

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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Promoting Innovation and Competition in the	)	
Provision of Multichannel Video	)	MB Docket No. 14-261
Programming Distribution Services	)	
	)	
_____	)	

**COMMENTS OF CHARTER COMMUNICATIONS, INC.**

March 3, 2015

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Charter Communications, Inc., (“Charter”) hereby submits these comments in response to the Commission’s Notice of Proposed Rulemaking (“*Notice*”).<sup>1</sup>

**INTRODUCTION AND EXECUTIVE SUMMARY**

The video distribution marketplace has markedly changed in the past few years—and quite dramatically since the passage of the Cable Act of 1992. Traditional, facilities-based MVPDs such as Charter now face competition from a wide range of video services, including both linear and on-demand OVDs—two services clearly on the rise. As the options available to consumers expand and the marketplace for video distribution services becomes increasingly fragmented, Charter supports the Commission’s efforts to ensure that the regulatory environment governing those services keeps pace with rapid technological innovations and changes in customer behavior.

However, the Commission must exercise care, as video distribution moves online, to ensure that its efforts do not have the effect of creating substantial variations in regulatory

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<sup>1</sup> *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, MB Docket No. 14-261, FCC 14-210, 29 FCC Rcd 15,995 (rel. Dec. 19, 2014) (hereinafter “*Notice*”).

obligations for different video providers. As rising consumer broadband speeds make online video an increasingly attractive option to both distributors and consumers, traditional video providers are likely in coming years to avail themselves of the opportunity to offer greater programming options online. Traditional providers already compete with OVD services today, but in the near future, their over-the-top services will offer functionally identical services as today's OVD providers and compete head-to-head for the same subscribers. The innovation driven by this coming competition has the potential to bring significant benefits to consumers, but only if it can take place on fair and equal footing.

An even competitive playing field is far from assured given the present state of the marketplace. Traditional video providers are today saddled with a large number of costly obligations, many of them imposed by regulation, others the result of contractual requirements that the regulatory regime has empowered programmers to dictate. These obligations limit the ability of traditional video services to provide slimmer and less costly packages of programming that consumers increasingly demand; indeed, OVD services are desirable to many customers today precisely because they are not encumbered by similar obligations. If traditional providers are forced to carry those obligations with them when they or their affiliates launch services online, OVD services affiliated with traditional providers will not be able meaningfully to compete on either features or price with the far more flexible options available to independent OVDs.

The OVD marketplace is still nascent and the Commission can steer it towards the vibrant give-and-take of open competition. Charter supports the comments of the National Cable

and Telecommunications Association (“NCTA”) as the best way to reach that goal.<sup>2</sup> But if the Commission intends to proceed with the “linear programming interpretation” proposed in the *Notice* and classify linear OVDs as MVPDs, it should ensure that OVDs affiliated with cable providers (or other traditional distributors) are afforded equal treatment to unaffiliated OVDs, and given the same freedom from the legacy obligations that accompany the provision of traditional, facilities-based service. Charter thus applauds the Commission’s tentative proposal to extend equal regulatory treatment to cable-provided OVD services in the *Notice*<sup>3</sup> and urges adoption of this part of the Commission’s proposal.

**I. THE RULES GOVERNING LINEAR OVDS SHOULD NOT TURN ON WHETHER THEY ARE AFFILIATED WITH FACILITIES-BASED PROVIDERS.**

The remarkable growth in online video over the past several years—enabled by dramatic increases in broadband speed by providers like Charter—has invigorated competition in the market for video services and created exciting opportunities for new offerings. Although the market for online video services is relatively young, the potential for those offerings to compete with traditional, facilities-based cable and DBS video services—and to offer consumer experiences similar to traditional offerings—is enormous. The competitive effects of online video are already being felt by facilities-based providers today, as many subscribers “cut the cord” and rely exclusively on online video services.<sup>4</sup> As consumer broadband speeds continue to increase, the range of options that can be provided via online video will continue to expand—to

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<sup>2</sup> See Comments of the National Cable and Telecommunications Association, MB Docket No. 14-261 (filed Mar. 3, 2015). Charter agrees with NCTA that the Commission lacks authority to characterize non-facilities based providers as MVPDs.

<sup>3</sup> See *Notice*, 29 FCC Rcd at 16,029-30 ¶ 78.

<sup>4</sup> See, e.g., Shalini Ramachandran, *Pay-TV ‘Cord Cutting’ Accelerates*, Wall St. J., Nov. 6, 2014, <http://www.wsj.com/articles/pay-tv-cord-cutting-accelerates-1415321442>.

the point that OVD services will in the next few years become functionally indistinguishable from the facilities-based services with which they compete.

The potential for competitive upheaval from OVDs is significant, and facilities-based providers must be permitted to compete in that market on full and fair terms. Indeed, the experience of facilities-based video providers makes them natural entrants to the OVD market who can bring to bear their experience in creating innovative service options. Charter has already begun availing itself of over-the-top video delivery to augment its traditional, linear service and to offer a variety of on-demand offerings to its subscribers. Charter is likely to explore launching more comprehensive linear and on-demand OVD options in the future.

As facilities-based video providers like Charter enter this market and offer linear OVD services, the Commission must provide those services with regulatory treatment that is no more burdensome than it affords to non-facilities-based providers. An equal playing field will further the Commission's goal of "increasing competition in video markets,"<sup>5</sup> and ensure that consumers are served by the most innovative products each competitor has to offer.

Aside from the fact that there is every reason to treat cable-affiliated and independent OVDs comparably for regulatory purposes—both as a matter of fairness in the marketplace and as a matter of ensuring vibrant competition to benefit consumers—there is no coherent reason *not* to. Once traditional video providers (or their affiliates) offer over-the-top service options, those services will be both functionally and technologically indistinguishable from the offerings of today's unaffiliated OVD providers, who already enjoy a head start in building subscription numbers, brand awareness, and less restrictive programming licenses. There is also no appreciable or principled difference in market power between OVDs affiliated with traditional

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<sup>5</sup> *Notice*, 29 FCC Rcd at 15,997 ¶ 5.

providers and those that are not: both cable companies and OVDs come in sizes large and small; indeed, the market leaders in on-demand OVD services today, Netflix and Hulu, have more subscribers than most facilities-based providers.<sup>6</sup>

Moreover, traditional video providers enjoy no special advantage in the online space that could justify providing a regulatory leg-up to independent providers. Although facilities-based providers today enjoy certain program acquisition rights that flow from regulatory classification as an MVPD, the linear programming interpretation proposed by the Commission would extend those same rights to over-the-top providers. To the contrary (and as explained in Part II *infra*), facilities-based providers are burdened with significant regulatory *disadvantages* from their

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<sup>6</sup> According to its 2014 fourth-quarter earnings report, Netflix has 37.7 million paid U.S. subscribers—millions more than the merged Comcast/Time Warner entity would have if the Commission approves the pending transaction. See Letter from Reed Hastings, CEO, & David Wells, CFO, Netflix, Inc., to Shareholders at 13 (Jan. 20, 2015), available at [http://files.shareholder.com/downloads/NFLX/4029210289x0x804108/043A3015-36EC-49B9-907C-27960F1A7E57/Q4\\_14\\_Letter\\_to\\_shareholders.pdf](http://files.shareholder.com/downloads/NFLX/4029210289x0x804108/043A3015-36EC-49B9-907C-27960F1A7E57/Q4_14_Letter_to_shareholders.pdf); see also Supplemental Declaration of Dr. Gregory L. Rosston & Dr. Michael Topper, *An Economic Analysis of the Proposed Comcast Divestiture Transactions with Charter* at 1 (June 4, 2014), attached to *Public Interest Statement of Comcast Corporation and Charter Communications, Inc., Charter-to-Comcast Exchange Transaction*, MB Docket No. 14-57 (June 4, 2014); <http://corporate.comcast.com/images/REDACTED-COMBINED-As-Filed-2014-06-04-Charter-to-Comcast-with-legend.pdf> (estimating merged subscriber base of Comcast/Time Warner entity to be approximately 29 million customers). And Hulu's subscription service has over six million subscribers, exceeding the current video subscriber counts of each of the next-largest cable companies, Cox, Charter, and Cablevision. See Mike Hopkins, CEO, Today at the Hulu Upfront, April 30, 2014, available at <http://blog.hulu.com/2014/04/30/today-at-the-hulu-upfront/> (noting over six million HuluPlus subscribers in April 2014); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10,496, 10,530 ¶ 70 (2013) (noting 4.7 million Cox subscribers); Charter Communications, Inc., Pro Forma Customer Metrics at 1 (Dec. 31, 2014), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjY5MjQzfENoaWxkSUQ9LTF8VHlwZT0z&t=1> (noting 4.2 million video subscribers at the end of 2014); Cablevision Systems Corp., Press Release, Cablevision Systems Corporation Reports Fourth Quarter and Full Year 2014 Results (Feb. 25, 2015), available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjY5MjQzfENoaWxkSUQ9LTF8VHlwZT0z&t=1> (noting 2.7 million video subscribers at the end of 2014).

classification under the Cable Act (as well as various corresponding state and municipal laws) as cable operators, whereas independent OVDs are not, and never have been, subject to those burdens.

The *Notice* tentatively proposes that, when traditional cable providers offer over-the-top video distribution services, those services be recognized and treated as MVPD services, but not as “cable service” that would cause (directly and indirectly) the many obligations under the Cable Act to attach.<sup>7</sup> Charter applauds this approach as effectively furthering competitive neutrality, and urges the Commission to adopt it.

For the same reason, Charter supports the Commission’s tentative conclusion that a cable-affiliated OVD service, if provided to consumers without regard to whether they subscribe to the cable operator’s managed video service, should be considered a non-cable MVPD service inside and outside of the operator’s footprint, even if it is accessible over that cable operator’s broadband facilities.<sup>8</sup> Indeed, a cable-affiliated OVD service that is not tethered to the cable operator’s managed video service should be considered a non-cable MVPD service regardless of what geographic area it serves.<sup>9</sup> OVD services—whether affiliated with a cable operator or not—may have good cause to limit or tailor their offerings to particular geographical regions, whether to enable cost-effective marketing, to match geographically-specific customer interests, or to facilitate the acquisition of programming licenses. OVD services affiliated with cable providers should have the same flexibility as unaffiliated OVDs to address these issues and structure the geographic reach of their services as they see fit. To conclude otherwise would

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<sup>7</sup> See *Notice*, 29 FCC Rcd at 16,029-30 ¶ 78.

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

skew competition and harm consumers by preventing facilities-based providers from fully entering into the OVD market.

## **II. OVDS—WHETHER AFFILIATED WITH A TRADITIONAL PROVIDER OR NOT—SHOULD BE FREED FROM BURDENSOME LEGACY OBLIGATIONS.**

In addition to affording all OVDs equal regulatory treatment, the Commission should ensure that the costly obligations that unnecessarily limit the flexibility and increase the costs of traditional video services are not imported into the OVD marketplace. The regulatory framework governing traditional cable service—which was devised at a time of near-monopoly conditions over local video delivery that no longer describes the market today—certainly has no application or relevance to the online video delivery market, where consumers face a dizzying array of options and any competitor can enter the space with minimal barriers to entry. Extending legacy requirements online would significantly hamper competition if applied to OVD services, including those affiliated with or operated by traditional providers.

Nowhere is this more true than when it comes to the suite of regulations governing programming carriage and acquisition. As Chairman Wheeler has noted, one of the most promising features of OVD services today is that they offer consumers possibilities for slimmer, tailored programming packages, such that consumers “will not be forced to pay for channels they never watch.”<sup>10</sup> Cable providers have long complained about forced bundling that makes their services more expensive and forced tier placement that prevents them from offering more

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<sup>10</sup> See Chairman Tom Wheeler, *Tech Transitions, Video, and the Future*, Official FCC Blog (Oct. 28, 2014, 1:48PM), <http://www.fcc.gov/blog/tech-transitions-video-and-future> [*hereinafter* “Chairman Wheeler, *Tech Transitions*”] (“Taking advantage of this rule, new OTTs may offer smaller or specialized packages of video programming, so consumers will be able to mix-and-match to suit their tastes.”).

flexible programming lineups.<sup>11</sup> Additionally, cable providers face a host of must-carry and PEG obligations<sup>12</sup> that further force them to purchase and carry content that many consumers do not want. Their online-only counterparts, however, may not be subject to the same carriage obligations and bundling requirements from programmers, particularly if the Commission takes action to further Chairman Wheeler’s vision of “giv[ing] consumers more alternatives from which to choose so they can buy the programs they want.”<sup>13</sup> Nor, as non-cable providers, will they face any of the same must-carry or PEG obligations that require them to increase the complexity of their offerings. Cable-affiliated OVDs should be able to provide consumers the same options—ensuring a robust competitive environment that maximizes benefits for consumers.

These legacy obligations affect not only the ability of traditional video providers to offer flexible programming packages, but also inflict costs that unaffiliated providers do not face. For instance, the forced bundling and tier placement, must-carry, and PEG obligations not only force traditional video providers to carry unnecessarily bloated programming packages, they also make even the most minimal packages more expensive to consumers. Traditional video providers also face costs arising from regulation by state, local and municipal franchising authorities, such as franchise fees related to their physical plant and idiosyncratic local customer service requirements.<sup>14</sup> Those obligations increase the cost of traditional video service, and make it more challenging to offer consistent and rationalized service on a national or regional basis.

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<sup>11</sup> See, e.g., Comments of Charter Communications, Inc., at 2-3, 8-9, RM 11728, (Sept. 29, 2014); Comments of Cablevision Systems Corporation and Charter Communications, Inc., at 1-5, MB Docket No. 10-71 (June 26, 2014).

<sup>12</sup> See 47 U.S.C. §§ 531(b), 534, & 535.

<sup>13</sup> Chairman Wheeler, *Tech Transitions*.

<sup>14</sup> See 47 U.S.C. § 552(a)(1).

Whatever justification may continue to exist for these regulations as they pertain to the operation of local facilities, there is no justification for extending these obligations or requirements to services offered online, where customers have available to them a wide array of competing options and ownership and operation of the underlying facilities is increasingly irrelevant to the ability to provide services over them. To ensure a truly competitive online video market going forward—and to ensure that unaffiliated OVDs are not able to outcompete traditional providers merely because they are favored by regulatory arbitrage—the Commission should ensure that cable and other facilities-based providers who offer OVD services are able to do so free from the legacy costs and obligations of the past.

### **CONCLUSION**

Charter respectfully requests that—in the event the Commission chooses to proceed with its proposed linear programming interpretation—it ensure that all linear OVDs, irrespective of their affiliation with a traditional facilities-based provider, are afforded equal regulatory treatment and that the costly obligations placed on traditional video services are not imported into the OVD marketplace.

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