The voice of mid-size communications companies

September 20, 2016

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

Re: *Ex Parte* Communications: MB Docket Nos. 16-41 and 16-42; CS Docket No. 97-80

Dear Ms. Dortch:

On September 16, 2016, A.J. Burton of Frontier Communications (Frontier), and Genny Morelli and the undersigned of ITTA, met with Marc Paul of the Office of Commissioner Rosenworcel, and separately with Matthew Berry of the Office of Commissioner Pai, regarding the above-captioned proceedings.[1] On September 20, 2016, the same representatives of ITTA met with Robin Colwell of the Office of Commissioner O'Rielly regarding the above-captioned proceedings.

In our meetings, we focused on elements of the Chairman's Proposal in the expanding consumers' video navigation choices proceeding related to implementation timeframes and limiting burdens on smaller providers.[2] We expressed our support for the proposal that smaller operators – defined as those with fewer than 400,000 subscribers – be exempted from the obligation to comply with the requirements.[3] Even with such an exemption, any new requirements that the Commission were to adopt would apply to the top 11 MVPDs,[4] representing 95 percent (or more) of all MVPD subscribers nationally.[5]

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[1] *Promoting the Availability of Diverse and Independent Sources of Video Programming*, MB Docket No. 16-41, Notice of Inquiry, 31 FCC Rcd 1610 (2016); *Expanding Consumers' Video Navigation Choices; Commercial Availability of Navigation Devices*, MB Docket No. 16-42, CS Docket No. 97-80, Notice of Proposed Rulemaking and Memorandum Opinion and Order, 31 FCC Rcd 1544 (2016); *see also* Fact Sheet, Chairman Wheeler's Proposal to Increase Consumer Choice & Innovation in the Video Marketplace (Sept. 8, 2016), https://www.fcc.gov/document/chairman-wheelers-plan-increase-choice-and-innovation-video (Chairman's Proposal).

[2] *See* Chairman's Proposal at 2.

[3] *Id.*

[4] *See, e.g.*, Mike Farrell, *Eat or Be Eaten: Consolidation Creates a Top-Heavy List of 25 Largest MVPDs*, Multichannel News, Aug. 17, 2015, at 8 (taking into account subsequent acquisition of Cablevision by Altice, listing 11 MVPDs with more than 400,000 subscribers); Letter from Thomas Cohen, Counsel for ACA, to Marlene Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80, at 3 n.4 (filed Sept. 6, 2016).

[5] *See* Chairman's Proposal at 1.

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We also discussed the proposal's implementation timeframes, namely, two years for providers with over one million subscribers to fully implement the new requirements, and an additional two years to comply for providers with at least 400,000 but fewer than one million subscribers.[6] Consistent with our advocacy earlier this summer,[7] we urged setting the threshold for determining which companies would receive additional implementation time at two million subscribers. With such a threshold, the top seven MVPDs, serving over 90 percent of MVPD subscribers nationally, would be subject to fully implement the new requirements within two years, and the vast majority of consumers throughout the country would have the choice of free apps from three or more (at least two DBS providers and a large cable MVPD) providers within that timeframe. Setting the additional implementation time threshold at two million subscribers is consistent with the record in this proceeding,[8] consistent with precedent,[9] and, as explained further below, fully equitable.

The merits of a two million subscriber threshold for additional implementation time are manifest. Altice, with 3.6 million subscribers, is the seventh largest MVPD, with nearly *three times* the number of subscribers as the next on the list, Frontier, which has 1.3 million subscribers.[10] The implementation burdens of developing several different apps compatible with different platforms[11] are exponential for a provider with 1.3 million subscribers (i.e., Frontier)

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[6] *See id.* at 2.

[7] *See, e.g.,* Letter from Michael J. Jacobs, Vice President, Regulatory Affairs, ITTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80, at 2 (filed July 14, 2016) (in the absence of a small provider exemption for providers with two million or fewer subscribers, "we suggested, for providers with more than one million but with two million or fewer subscribers, an implementation delay of one or two years, beyond the two-year implementation period suggested").

[8] *See, e.g.,* Letter from Rick Chessen, Senior Vice President, Law and Regulatory Policy, NCTA, and Stacy Fuller, Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 16-42, CS Docket No. 97-80, at 2 n.5 (filed Sept. 6, 2016) (the HTML5 Apps-Based Approach first proposed by NCTA et al. in June 2016 "would only apply to MVPDs with one million or more subscribers. Today, only eight MVPDs meet this threshold (seven if the FCC adopts a two million subscriber threshold as some parties have urged)").

[9] *See, e.g., Accessibility of User Interfaces, and Video Programming Guides and Menus; Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 17330, 17404, para. 117 n.469 (in analogous proceeding where the Commission adopted accessibility rules for "digital apparatus and navigation devices used to view video programming," Commission stated that it will entertain requests "for a limited extension of time to comply for operators with more than 400,000 subscribers and fewer than 2 million subscribers").

[10] Press Release, Leichtman Research Group, Major Pay-TV Providers Lost About 665,000 Subscribers in 2Q 2016 (Aug. 15, 2016), http://www.leichtmanresearch.com/press/081516release.html (LRG Aug. 15 Press Release); *see also* Ben Munson, Top 9 Cable, Satellite and Telco Pay-TV Operators in Q1: Ranking Comcast to TWC to Charter to Cablevision (May 11, 2016), http://www.fiercecable.com/special-report/top-9-cable-satellite-and-telco-pay-tv-operators-q1-ranking-comcast-to-twc-to (including pie chart, attached hereto, where Frontier falls within the "Other telco" sliver of "U.S. Pay TV Share by Operator"). Although this chart does not reflect Frontier's acquisition of certain Verizon assets in Florida, Texas, and California, that acquisition does not materially change the picture.

[11] *See* Chairman's Proposal at 1.

relative to the burdens on a provider (i.e., Altice) with nearly three times the subscriber count, let alone relative to a provider like AT&T, which has nearly *twenty times* Frontier's subscriber count.[12] Frontier will be forced to spread the same R&D, engineering, testing, and other implementation costs as the seven largest MVPDs over a customer base ranging from five percent to one-third the size of those competitors, and has correspondingly fewer resources to devote to the endeavor.

There are a couple of different approaches the Commission could take to effectuate a two million subscriber threshold for additional implementation time. One would be to apply an upper bound of two million subscribers to the Chairman's Proposal for defining medium sized providers. This would increase the field of providers afforded additional implementation time from three to four but there would be no change in the number of providers subject to the new requirements. A *de minimis* one percent of MVPD subscribers nationally would be subject to an additional two years before their MVPD is required to fully implement the new requirements. Another approach could be to create a fourth category, for providers with at least one million but under two million subscribers, who would have one additional year beyond the large provider timeframe to implement the new requirements. Regardless of which of these approaches the Commission takes, any additional implementation period to which any provider is subject relative to the large provider implementation timeframe should be measured from when the last large provider completes implementation, or from the two year anniversary of the trigger of the large provider implementation timeframe, whichever is later.[13]

The Commission also should measure provider subscriber counts as of December 31, 2015, utilizing the not uncommon Commission yardstick of calendar year-end metrics, for purposes of whether, and if so, when, a provider is required to comply with the new requirements. Alternatively, the Commission could utilize the release date of the order. Either approach would provide regulatory certainty, and would preclude entities from engaging in unsightly gamesmanship related to merger activity merely in an effort to avoid the ambit of the new requirements.

Finally, consistent with ITTA's comments on the NOI in the diverse and independent video programming proceeding,[14] we urged that the Commission's NPRM in that proceeding include seeking comment on the effect on smaller and new entrant MVPDs of forced program bundling by large programmers. We also emphasized that the Commission should specifically seek comment on the impact of penetration and channel placement requirements on the ability of MVPDs to carry more independent and diverse programming.

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[12] LRG Aug. 15 Press Release.

[13] Relegating a provider the size of Frontier to request an implementation deadline waiver would not be a compelling or justified option. The uncertainties of the waiver process, both as to outcome and timing, would realistically render the provider responsible for apps development progress that is simply infeasible for it.

[14] *See* ITTA Comments, MB Docket No. 16-41 (Mar. 30, 2016).

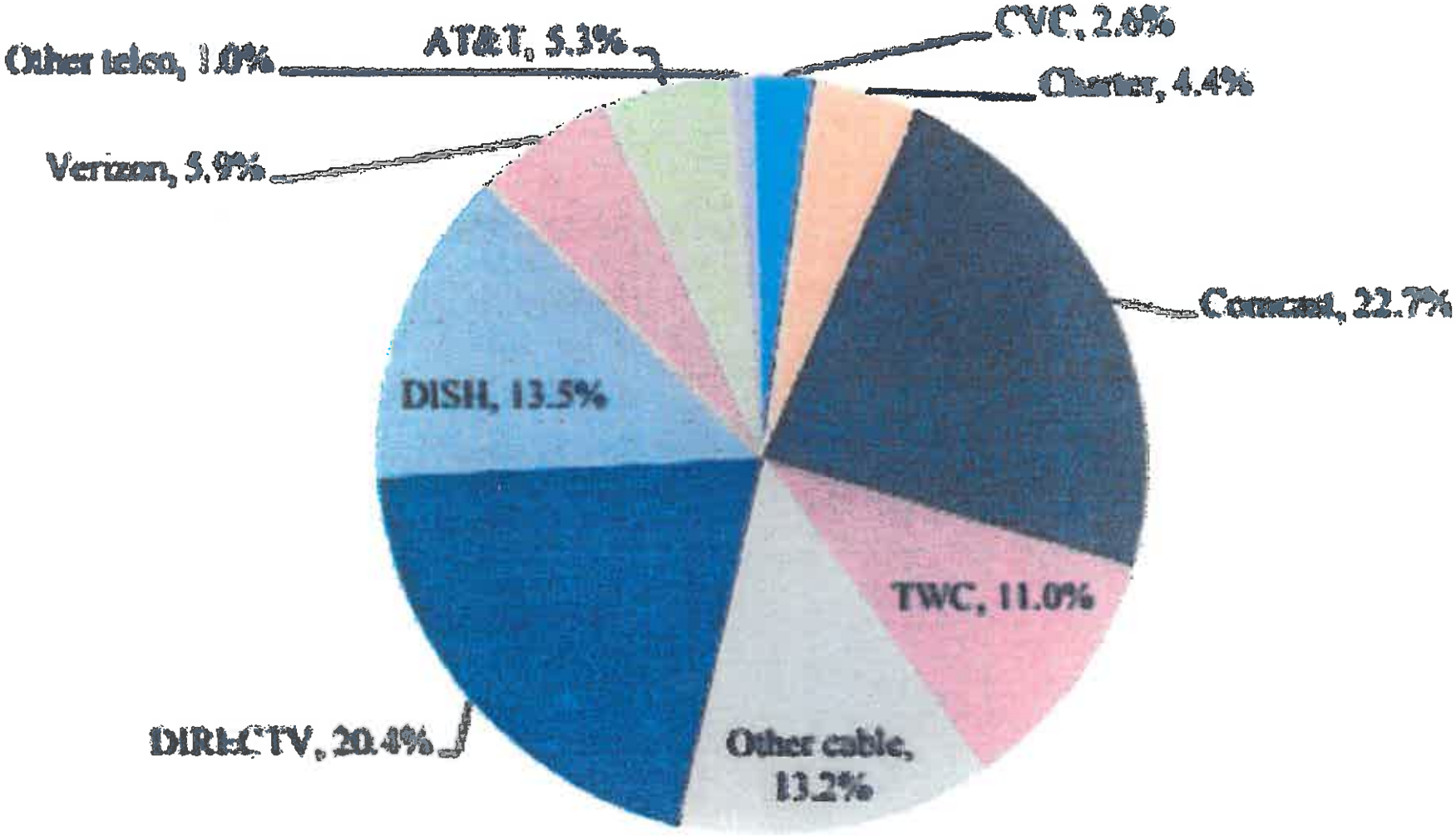
Please do not hesitate to contact the undersigned with any questions regarding this submission.

Respectfully submitted,

Michael J. Jacobs
Vice President, Regulatory Affairs

cc: Marc Paul
Matthew Berry
Robin Colwell

Figure 6. U.S. Pay TV Share by Operator



Source: Company data, Evercore ISI Research, SNL Kagan