its commitment to diversity.²¹ While commendable, these actions fail to constitute a meaningful effort to establish economic inclusion. As a percentage of Charter's revenues, or even Charter's revenues from minority subscribers,²² \$13 million is a fraction of what would constitute meaningful investment, representing less than 2% of Charter's revenues from African American subscribers.

Charter also professes its commitment to a diverse workforce²³ but fails to mention that only two out of the 24 members of its executive leadership team are people of color.²⁴ Diversity in call centers is not the same kind of economic inclusion as diversity in the executive suites. Further, even when it comes to call center and sales positions, a U.S. Department of Labor's Office of Federal Contract Compliance Programs evaluation found that Charter discriminated against African Americans and women who applied for direct sales and telesales positions, resulting in a \$725,000 resolution.²⁵ In sum, Charter's professed interest in and support for

²¹ Petition at 7.

²² Charter's revenues in 2019 grew by \$2.1 Billion to over \$46 Billion. \$6 Billion is a general approximation of Charter's revenues from Black Americans based on population figures from the U.S. Census. *See* Charter Communications. (2019). Form 10-K 2019. Retrieved from <https://www.sec.gov/Archives/edgar/data/1091667/000109166720000024/chtr12312019-10k.htm>; *See also* U.S. Census Quick Facts, U.S. Census Bureau, Jul. 1, 2019, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Jul. 21, 2020).

²³ Petition at 6.

²⁴ Leadership, Charter Communications, <https://corporate.charter.com/leadership> (last visited Jul. 21, 2020); *See also* Board of Directors, Charter Communications, <https://ir.charter.com/corporate-governance> (last visited Jul. 21, 2020).

²⁵ *See* Press Release, U.S. Department of Labor Reaches Resolution of Allegations of Hiring Discrimination By Time Warner Cable, U.S. Dept. of Labor, Feb. 19, 2020, <https://www.dol.gov/newsroom/releases/ofccp/ofccp20200219> (stating, "OFCCP's preliminary findings showed Time Warner Cable discriminated against African Americans and women applying for sales representative, direct sales trainee and inbound telesales positions.").

diversity and inclusion do not amount to meaningful, impactful action and, in fact, pale in comparison to the anti-competitive, anti-consumer, and anti-minority threat posed by lifting the Merger Order's conditions.

Minority consumers disproportionately impacted by lack of access to affordable broadband would be harmed further by Charter's increased regulatory flexibility. According to Nielsen, streaming is a primary source of entertainment for African Americans.²⁶ This demand for streaming video drives broadband adoption. Allowing Charter to institute data caps and interconnection fees, driving up the cost of broadband, would harm broadband adoption in Black communities. The data caps would also drive up costs for low-income subscribers.

Charter's petition for relief could threaten minorities' health and safety during the pandemic. According to the CDC, African Americans have an age-adjusted COVID-19 hospitalization rate approximately 5 times that of non-Hispanic white persons.²⁷ Instituting data caps on this population during a COVID-19 spike reduces the opportunity for distance learning, telework, and telehealth. According to a Pew Study, 53 percent of Americans say the Internet has been essential during the COVID-19 outbreak.²⁸ Another study indicates that nearly half of all households without Internet access are people of color and this is tied in large part to economic inequity.²⁹ Allowing Charter to institute data caps that will increase the cost of an

²⁶ Press Release, Nielsen Examines the Digital Habits and Impact of Black Consumers, Nielsen, Sept. 13, 2018, <https://www.nielsen.com/us/en/press-releases/2018/nielsen-examines-the-digital-habits-and-impact-of-black-consumers/>.

²⁷ COVID-19 in Racial and Ethnic Minority Groups, CDC, Jun. 25, 2020, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html> (last visited Jul. 20, 2020).

²⁸ Emily A. Vogels, et. al., 53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak, Apr. 30, 2020, Pew Research, <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/> (last visited Jul. 20, 2020).

²⁹ Dana Floberg, The Racial Digital Divide Persists, Free Press, Dec. 31, 2018, <https://www.freepress.net/our-response/expert-analysis/insights-opinions/racial-digital-divide-persists> (last visited Jul. 20, 2020).

essential service at a time when communities of color are struggling due to the economic fallout of an international crisis is clearly not in the public interest.

Charter's request to institute data caps during the COVID-19 pandemic also flies in the face of the Commission's Keep Americans Connected pledge, under which Chairman Pai has encouraged broadband providers to relax their data usage limits in appropriate circumstances and take steps to promote remote learning and telehealth.³⁰ It is also contrary to Charter's own press release committing to Chairman Pai's pledge, which includes a moratorium on data caps.³¹

III. THE COMMISSION'S UNTIMELY COMMENCEMENT OF THIS PROCEEDING SHOULD RENDER THE OUTCOME MOOT.

A. The Commission lacks authority to commence this proceeding prior to August 18, 2020.

As Newsmax explained in its July 8, 2020 letter,³² the Commission established clear deadlines in its Merger Order for Charter to file a petition for relief. Newsmax rightfully asserted that the Bureau issued the public notice seeking comment on Charter's Petition too soon.³³ In the Merger Order, the Commission generously allowed Charter to petition for relief of the imposed conditions but specified the permitted timing.³⁴ The Merger Order established that in the event that Charter files a petition for relief from the imposed conditions "during the three

³⁰ Although the voluntary pledge is over as of June 30, 2020, Charter's petition was filed before its expiration. Press Release, Keep Americans Connected Pledge, FCC, Jul. 8, 2020, <https://www.fcc.gov/keep-americans-connected>.

³¹ Press Release, Charter to Offer Free Access to Spectrum Broadband and Wi-Fi For 60 Days For New K-12 and College Student Households and More, Charter Communications, Inc., Mar. 13, 2018, <https://corporate.charter.com/newsroom/charter-to-offer-free-access-to-spectrum-broadband-and-wifi-for-60-days-for-new-K12-and-college-student-households-and-more>.

³² Letter from William L. Wiltshire, Counsel For Newsmax Media, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-197 (filed Jul. 8, 2020) (Newsmax Letter re: Charter Petition Timing).

³³ *Id.*

³⁴ Merger Order, 31 FCC Rcd at 6558, App. B.

(3) months after the fourth anniversary of the closing date,” the Bureau shall seek public comment “nine (9) months prior to the fifth anniversary of the Closing Date.”³⁵

The parties closed the transaction on May 18, 2016.³⁶ Although Charter filed its petition before the three month deadline, the Bureau was directed to seek public comment "nine (9) months prior to the fifth anniversary of the Closing Date," or August 18, 2020.³⁷ The Merger Order's language does not grant the Bureau the discretion to seek comment prior to August 18, 2020.³⁸ The Bureau must execute the clear and explicit directive from the full Commission.

B. ESN relied on the timeframe established in the Merger Order and would have been able to provide more material facts on the record had the Commission abided by its own order.

ESN is an independent programming network that relies on fair, impartial, and transparent Commission action when dealing with much larger and more powerful distributors, such as Charter. ESN took the Commission at its word in the Merger Order and did not anticipate having to file comments regarding a possible petition by Charter until August 18, 2020.

By needlessly rushing this proceeding without adequate notice of its change in policy, in violation of its own order and basic administrative procedure requirements, the Commission undermines independent programmers’ ability to fully participate in this important matter and risks judicial intervention that would complicate, delay, and probably invalidate any final Commission action in this docket.

³⁵ *Id.*

³⁶ *Public Notice, Petition by Charter Communications, Inc. to Sunset Merger Conditions*, WC Docket No. 16-197, DA 20-652 (June 22, 2020) (“*Public Notice*”).

³⁷ Merger Order, 31 FCC Rcd at 6558, App. B.

³⁸ *Id.*

IV. CONCLUSION

Charter's incentive and ability to discriminate in anti-competitive ways through data caps, usage based pricing, and interconnection agreements, its unsuccessful arguments in federal court that it should be permitted to discriminate based on race, and the Commission's procedurally flawed rush to commence this proceeding should result in the Commission denying Charter's petition for relief.

Mark DeVitre
Executive Vice President and General Counsel
Entertainment Studios Networks
1925 Century Park East, 10th Floor
Los Angeles, CA 90067
(310) 277-3500

Respectfully Submitted,

/s/ David R. Goodfriend

David R. Goodfriend
Meagan M. Sunn
The Goodfriend Group
208 I Street NE
Washington, D.C. 20002
(202) 549-5612

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