Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc. and SpinCo	)	**MB Docket No. 14-57**
	)	
For Consent to Transfer Control of Licenses and Authorizations	)	

REPLY OF
CINCINNATI BELL EXTENDED TERRITORIES LLC

Cincinnati Bell Extended Territories LLC ("Cincinnati Bell"), a local head-to-head terrestrial competitor to Time Warner Cable, Inc. ("TWC"), submits this reply to respond to erroneous statements made by Comcast regarding Cincinnati Bell's arguments weighing in favor of placing pro-competitive conditions on the transaction involving consolidation of Comcast Corporation ("Comcast") and TWC ("Comcast/TWC Transaction") – the two largest cable multichannel video programming distributors ("MVPDs") -- and the subsequent transaction involving Comcast, Charter Communications, Inc. ("Charter") – the fourth largest cable provider -- and SpinCo ("Comcast/Charter/SpinCo Transaction") that will result in the further consolidation among cable providers.

I. COMCAST'S DENIAL OF PROGRAMMING COST ADVANTAGES UNDERSCORES THE NEED FOR INFORMATION DISCLOSURES.

A. Smaller MVPDs Pay Higher Rates for Programming than Larger MVPDs.

In its Opposition to Petitions to Deny and Response to Comments, Comcast treats dismissively concerns raised by Cincinnati Bell and others about Comcast's ability to exploit its "must-have" platform to extract economic and non-economic terms not otherwise made available to competitors.[1] Comcast acknowledges "[t]here may well be differences between smaller MVPDs and MVPDs the size of TWC, DirecTV or Comcast," but claims that "major price differentials appear to be flattening out with the industry moving to more standard pricing."[2] Comcast, however, provides only conjecture, not concrete evidence, as to such "flattening out" towards "more standard pricing."[3]

Even Comcast's economists, Rosston and Topper, concede that "small to medium MVPDs generally tend to pay a higher price than large MVPDs."[4] Nevertheless, they suggest Comcast's ability to obtain better prices from content providers will not cause smaller MVPDs to pay higher prices.[5] According to Rosston and Topper, in instances where Comcast and/or TWC compete with a smaller MVPD, "if Comcast were to get lower prices, the most logical effect would be for smaller carriers also to get lower, not higher prices." From their perspective:

> It is perhaps easiest to understand this point by hypothesizing what would happen if content providers all gave Comcast lower prices and then raised the prices to its smaller competitors. In that case, the smaller competitors may be more likely [sic] lose customers to Comcast (depending on the magnitude of the differential). But Comcast would pay lower prices than the competitor paid before the price changes, so that the content provider would end up with lower overall revenue as a result of trying to make up the lower Comcast price by raising prices to others. This makes little sense and may be one of the reasons that programming fee differentials appear to be flattening out in today's competitive MVPD marketplace.[6]

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[1] *See* Opposition to Petitions to Deny and Responses to Comments, Comcast Corporation and Time Warner Cable, Inc., MB Docket No. 14-57 (September 23, 2014) at 156-157 ("Comcast/TWC Opposition").
[2] *See* Comcast/TWC Opposition at 158.
[3] What Comcast considers to be "major price differentials" is also not made clear. While savings of pennies per subscriber per month per network may not be material to a company the size of Comcast, in the aggregate it is to a smaller MVPD that competes head-to-head with Comcast.
[4] *See* Comcast/TWC Opposition, Exhibit 2 – Gregory L. Rosston and Michael D. Topper, An Economic Analysis of The Proposed Comcast Transactions with TWC and Charter in Response to Comments and Petitions (September 20, 2014) "(Rosston/Topper Reply Declaration") at 23.
[5] *See* Rosston/Topper Reply Declaration at 31.
[6] *See* Rosston/Topper Reply Declaration at 32 (internal footnotes omitted).

Unfortunately, reality proves otherwise. Cincinnati Bell has not seen a "flattening out" of rates nor has it been able to negotiate comparable rates given to TWC. In fact, Cincinnati Bell's experience is quite the opposite.

Service parity is largely unavailable to Cincinnati Bell and other TWC/Comcast competitors.[7] In recent retransmission consent negotiations, Cincinnati Bell has been repeatedly told that it cannot receive the same or even slightly higher rates than that given to TWC. As to satellite cable programming, Cincinnati Bell procures much of it through the National Cable Television Cooperative ("NCTC"), an organization that buys programming for members representing about nine million subscribers. NCTC's Chief Executive Officer, Rich Fickle, has noted that Comcast and TWC already pay significantly less for programming than do other MVPDs and members of NCTC.[8] According to Mr. Fickle:

> Currently, NCTC faces increased demands from programmers resulting from the concessions they grant large MVPDs such as Comcast and TWC. Programmers acknowledge during negotiations with the NCTC their need to make up the revenue amounts they are not able to secure from Comcast, TWC or other large MVPDS. Specifically, some programmers have stated their intention to make up lost revenues resulting from their negotiations with Comcast, TWC or others directly through their agreements with NCTC members and other small MVPDS.[9]

Consistent with the views of other participants, Mr. Fickle predicts that this difference -- the significant cost advantage enjoyed by Comcast and eventually by Charter -- "will significantly increase."[10]

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[7] *See* Comments of Cincinnati Bell Extended Territories LLC, MB Docket 14-57 (August 25, 2014) ("Cincinnati Bell Comments") at 9.
[8] Declaration of Rich Fickle at ¶8, Exhibit B to the Comments of the American Cable Association, MB Docket 14-57 (August 25, 2014) ("Fickle Declaration").
[9] *See* Fickle Declaration at ¶ 9.
[10] *Id.*

B. Comcast and Other Large MVPDs Ensure the Best Pricing Through Use of Most Favored Nation Provisions.

Comcast and other larger MVPDs ensure they maintain preferential terms vis à vis smaller MVPDs through most favored nation ("MFN") provisions that guarantee the larger MVPD the best economic and non-economic terms and conditions. While providers of essential inputs may want to custom tailor agreements to meet the unique needs of smaller MVPDs, they are contractually barred from doing so.[11] Given the scale of Comcast and Charter post-merger, MFN provisions would serve a singular purpose – to suppress competition – since a provider with the scale and purchasing power of Comcast and Charter simply would not need contractual protection against a smaller MVPD being able to extract a better deal or that such better deal might pose some material threat to the totality of either's operations.

Unfortunately, the full extent to which MFNs harm smaller MVPDs is not readily ascertainable because of the secrecy surrounding programming agreements – both retransmission consent agreements and cable carriage agreements. Programmers almost universally require MVPDs to maintain strict confidentiality regarding all aspects of the programming agreement, often without reciprocal obligations.

To bear out the experience of Cincinnati Bell and others similarly situated, the Commission itself must undertake an examination of the rates, terms and conditions of programming agreements of Comcast and Charter as well as those imposed upon their terrestrial competitors. The Commission should gather programming agreements not only from Comcast, Time Warner, and Charter as it has already done but all terrestrial triple-play competitors[12] to

[11] *See* Cincinnati Bell Comments at 10.
[12] The FCC can identify terrestrial video programming competitors by reviewing its Community Unit database to identify those Comcast, TWC or Charter communities that are also served by another provider.

quantify the current economic and non-economic differentials.[13] Only then will the Commission be able to establish with certainty what Cincinnati Bell and others have said – competing smaller MVPDS face a gross imbalance in the costs associated with program acquisition, which negatively impacts their ability to provide meaningful local competition and ultimately hurts consumers and thus the public interest.

II. TERRESTRIAL TRIPLE PLAY COMPETITORS MUST HAVE ACCESS TO PROGRAMMING ON THE SAME RATES, TERMS AND CONDITIONS EXTRACTED BY THEIR COMPETITORS.

A. The Commission Must Cap Programming Agreement Rates, Terms and Conditions for Terrestrial Triple Play Competitors at Those Enjoyed by Their Larger Competitors.

As noted above, Cincinnati Bell procures much of its programming through the NCTC, an organization that buys programming for members representing about nine million subscribers. The current cost advantage enjoyed by Comcast over the single largest cost of providing MVPD services – programming – makes competition difficult. If the transaction is allowed to occur, the cost advantages currently enjoyed by both Comcast and Charter will grow, making head-to-head terrestrial competition with Comcast and Charter even more challenging.

Comcast and Charter can debate without end the accuracy of these statements and conclusions. But numbers don't lie. Thus, if Comcast and Charter are convinced that there is no significant cost advantage today and there will be no cost advantage following the transaction, then Comcast and Charter should have no objection to both the Commission monitoring these programming cost differentials and the creation of an independent clearinghouse where cost information can be independently aggregated and differentials verified. The Commission has the

[13] Importantly, those differentials must be computed on a net-effective rate per subscriber to provide a meaningful comparison.

authority to mandate that programmers not only provide such information, but the Commission can also restrict the rates, terms and conditions offered competitive terrestrial MVPDs if necessary.

B. The Rates, Terms And Conditions Of Agreements With Programmers Vertically Integrated With A Cable Operator Are Subject To Commission Jurisdiction.

Congress mandated in the 1992 Cable Act that the Commission adopt regulations to "promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market. . ."[14] by prohibiting "unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[15] Congress gave the Commission a broad grant of authority under Section 548(b), which is not limited by the enumerated "minimum contents of regulations" listed in Section 548(c)(2).

The courts have confirmed that the Commission has broad authority under Section 548(b). For example, the United States Court of Appeals for the District of Columbia held that the Commission could prohibit a cable operator from entering into exclusive service arrangements with multiple dwelling unit owners.[16] The Commission also used this section to justify the extension of the statutory ban on exclusive satellite cable programming agreements to terrestrial programming, which the D.C. Circuit upheld under the theory that Section 548(b) was a "clear repository of Commission jurisdiction to adopt additional rules and take additional actions."[17]

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[14] 47 U.S.C. § 548(c)(1).
[15] 47 U.S.C. § 548(b).
[16] *National Cable Telecommunications Ass 'n v. FCC,* 567 F. 3d 659 (D.C. Cir. 2009) (*"NCTA"*).
[17] *Cablevision Systems Corp. v. FCC,* 649 F. 3d 695 at 701 (D.C. Cir. 2011) *("Cablevision"*).

Thus, the Commission has clear authority to require the production of any information concerning rates, terms and conditions afforded to any MVPD for purposes of either oversight to avoid abusive pricing practices that injure competition or to mandate non-discriminatory pricing between local terrestrially-based MVPD competitors and Comcast/Charter by programmers vertically integrated with a cable operator.

C. The Rates, Terms And Conditions Of Programming Agreements Of Programmers *Not* Vertically Integrated With A Cable Operator Are Also Subject To Commission Regulation.

Congress also gave the Commission express authority to establish regulations "governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors" under Section 536.[18] Similar to the structure of Section 548, Section 536 provided a list of mandatory practices to be covered by Commission regulations.

The Commission's authority under Section 536 can be read broadly and should not be limited to a list of mandatory regulatory elements that includes only restrictions on the conduct of MVPDs.[19] Despite the absence of decisions interpreting the scope of Section 536, its structure is virtually identical to that of Section 548 and therefore should be interpreted similarly.[20]

The statutory construction analyses applied by the Court in *NCTA* and *Cablevision* would apply equally to Section 536. In both cases, the Court held that "Congress's enumeration of

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[18] 47 U.S.C. § 536(a).

[19] The legislative history supports this broad grant of authority with no stated restrictions ("Section 11 amends the Communications Act by adding a new Section 616 [47 U.S.C. § 536] which requires the FCC to establish regulations governing program carriage agreements and related practices between multichannel video programming distributors and video programming."). H.R. Rep. No. 102-628, at 81 (1992).

[20] Each has a grant of general authority, *see* 47 U.S.C. §§ 536(a)(1) and Section 548(a)), a requirement that regulations be enacted and a list of minimum elements to be included in the regulations. *See* 47 U.S.C. §§ 536(a)(3)-(5) and 548(c)(2)(A)-(C).

specific, required regulations in subsection (c) actually suggest that Congress intended subsection (b)'s generic language to cover a broader field."[21] Furthermore, the Court rejected the argument in *Cablevision* that "by leaving terrestrial programmers off the list of entities covered by Section [548](b), Congress unambiguously placed terrestrially delivered programming beyond Commission jurisdiction."[22] The Court continued that

> Section [548]'s expansive language suggests that it intended to give the Commission sufficient flexibility 'to maintain. . . a grip on the dynamic aspects of [video programming]' so that it could pursue the statute's objectives as industry technology evolves. . . . [citations omitted.] [Moreover,] [w]hen Congress delegates broad authority to an agency to achieve a particular objective, agency action pursuant to that delegated authority may extend beyond the specific manifestations of the problem that prompted Congress to legislate in the first place.[23]

One could argue that the difference between programmers who are vertically integrated and those who are not is similar to the difference between satellite and terrestrially-delivered programming. In that case, the Court concluded that:

> It does not follow, however, that just because Congress required mandatory minimum regulations for some technologies, it intended to exclude other technologies from regulation. Hardly clairvoyant, especially with respect to rapidly evolving technologies, Congress may well have targeted satellite programming in section 628(c)(2) simply because it was at the time far and away the dominant form of video programming and thus the focus of concerns about anticompetitive withholding.[24]

When the 1992 Cable Act was passed, Congress conferred upon the Commission unrestricted ability to regulate MVPD/programmer agreements but was obviously concerned mostly about MVPD abuse of programmers. Today, the economics have changed and the proposed transactions will further reshape that landscape. The use of this authority by the

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[21] *Cablevision* at 705, citing *NCTA* at 664-65.
[22] *Id.* at 707.
[23] *Id.*
[24] *See id*. at 705.

Commission to eliminate discrimination between local terrestrially-based competitors falls squarely within the pro-competition policies articulated by Congress when it passed the 1992 Cable Act.[25]

III. THE REMEDY – LEVEL THE PLAYING FIELD AND REQUIRE TRANSPARENCY

To ameliorate the impact of further consolidation, the Commission should place conditions on the post-merger Comcast, Charter and Spinco. While Cincinnati Bell identifies in its Comments additional conditions not discussed here, two conditions in particular would help remove the shroud of mystery that surrounds programming acquisition in the cable industry and current practices that are detrimental to competition and consumers.

A. The Commission Should Nullify MFNs Benefiting Comcast and Charter Where They Compete with Smaller Terrestrial MVPDs.

As outlined above, MFNs serve only to deter meaningful local terrestrially-based competition. Accordingly, the Commission should condition both the Comcast/TWC Transaction and the Comcast/Charter/Spinco Transaction on Comcast, Charter and Spinco (i) each disclaiming enforcement of any existing MFN and (ii) each being prohibited from entering into any agreement that includes MFNs in the future where any of these companies compete with a terrestrial MVPD. Elimination of MFNs will serve to ensure that meaningful negotiations between programmers and all MVPDs are possible.

B. The Commission Should Require Transparency Through A Programming Agreement Database.

Leveling the playing field among all terrestrially based MVPDs requires transparency in terms of all material economic and non-economic terms. To accomplish this, the Commission

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[25] *See* H.R. Rep. No. 102-628 at 27, reprinted in 1992 U.S.C.C.A.N. 1133 ("A principal goal of H.R. 4850 is to encourage competition from alternative and new technologies, including competing cable system, wireless cable, direct broadcast satellites, and satellite master antenna television services").

should mandate the creation of an agreement database that would identify for each essential input (without limitation, content in all formats, equipment and technology and services agreements) all material economic and non-economic terms and conditions provided to post-merger Comcast and Charter. Funded by Comcast and Charter, an independent third party should serve as the data custodian, who would publish an online list of all agreements maintained in the registry. A competing terrestrial MPVD negotiating an agreement with a vendor would be provided, upon request and subject to confidentiality provisions and use and retention limitations, the relevant data for that agreement. Access to this data will ensure a more level playing field in programming negotiations and serve as a check to make sure Comcast and Charter's size do not unfairly hamper meaningful competition for the benefit of consumers.

IV. CONCLUSION

Cincinnati Bell and similarly situated competitors seek only to be able to continue to provide meaningful local competition to the likes of Comcast and Charter. The conditions outlined above will go a long way towards allowing a more level and fair playing field in programming acquisition and accordingly should be required by the Commission.

Respectfully submitted,

Lisa M Cordell

Lisa Chandler Cordell
Eric E. Breisach
Breisach Cordell PLLC
5335 Wisconsin Avenue, NW
Suite 440
Washington, DC 20015
(202) 751-2702

Attorneys for Cincinnati Bell Extended Territories LLC

Ted Heckmann
Managing Director of Regulatory Affairs
And Assistant Corporate Secretary
Cincinnati Bell Extended Territories LLC
221 East Fourth Street
Cincinnati, Ohio 45202

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