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

In the Matter of	)	
	)	
Applications of Charter Communications, Inc.	)	
Time Warner Cable, Inc., and	)	MB Docket No. 15-149
Advance/ Newhouse Partnership	)	
	)	
For Consent to Transfer Control of Licenses	)	
and Authorizations	)	

COMMENTS

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EXECUTIVE SUMMARY

In these comments, the American Cable Association ("ACA") demonstrates that the combination of Charter, Time Warner Cable ("TWC) and Advance/Newhouse's Bright House Networks, LLC ("BHN") (collectively "the Applicants") into "New Charter," will result in competitive harm to purchasers of cable programming affiliated with New Charter and to consumers. The transaction involves companies with significant roles in both the downstream video distribution and upstream video programming industry, which provide this programming to multichannel video programming distributors ("MVPDs"). Their combination will create the 3rd largest MVPD in the nation with 17.3 million video subscribers. The program access and arbitration remedies utilized in prior Commission transaction reviews involving similar combinations of programming and distribution assets are inadequate to address these public interest harms. Because these harms are significant and are not counterbalanced by public interest benefits, the Commission cannot approve the proposed combination without adopting specific and meaningful relief.

ACA has a substantial interest in this proceeding. ACA has over 800 members that, as small and medium-sized MVPDs, provide video programming to their subscribers. Of these members, nearly all purchase cable programming networks owned by Discovery Communications ("Discovery"), which is affiliated with both Charter and BHN, and premium network Starz, which is affiliated with Charter. The cable programming affiliated with the Applicants is highly important to competitive MVPDs, and accordingly, ACA members that compete with New Charter will feel the impact of the combination of these video programming and distribution assets.

Transaction-Specific Harm

The proposed transaction involves the vertical integration of important programming assets attributable under the Commission's rules to Charter through the ownership and positional interests of John Malone – Discovery and Starz – with the distribution assets, respectively, of TWC and BHN. As a result, ACA members whose systems today overlap with TWC systems will be purchasing Discovery and Starz programming affiliated with a direct competitor for the first time. Similarly, ACA members whose systems today overlap with BHN for the first time will be purchasing Starz programming affiliated with a direct competitor. This will create new opportunity costs for New Charter in selling its affiliated programming to these MVPDs, thus expanding the harm of vertical integration across a new and wider subscriber base. Further, to the extent that the transaction creates efficiencies that benefit New Charter, it will incentivize Discovery and Starz to charge higher rates and impose more onerous terms and conditions for its programming to MVPD rivals. Competition and consumers will suffer.

The economic theory underlying the ACA's analysis is this: so long as New Charter, Discovery and Starz are able to coordinate their actions to take advantage of opportunities to maximize their combined profits, they will collectively make decisions with that goal in mind. Programming fees will rise because Discovery and Starz will seek to recoup – through their negotiations for program carriage – the opportunity cost of New Charter not acquiring new customers from rival MVPDs.

ACA members that currently compete with Applicants will likely find themselves at greater competitive disadvantage after the transaction is completed. Discovery, which already has a significant incentive to overcharge MVPDs that compete against Charter and BHN, will find that its incentive grows as a result of this transition. Similarly, Starz, which also has an existing incentive to overcharge MVPDs that compete against Charter, will find that its incentive to disadvantage Charter's rivals grows as well. This conclusion is based on economic theory and evidence relied upon by the Commission in analyzing previous transactions involving MVPDs that have interests in programming. In these reviews, the Commission found that companies that own programming have an incentive to disadvantage their rivals in the sale of their affiliated programming *in proportion to their per-video subscriber profits*. In other words, if the profit margin per-video subscriber of a vertically integrated MVPD rises, so does its incentive to harm its rivals either by withholding its programming permanently or temporarily during negotiation impasses, or by forcing them to pay higher prices. Applicants argue that public interest benefits will arise from the transaction as a result of efficiencies gained by the consolidation of these assets, a factor that will likely increase the per-video subscriber profits of New Charter. This too will increase the incentives of its affiliated programmers to raise prices to rival MVPDs.

For these reasons, the Commission should reject Applicants' unsubstantiated claim that the transaction creates no risk of vertical harms. Applicants seek to gloss over the fact that New Charter would be in a position to influence the decisions of Discovery and Starz in setting the prices, terms, and conditions for the sale of their programming to rival MVPDs, that this programming is highly important to competitive MVPDs, and that the Commission's attribution rules recognize that even an ownership stake in a programmer as small as five percent is sufficient to influence the decisions of that programmer. The ownership interests held by John Malone that tie New Charter, Discovery, and Starz together constitute economic interests in national cable programming far greater than the five percent threshold contemplated by the Commission's rules. As a result, the risk of public interest harms is in fact substantial and must be remediated by the Commission with conditions that provide adequate protections for small and medium-sized MVPDs if the applications are to be approved.

Previous Remedial Conditions and Their Flaws

In prior video-related transaction Orders, the Commission has relied on a combination of a non-discriminatory access condition and a commercial "baseball-style" arbitration remedy to lessen the ability of vertically integrated programmers to harm rivals of their affiliated MVPDs. The Commission found that the non-discriminatory access condition was needed to protect against discriminatory practices, whereas a commercial arbitration remedy was required to prevent above fair market value pricing through a uniform pricing strategy.

However, neither the non-discriminatory access condition nor the baseball-style arbitration remedy have been fully effective in the past, and neither will they be sufficient in the future to address the problems created by the combination of Charter, TWC, and BHN. This is particularly true for small and medium-sized MVPDs. In view of the fact that the transaction spreads the scope of the existing harms of Charter's affiliation with Discovery and Starz to regions currently served by TWC and BHN, and increases the existing harm of Charter's affiliation with Discovery and Starz in areas currently served by Charter, the remedial conditions imposed on New Charter must go beyond the largely ineffective remedies previously used by the Commission.

<u>The Non-discriminatory Access Condition</u>. For over a decade, the Commission has relied on a non-discriminatory access condition in transactions combining MVPD distribution and "must have" programming assets, including cable programming networks and local

broadcast stations, to ensure that this content is made available to all MVPDs on a non-exclusive basis and on nondiscriminatory terms and conditions. In nearly all major transactions where demonstrable vertical harms were present, the Commission applied this condition to programming assets not otherwise subject to the program access rules as well as to programming assets already subject to the rules' prohibition on discrimination and exclusivity, demonstrating the Commission's belief in the independent value of imposing a non-discriminatory access obligation in combination with the commercial arbitration remedy.

Flaws in the Non-discrimination Access Condition's Enforcement Procedures. To enforce the non-discriminatory access condition, the Commission has relied upon its program access complaint rules. Unfortunately this enforcement mechanism for the non-discriminatory access condition has two significant flaws that limit its utility for MVPDs, particularly small and medium-sized MVPDs.

First, the Commission's requirement that a discrimination complaint compare the deal offered to the complainant to that offered to a "competing" distributor, when combined with the permissible "volume discount" defense, severely limits any protection for small and medium-sized MVPDs against unjustified discrimination in rates, terms, and conditions. The "competing" distributor requirement unduly restricts choice of the comparison case that an MVPD may use to bring a discrimination complaint by requiring that the service area of the complainant and the comparable MVPD have some geographic overlap. While this restriction may have seemed sensible when adopted in 1993, today the single most important factor in determining prices, terms, and conditions of carriage is subscriber volume. For purposes of establishing discrimination, the geographic restriction may preclude a complainant from basing a discrimination case on the MVPD most comparable to it in fact, making it much more difficult to identify and prove that the reason for the price differential is unjustified under the rules.

Problems with the Commission's limitation on the attributes of an MVPD that may be used as a reasonable comparable in a program access discrimination case are exacerbated by the volume discount defense, which makes identifying unjustifiable discrimination nearly impossible for most small and medium-sized MVPDs, who typically compete against much larger MVPDs. The widespread use of non-disclosure provisions in programming agreements makes it difficult for the Commission to determine whether the higher price charged to the smaller MVPD is justified by legitimate discounts for subscriber volume, or whether it includes unjustified discrimination. The net effect of these flaws is that small and medium-sized MVPDs are unlikely to obtain relief under these enforcement procedures because of the Commission's difficulty in distinguishing legitimate grounds for price differentials from illegitimate ones.

Second, the Commission's rules fail to ensure that MVPDs have the information necessary to determine whether a programmer is acting in a discriminatory manner, which is a vital predicate for an MVPD to protect itself effectively. The rules do not require a programmer to respond to an MVPD's certified request for a "rate card" or other similar data and information to make such an assessment. This, combined with programming industry's practice of keeping MVPDs in the dark about rates charged to other MVPDs for the same programming, makes it impossible for any MVPD to assess whether it is being treated in a discriminatory manner. Although a lack of proof of discrimination does not preclude the filing of a complaint in such cases, the complainant must still base its complaint on a comparison with a competing distributor without the information needed to decide which competing distributor will provide the best comparison case for success on the complaint. Even with an otherwise effective enforcement mechanism, a programmer's ability to keep critical information out of the hands of MVPDs frees the programmer to act on its incentive to discriminate without fear of reprisal.

Commercial Arbitration Remedy. In addition to the non-discriminatory access condition, the Commission has almost invariably imposed a commercial arbitration remedy in recognition of the fact that the non-discriminatory access condition alone would be insufficient to protect against the full extent of vertical harms. This is because the non-discriminatory access condition on its own cannot effectively prevent a vertically integrated programmer from harming its rivals by employing a uniform price increase strategy where it avoids overt discrimination by unvaryingly charging all MVPDs rates above fair market value, including the vertically integrated distributor itself. The commercial arbitration remedy used by the Commission was created to limit the incentive and ability of the vertically integrated programmer to implement this strategy and charge MVPDs rates above fair market value post-transaction.

Flaws in the Commercial Arbitration Procedures. Flaws in the design of the Commission's commercial arbitration remedy have rendered it ineffective for small and medium-sized MVPDs. The lack of critical information that undermines the utility of the program access complaint procedures for small and medium-sized MVPDs has a similar effect on the usefulness of the arbitration remedy. With no access to critical information on market rates for programming, a small or medium-sized MVPD cannot accurately assess during its negotiations whether it is being offered programming at its fair market value. Moreover, this lack of knowledge leaves these MVPDs unable to formulate an informed final offer at the start of the arbitration process. Faced with the understanding that a vertically-integrated programmer has significantly greater access to the information that is relevant to an arbitrator's determination of which final offer received is closest to fair market value; these MVPDs believe the remedy is not worth utilizing because their chances of prevailing in the arbitration are low. For these reasons, the baseball-style commercial arbitration remedy the Commission has employed has never lived up to its expectations as an effective antidote to the incentive and ability of vertically integrated programmers to charge rates above fair market value, particularly for small and medium-sized MVPDs.

In view of the fact that this transaction increases the existing harms of Discovery and Starz's affiliation with Charter and spreads the harm of Starz affiliation with Charter to areas served today by TWC and BHN, the Charter-TWC-BHN transaction calls for the imposition of conditions more effective than those used previously by the Commission in previous cases and specifically targeted to improve their functionality for small and medium-sized MVPDs.

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COMMENTS

AMERICAN CABLE ASSOCIATION

I. INTRODUCTION

The American Cable Association ("ACA") submits these Comments in response to the Public Notice issued by the Commission in the above captioned proceeding requesting comment on the application filed by Charter Communications, Inc. ("Charter"), Time Warner Cable Inc. ("Time Warner Cable" or "TWC"), and Advance/Newhouse Partnership ("Advance/Newhouse") (collectively, "Applicants") seeking consent to transfer control of various Commission licenses in connection with a series of proposed transactions through which Charter, Time Warner Cable and Advance/Newhouse's Bright House Networks ("BHN") will merge ("the transaction") into a company referred to as "New Charter."[1]

[1] *Commission Seeks Comment on Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations*, Public Notice, MB Docket No. 15-149 (rel. Sep. 11, 2015) ("Public Notice").

ACA maintains, and will demonstrate, that the transaction will harm consumers and competition in the multichannel video programming distributor ("MVPD") marketplace. Specifically, the transaction will increase the incentive and ability of cable programmers affiliated with New Charter, such as Discovery and Starz, to impose higher prices and more onerous terms and conditions on MVPDs whose service areas overlap with those of TWC and BHN, and will increase their incentive to raise prices in areas that overlap with Charter today.

ACA and its over 800 members that, as MVPDs, provide video programming to their subscribers, have a substantial interest in this proceeding. Of these members, nearly all purchase cable programming networks owned by Discovery Communications ("Discovery"), which is affiliated with both Charter and BHN, and premium network Starz, which is affiliated with Charter. Many of these members also compete against TWC, Charter and BHN.

As a result of the transaction, ACA members whose systems today compete against TWC will be for the first time purchasing Discovery programming from a direct competitor – New Charter. Similarly, ACA members whose systems today compete against TWC and BHN will be for the first time purchasing Starz programming affiliated with this competitor. The vertical integration with expanded New Charter will create new incentives and abilities for Discovery and Starz to impose higher prices and more onerous terms and conditions on New Charter's rivals. Additionally, to the extent that the transaction creates efficiencies that benefit Charter and BHN, the combination of the Charter, TWC and BHN distribution assets will incentivize Discovery and Starz to charge higher prices and more onerous terms and conditions for its programming to rivals of current Charter and BHN systems and for Starz programming to all rivals of New Charter systems.

Although Applicants maintain that "New Charter [will] have no incentive or ability to harm competition with other MVPDs" because it is not a "significant owner" of content and the "programming controlled by the merging entities is limited to various local and regional networks,"[2] this implausibly narrow view of the potential harms posed by the transaction should be given little credence. To the contrary, ACA will demonstrate that the Applicants have significant ownership stakes in national cable programming assets that are highly important to competitive MVPDs. Accordingly, the Commission must adopt remedial conditions to ameliorate these harms. However, it is not enough for the Commission to simply adopt the same type of remedial conditions it has previously adopted to ameliorate harms similar to those presented by this merger because these conditions have proven ineffective for small and medium-sized MVPDs. The Commission cannot approve the application unless it crafts new remedies that can be used by the smaller MVPDs harmed by the merger.

II. STANDARD OF REVIEW

Under Section 310(d) of the Communications Act, the Commission must determine whether Applicants have demonstrated that the proposed assignment and transfer of control of certain Commission licenses and authorizations held by Applicants as part of the proposed transaction will serve "the public interest, convenience, and necessity."[3] In making this

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[2] *Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations*, MB Docket No. 15-149, Public Interest Statement at 52 (filed Jun. 25, 2015) ("Public Interest Statement").

[3] Section 310(d) of the Act requires that the Commission consider applications for transfer of Title III licenses under the same standard as if the proposed transferee were applying for licenses directly under Section 308. 47 U.S.C. § 310(d). *See*, *e.g.*, *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶ 22 (2011) ("Comcast-NBCU Order"); *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, To Sirius Satellite Radio Inc., Transferee*, Memorandum Opinion and Order, 23 FCC Rcd 12348, ¶ 30 (2008) ("XM-Sirius Order"); *News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd 3265, ¶ 22 (2008) ("Liberty-News-DirecTV Order"); *Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, Memorandum Opinion and Order, 21 FCC Rcd 8203, ¶ 23 (2006) ("Adelphia Order"); *SBC Comm. Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, ¶ 16 (2005) ("SBC-AT&T Order"); *Verizon Comm., Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18433, ¶ 16 (2005) ("Verizon-MCI Order"); *General Motors Corporation and Hughes Electronics Corporation,*

determination, the Commission must first assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules. If the proposed transaction will not violate a statute or rule, the Commission next must consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act or related statutes.[4] The Commission then employs a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits.[5] Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, will serve the public interest.[6] If the Commission is unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, the application must be designated for hearing.[7]

The Commission's public interest evaluation necessarily encompasses the "broad aims of the Communications Act,"[8] which include, among other things, "a deeply rooted preference for preserving and enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, ensuring a diversity of information sources and services to

Transferors, and The News Corporation Limited, Transferee, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 18 (2004) ("News-Hughes Order").

[4] *See*, *e.g.*, Comcast-NBCU Order, ¶ 22; XM-Sirius Order, ¶ 30; Liberty-News-DirecTV Order, ¶ 22; SBC-AT&T Order, ¶ 16; Verizon-MCI Order, ¶ 16.

[5] *See id.*; News-Hughes Order, ¶ 15.

[6] *See*, *e.g.*, Comcast-NBCU Order, ¶ 22; XM-Sirius Order, ¶ 30; Liberty-News-DirecTV Order, ¶ 22; SBC-AT&T Order, ¶ 16; Verizon-MCI Order, ¶ 16; *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations) (Transferors) and EchoStar Communications Corporation (a Delaware Corporation) (Transferee)*, Hearing Designation Order, 17 FCC Rcd 20559, ¶ 25 (2002) ("EchoStar-DirecTV Order").

[7] 47 U.S.C. § 309(e); *see also* Comcast-NBCU Order, ¶ 22; XM-Sirius Order, ¶ 30; Liberty-News-DirecTV Order, ¶ 22; Adelphia Order, ¶ 23; SBC-AT&T Order, ¶ 16; Verizon-MCI Order, ¶ 16; EchoStar-DirecTV Order, ¶ 25.

[8] *See*, *e.g.*, Comcast-NBCU Order, ¶ 23; XM-Sirius Order, ¶ 31; Liberty-News-DirecTV Order, ¶ 23; News-Hughes Order, ¶ 16; EchoStar-DIRECTV Order, ¶ 26.

the public, and generally managing spectrum in the public interest."[9] The Commission's public interest analysis may also entail assessing whether the transaction will affect the quality of communications services or will result in the provision of new or additional services to consumers.[10] In conducting this analysis, the Commission may consider technological and market changes as well as trends within the communications industry, including the nature and rate of change.[11]

The Commission's competitive analysis, which forms an important part of the public interest evaluation, is informed by, but not limited to, traditional antitrust principles.[12] The Commission and the Department of Justice ("DOJ") each have independent authority to examine the competitive impacts of proposed communications transactions involving transfers of Commission licenses, but the standards governing the Commission's competitive review differ somewhat from those applied by the DOJ.[13] Like the DOJ, the Commission considers how a transaction will affect competition by defining a relevant market, looking at the market power of incumbent competitors, and analyzing barriers to entry, potential competition and the efficiencies, if any, that may result from the transaction. The DOJ's review, however, focuses on whether a transaction may substantially lessen competition or tend to create a monopoly.[14]

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[9] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 ("1996 Act"), *codified at* 47 U.S.C. § 157; 47 U.S.C. §§ 254, 332(c)(7); 1996 Act, Preamble; Comcast-NBCU Order, ¶ 23; XM-Sirius Order, ¶ 31; Liberty-News-DirecTV Order, ¶ 23.

[10] *See*, *e.g.,* Comcast-NBCU Order, ¶ 23; XM-Sirius Order, ¶ 31; Liberty-News-DirecTV Order, ¶ 23.

[11] *See id.*

[12] *See*, *e.g.*, Comcast-NBCU Order, ¶ 24; XM-Sirius Order, ¶ 32; Liberty-News-DirecTV Order, ¶ 24; Adelphia Order, ¶ 25; News-Hughes Order, ¶ 17; EchoStar-DirecTV Order , ¶ 27.

[13] *See*, *e.g*., Comcast-NBCU Order, ¶ 24; XM-Sirius Order, ¶ 32; Liberty-News-DirecTV Order, ¶ 24; Verizon-MCI Order, ¶ 18; SBC-AT&T Order,¶ 18. *See also Satellite Business Systems*, 62 FCC 2d 997, 1088 (1977), *aff'd sub nom. United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*); *Northern Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice…must apply").

[14] 15 U.S.C. § 18.

Under the Commission's review, the Applicants must show that the transaction affirmatively will serve the public interest. Otherwise, the application is set for hearing. Whereas the DOJ's review is also limited solely to an examination of the competitive effects of the acquisition, without reference to other public interest considerations,[15] the Commission's competitive analysis under the public interest standard is somewhat broader.

The Commission's analysis recognizes that a proposed transaction may lead to both beneficial and harmful consequences.[16] For instance, combining assets may allow a firm to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.[17] The Commission's public interest authority enables it, where appropriate, to impose and enforce transaction-related conditions that ensure that the public interest is served by the transaction.[18]

Section 303(r) of the Act authorizes the Commission to prescribe restrictions or conditions not inconsistent with law that may be necessary to carry out the provisions of the Act.[19] Indeed, unlike the role of antitrust enforcement agencies, the Commission's public interest authority enables it to rely upon its extensive regulatory and enforcement experience to impose and enforce conditions to ensure that the transaction will yield overall public interest

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[15] *See*, *e.g.*, XM-Sirius Order, ¶ 32.

[16] *See*, *e.g.*, Comcast-NBCU Order, ¶ 25; XM-Sirius Order, ¶ 33; Adelphia Order, ¶ 25; SBC-AT&T Order, ¶ 18; Verizon-MCI Order, ¶ 18.

[17] *See*, *e.g.*, XM-Sirius Order, ¶ 33; Liberty-News-DirecTV Order, ¶ 25; Adelphia Order, ¶ 25.

[18] *See*, *e.g.*, Comcast-NBCU Order, ¶ 25; XM-Sirius Order, ¶ 33; Liberty-News-DirecTV Order, ¶ 26.

[19] 47 U.S.C. § 303(r); *see* also Comcast-NBCU Order, ¶ 25; XM-Sirius Order, ¶ 33; Liberty-News-DirecTV Order, ¶ 26; *U.S. v. Southwestern Cable Co*., 392 U.S. 157, 178 (1968) (holding that section 303(r) permits the Commission to order a cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (affirming syndicated exclusivity rules adopted pursuant to section 303(r) authority). Similarly, Section 214(c) of the Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c); *see also* SBC-AT&T Order, ¶ 19; Verizon-MCI Order, ¶ 19.

benefits.[20] Further, the Commission has held that it will impose conditions to confirm specific benefits or remedy specific harms likely to arise from the transaction and that are related to the Commission's responsibilities under the Act and related statutes.[21]

For the reasons explained below, on balance, the proposed transaction threatens public interest harms that are not outweighed by the projected public interest benefits of the combination. Accordingly, the Commission must either reject the application or consider the imposition of conditions, beyond those imposed in previous transactions, to ensure that the transaction will be, on balance, consistent with the public interest.

III. THE PROPOSED MERGER THREATENS SERIOUS PUBLIC INTEREST HARMS

Applicants argue that the transaction creates no risk of public interest harms to the traditional video programming distribution marketplace because "New Charter will have neither the incentive nor the ability to interfere with it."[22] They reason that because New Charter "will not be a significant owner of content" and that "so much of that will be local and regional, the concerns the Commission has previously expressed regarding vertical integration of video programming and MVPD are not relevant here."[23] Further, they reason that Liberty Broadband and Advance/Newhouse affiliated programming interests will not influence New Charter's programming decisions because New Charter "will have no financial interest in the success of programming affiliated with those entities."[24]

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[20] *See*, *e.g.*, Comcast-NBCU Order, ¶ 25; XM-Sirius Order, ¶ 33; Liberty-News-DirecTV, ¶ 26; News Corp.-Hughes Order, ¶ 5; *see also Schurz Communications, Inc. v. FCC*, 982 F.2d 1043, 1049 (7th Cir. 1992) (discussing Commission's authority to trade off reduction in competition for increase in diversity in enforcing public interest standard).

[21] *See*, *e.g.*, Comcast-NBCU Order, ¶ 25; Liberty-News-DirecTV Order, ¶ 26; SBC-AT&T Order, ¶ 19; Verizon-MCI Order, ¶ 19.

[22] Public Interest Statement at 43, 52.

[23] *Id.* at 52.

[24] *Id.* at 53.

ACA respectfully disagrees. Applicants vastly understate the web of affiliated relations between the video distribution and programming assets that are united by this transaction – particularly the programming assets of Liberty Broadband and its controlling shareholder, John Malone, and the greatly expanded distribution assets of New Charter, in which John Malone also holds substantial ownership interests through his interests in Liberty Broadband – and the impact of their combination on rival MVPDs and their subscribers. As discussed below, vertical harm to MVPD purchasers of cable-affiliated programming occurs regardless of the *amount* of content owned or affiliated with a cable operator; it arises from the affiliation alone, which both Congress and the Commission have recognized gives the cable affiliated programmer the incentive and ability to raise rivals' costs through the prices, terms, and conditions it demands for its programming. Such harms can arise through use of foreclosure, artificial price hikes, and discriminatory pricing strategies.

A. The Merger Unites Substantial Video Distribution and Programming Assets.

Through a series of related transactions, Charter, Time Warner Cable, and BHN will merge into "New Charter." The Charter-TWC-BHN deal involves companies with significant roles in both the downstream video distribution and upstream video programming industry, which provides this programming to MVPDs. Charter is currently the seventh-largest MVPD, serving 4.2 million residential video customers.[25] Liberty Broadband has held a controlling interest in Charter since early 2013. Time Warner Cable also provides video services through cable systems across the country, and owns and manages a number of regional sports networks ("RSNs").[26] TWC's cable systems serve approximately 10.8 million video customers,

[25] *Id.* at 8.

[26] Among the programming interests owned by TWC that will be acquired by New Charter are two regional sports networks ("RSNs") in the Los Angeles designated market area ("DMA") – Time Warner Cable SportsNet and Time Warner Cable Deportes, which carry Los Angeles Lakers basketball games and other regional programming, as well as an RSN in the New York DMA, SportsNet New York, in which TWC owns a 28.9 percent interest. The Commission has repeatedly recognized the "must have" nature of RSN programming in both rulemaking and transaction review proceedings, and the incentive and ability

making it the fourth largest MVPD in the United States.[27] Bright House Networks is the tenth-largest MVPD in the United States, serving over 2 million video customers.[28] According to Applicants, Advance/Newhouse, BHN's parent, also holds a 32.81 percent attributable interest in national programming services provided by Discovery.[29] New Charter will reportedly own or manage systems serving approximately 17.3 million video customers across 41 states post-transaction, making it the 3rd largest MVPD in the country.[30]

As a result of the transaction, media executive John Malone will have significant ownership interests in New Charter through his ownership of Liberty Broadband stock; he currently has substantial direct ownership interests in Discovery and Starz. Specifically, Malone directly controls approximately 29% of Discovery's aggregate voting power[31] and has beneficial ownership interests in Starz of 46.6%.[32] Both ownership interests far exceed the five percent

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of cable-affiliated RSNs to disadvantage unaffiliated MVPDs in the prices, terms and conditions for access to their programming. *See* News-Hughes Order, ¶ 4; Adelphia Order, ¶ 42; Liberty-News-DirecTV Order, ¶ 65; Comcast-NBCU Order, ¶ 36; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, ¶¶ 37-38, 39, n. 193 (2007); *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, ¶ 34 (2010) ("2010 Terrestrial Loophole Order"). In these comments, ACA focuses its analysis of the transaction-specific harms on the national cable programming networks that will be affiliated with New Charter post-transaction.

[27] Public Interest Statement at 10.

[28] *Id.* at 12.

[29] *Id.* at 13. Based on publicly available sources, it does not appear that Advance/Newhouse's ownership interest in Discovery will pass to New Charter along with the interests in BHN. Nonetheless, Discovery would remain affiliated with New Charter through John Malone.

[30] Public Notice at 5; *see* Mike Farrell, *Eat or Be Eaten: Consolidation Creates A Top-Heavy List of the 25 Largest MVPDs*, MULTICHANNEL NEWS at 8-10 (Aug. 17, 2015).

[31] Discovery Communications, Inc., Annual Report (Form 10-K) at 23 (Feb. 19, 2015).

[32] Starz, Inc., Amendment to Statement of Beneficial Ownership Report, Schedule 13D at 4 (Feb. 10, 2015) (describing a proposed stock exchange transaction under which Mr. Malone and affiliated trusts would exchange shares in Starz for shares in Lions Gate Films and noting that "after giving effect to certain rights of the Malone Stockholders relating to the voting and disposition of the Starz Exchange Shares (as defined below), Mr. Malone may be deemed to beneficially own voting equity securities of the Issuer representing approximately 46.6% of the voting power with respect to the general election of directors of the Issuer."); s*ee also* Starz, Inc., Annual Report (Form 10-K), (Feb. 24, 2015).

threshold for cable affiliation under the Commission's program access rules.[33] Given the existence of such common ownership in New Charter, Discovery, and Starz, the affiliated programmers will have the incentive to impose higher prices and more onerous terms and conditions on rivals of New Charter.

B. The Proposed Charter-TWC-BHN Transaction Will Enhance the Vertical Harm Associated with Charter's Vertical Integration with Discovery and Starz.

The proposed transaction involves the vertical integration of important programming assets attributable to Charter through ownership and positional interests of John Malone – Discovery and Starz – with the distribution assets, respectively, of TWC and BHN.[34] After the transaction ACA members whose systems today overlap with TWC systems will be purchasing Discovery and Starz programming affiliated with a direct competitor for the first time, and ACA members whose systems today overlap with BHN will be purchasing Starz programming affiliated with a direct competitor for the first time. This will create new opportunity costs for New Charter in selling its affiliated programming to these MVPDs, thus expanding the harm of vertical integration across a new and wider subscriber base.

Once Charter acquires TWC's and BHN's distribution assets, the scope of this vertical harm will grow significantly through the increased overlap of New Charter's service territory with that of rival MVPDs in areas previously served by TWC and BHN. To analyze the vertical harms posed by similar transactions in the past, the Commission has accepted use of the Nash bargaining framework.[35] As ACA has explained in many previous filings, according to the

[33] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, Appendix B, Table B-1 (2015) (listing Liberty Media-affiliated programming networks).

[34] The transaction will also vertically integrate the RSNs owned by TWC with New Charter.

[35] *See* Comcast-NBCU Order, ¶ 46 and Appendix B, Section 1.B (describing Nash bargaining model consisting of four variables – (i) the opportunity cost for an MVPD to sell its programming assets to a rival MVPD, (ii) the diversion rate, (iii) the departure rate if programming is withheld, and (iv) the monthly profit – and the vertical price increases for Comcast-NBCU merger).

model, increases in a vertically integrated MVPD's profits per subscriber will increase its opportunity cost of selling its programming to its rivals.[36] In other words, by providing popular programming to a rival MVPD, a vertically integrated distributor risks losing existing or potential customers to that competitor. So to recoup the higher opportunity costs borne by their affiliated MVPD, a vertically integrated programmer will extract higher programming fees from rivals of their affiliate.[37] Rival MVPDs paying these higher programming fees then must pass along some or all of these higher costs to their subscribers.[38]

These conclusions are based upon economic theory and evidence relied upon by the Commission in analyzing previous transactions involving MVPDs that have interests in programming.[39] In these reviews, the Commission found that vertically integrated MVPDs have an incentive to disadvantage their rivals in the sale of their affiliated programming *in proportion to their per-video-subscriber profits*. In other words, if the profit margin per video subscriber of a vertically integrated MVPD rises, so does its incentive to harm its rivals by either withholding its

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[36] *See Applications of Comcast Corporation, General Electric Company, and NBC Universal, Inc., to Assign and Transfer Control of FCC Licenses,* MB Docket No. 10-56, Comments of the American Cable Association at 28-30 (filed June 21, 2010) (ACA Comcast-NBCU Comments"); Reply Comments of the American Cable Association at 6 (filed Aug. 19, 2010) ; *Applications of Comcast Corporation and Time Warner Cable Inc., Charter Communications Inc. and SpinCo for Consent to Assign Licenses or Transfer Control of Licenses, Comments of the American Cable Association*, MB Docket No. 14-57, Comments of the American Cable Association at 16-17 (filed Aug. 25, 2014) ("ACA Comcast-TWC Comments"); *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Comments of the American Cable Association at 14-16 (filed Sept. 15, 2014) ("ACA AT&T-DirecTV Comments"); Reply Comments of the American Cable Association at 4 (filed Jan. 7, 2015) ("ACA AT&T-DirecTV Reply Comments").

[37] Increases in opportunity cost have the same impact on programming fees as increases in direct cost. In the absence of other information, a standard and well-accepted practice in economic theory is to predict that the negotiated price between a buyer and seller will rise by half the amount of any cost increase.

[38] *See* ACA Comcast-NBCU Comments at 29; ACA Comcast-TWC Comments at 16-17, Exhibit A at 21-22; ACA AT&T-DirecTV Comments at 14-20. *See also Applications of AT&T and DirecTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Letter from Barbara Esbin to Marlene Dortch, Attachment at 6.

[39] In the Comcast-NBCU Order, for example, the Commission accepted that a "higher opportunity cost for selling its programming due to the merger gives a Comcast a greater incentive to raise the prices for its programming to rival MVPDs." Comcast-NBCU Order, ¶ 37.

programming permanently or temporarily during negotiation impasses, or simply by forcing them to pay higher prices for this programming.

Applicants assert that their proposed deal creates efficiencies, explaining that, "[t]he transaction brings synergies that will substantially reduce the Applicants' costs. Such 'merger-specific cost saving efficiencies' will be driven by increased scale in this transaction, and are a transaction-specific benefit of this Transaction."[40] Among the areas of cost savings anticipated is video programming,[41] which is known to comprise close to 40 percent of an MVPD's cost of serving a video subscriber.[42] To the extent this is true, a substantial reduction in costs achieved through the greater volume discounts New Charter can expect to receive as a result of its expanded subscribership will increase its per-video subscriber profits. This increased per-video subscriber profit will augment the incentive of New Charter-affiliated programmers to raise prices for their programming when selling to MVPDs that are rivals to Charter and BHN.

C. Applicants' Claims that the Transaction Will Not Cause Vertical Harm Are Unsubstantiated.

Applicants maintain that the transaction does not raise vertical concerns because (i) the merged company would not own any controlling interests in nationwide broadcast or cable networks, (ii) New Charter would not be a significant owner of content as the programming controlled by the merging entities is limited to various local and regional networks, and (iii) because New Charter would have no economic interests in Liberty Broadband,

[40] Public Interest Statement at 31.

[41] *See Applications of Charter Communications, Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Cable Television Relay Service Applications*, MB Docket No. 15-149, Letter from John L. Flynn to Marlene H. Dortch at 1-2 (filed Jul. 10, 2015) (describing costs savings expected to result from savings on video programming costs which, once achieved, are expected to grow).

[42] *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 15-158, Comments of the American Cable Association, Cartesian Report at 7 (smaller scale MVPDs "typically pass along 60% of their video revenues to programmers for programming fees").

Advance/Newhouse, or any of those two entities' affiliates, it would have no financial stake in the success of programming affiliated with those entities.[43]

Applicants are wrong to focus on the quantity of cable programming owned, or the lack of *Charter's* financial stake in programming affiliated with Liberty Broadband, Advance/Newhouse, or any of those two entities' affiliates. While it is true that the merged company would not own any controlling interests in nationwide broadcast or cable networks, the Commission's attribution rules recognize that other relationships lead to a cognizable influence over a programmer's decisions.[44] The financial interests relevant to an analysis of the harms of this transaction are those that are, and will be, owned or controlled by *John Malone* in Charter, New Charter, Liberty Broadband, Discovery and premium channel Starz, which constitute attributable ownership interests under the Commission's rules.[45]

The cable programming that will be affiliated with New Charter is extremely important to MVPDs and their subscribers and is not, as Applicants suggest, limited to various local and regional networks. New Charter will be in a position to influence the negotiating decisions of Discovery and Starz, and these are large national cable programmers purchased by most

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[43] Public Interest Statement at 50-54, 58-59. Applicants' economic expert, Fiona Scott Morton, notes in her report that Liberty Broadband will hold a minority interest in New Charter and that John Malone holds a minority interest in Liberty Broadband, but because Mr. Malone lacks a controlling interest, "he will not have the ability to require New Charter to favor any interests he might have in video programming." *See* Public Interest Statement, Exhibit D, Fiona Scott Morton, Public Interest Statement concerning the Merger of Charter, Bright House, and Time Warner Cable, at 12.

[44] *See* 47 C.F.R. § 76.501.

[45] *See* 47 C.F.R. § 76.501; *see also* Ryan Faughnder and Meg James, *Lionsgate and Starz in advanced merger talks, sources say*, LA TIMES, Oct. 5, 2015, *available at* http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-lionsgate-starz-merger-20151005-story.html (John Malone, holder of minority interests in Charter, Lionsgate and Starz, reported to be pushing merger between Lionsgate and Starz; analysts speculate Malone could become bigger player in Lionsgate, with poised to later take over media giants such as Viacom Inc., CBS Corp., or even Time Warner Inc.); *see also* Miriam Gottfried, *John Malone's Media Mashup: Starz Aligning*, THE WALL STREET JOURNAL, Sept. 16, 2015, *available at* http://www.wsj.com/articles/john-malones-media-mashup-starz-aligning-1442426887 (reporting on both potential sale of Starz to AMC or to Lionsgate, also partly owned by John Malone and noting that "Liberty spun off Starz in January 2013, and Mr. Malone retains a big voting stake in the premium channel").

MVPDs. The Commission has repeatedly recognized that cable programming "is not akin to so many widgets" and that the salient point is not the total number of programming networks available, "'but rather the popularity of the particular programming that is withheld and how the inability of competitive MVPDs to access that programming in a particular local market may impact their ability to provide a commercially attractive MVPD service.'"[46] Discovery has long been cited by MVPDs as among the group of marquee or "must have" vertically integrated cable programming networks that are necessary if competitive providers are to offer consumers an attractive channel line-up.[47] Discovery was recently ranked the eighth most popular cable network.[48] Similarly, Starz is well positioned among premium cable networks, trailing only HBO in subscriber numbers.[49]

The Commission also has long recognized both the competitive importance of cable programming networks affiliated with distributors through ownership or positional interests held by John Malone, and that vertical integration between MVPDs and programmers can result in competitive harms not remedied by the program access rules alone that must be addressed through transaction-specific remedial conditions.[50] In its order approving license transfers associated with the merger of Liberty Media and DirecTV ("Liberty-News-DirecTV Order"), the Commission found that "the vertical integration of Liberty Media with DirecTV would increase

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[46] 2010 Terrestrial Loophole Order, ¶ 34 (2010), quoting *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity and Video Programming Distribution: Section 628(c)(5) of the Communications Act; Sunset of Exclusive Contract Prohibition*, Report and Order, 17 FCC Rcd 12124, ¶ 33 (2002) ("2002 Program Access Order").

[47] *See* 2002 Program Access Order, ¶ 28.

[48] MEDIALIFE, *Media By The Numbers, This week's cable ratings*, Oct. 7, 2015, *available at* http://www.medialifemagazine.com/this-weeks-cable-ratings/; *see also* Discovery Press Web, Discovery Channel Delivers Third Consecutive Record-Breaking Quarter in Ratings and Viewership, Oct. 5, 2015, *available at* https://press.discovery.com/us/dsc/press-releases/2015/discovery-channel-delivers-third-consecutive--3668/.

[49] Tony Maglio, *Starz Hits New High of 23.7 Million Subscribers, Tops Wall Street Financial Forecast*, THE WRAP, Apr. 30, 2015, *available at* https://www.thewrap.com/starz-q1-subscribers-revenue-earnings-encore-chris-albrecht/.

[50] News-Hughes Order, ¶ 71.

the merged firm's incentive and ability to engage in anticompetitive conduct with respect to its affiliated broadcast and non-broadcast programming."[51] Liberty Media and Discovery programming was found to be the same "type of nationally-distributed, general interest programming that the Commission sought to address via the News Corp.-Hughes program access condition. That is, Liberty Media and Discovery each control popular programming networks that create similar nationally distributed and popular content without closer substitutes," and "are similarly situated within the corporate hierarchy of entities controlled by John Malone."[52]

With respect to vertical harms, the Commission noted that the concerns raised by commenters about fair and non-discriminatory access to Liberty Media's and Discovery's cable programming "echo the competitive concerns addressed in Section 628(c)(2) and the Commission's implementing rules," and agreed that the combination of Liberty Media and DirecTV would present the same potential for harm that the program access rules were designed to prevent or mitigate.[53] It found that "post-transaction, Liberty Media and John Malone would have an incentive and ability to unduly influence the decisions of attributable programming networks to improve DIRECTV's competitive position. Underpinning the program access rules is a recognition by Congress and the Commission that the incentive to engage in anticompetitive pricing or withholding strategies implicitly exists where there is vertical integration."[54] To guard against corporate restructurings eliminating the protections afforded by

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[51] Liberty-News-DirecTV Order, ¶ 65. At the time, Discovery was affiliated with a cable operator through Liberty Media investments by virtue of John Malone's board membership and ownership interests, subjecting Liberty Media and the satellite-delivered programming services in which it holds an interest, including Discovery, to the program access rules. *See id.*, ¶ 76 n. 221.

[52] Liberty-News-DirecTV Order, ¶ 78.

[53] *Id.*, ¶¶ 77, 79.

[54] *Id.*, ¶ 79. The Commission explained further that the Section 628(b) does not impose a threshold burden on complainants to establish that they have suffered harm as a result of the proscribed conduct because "Congress has already determined [this conduct] causes anticompetitive harm." *Id.*

the program access rules, the Commission separately imposed program access conditions on both Liberty Media and to Discovery, "for so long as John Malone or any other officer or director of Liberty Media or DIRECTV holds an attributable interest in Discovery and for so long as Liberty Media holds an attributable interest in DIRECTV, provided our program access rules are in effect."[55] Thus, the Commission has recognized that the cable programming networks affiliated through John Malone and the Liberty families of companies, including Discovery and Starz, were important enough to unaffiliated MVPDs to place them under a non-expiring non-discriminatory access condition.[56]

The Commission came to a similar conclusion in the Comcast-NBCU Order, where it noted that the combination of Comcast distribution and programming assets with NBCU programming assets would give Comcast an incentive and ability to charge competing MVPDs higher prices for its programming. There, the Commission was concerned both that Comcast would withhold broadcast, regional sports, and its suite of important national cable programming networks from other distributors, and that it would raise the prices for such programming, finding, with respect to the latter form of harm that:

> Comcast-NBCU will negotiate more aggressively relative to pre-transaction NBCU when selling NBCU content to Comcast's video distribution rivals. Unlike the pre-transaction NBCU, the integrated firm will take into account the possibility that any harm from failure or delay in reaching agreement would be offset to some extent by a benefit to Comcast, as reaching a higher price would raise the costs of Comcast's rivals. As a result, the transaction will improve Comcast-NBCU's bargaining position, leading to an increase in programming costs for Comcast's video distribution rivals.[57]

[55] *Id.*, ¶ 79. The Commission noted, however, that the condition adopted with respect to Discovery "will not become operative unless Discovery is no longer a 'cable satellite programming vendor' subject to program access rules." *Id.*

[56] While John Malone's precise ownership and positional interests in various media companies has not remained static since the Liberty-New-DirecTV Order, the same principles the Commission relied on in that transaction apply in the current case.

[57] Comcast-NBCU Order, ¶ 37.

So too, Applicants' focus on the lack of economic interests New Charter will hold in Liberty Broadband and Advance/Newhouse, and consequent lack of financial stake in the success of programming affiliated with those entities, is misplaced. What matters for access to programming by rival MVPDs is whether an entity having a small stake in a programming asset is enough to influence its activities. The Commission has found that having a stake as small as five percent in a video programmer is enough to influence the decisions of that programmer. John Malone has far greater stakes in Discovery and Starz and has a substantial ownership stake in Charter. These are not insignificant economic interests under the Commission's rules.

* * *

In summary, the transaction will cause increased vertical harm arising from the enhanced affiliation of Discovery and Starz programming with New Charter distribution assets. The existing vertical harm from the vertical integration, respectively, of Charter, Discovery, and Starz, and of BHN and Starz, will grow. First, the increased number of homes passed by New Charter as a result of its acquisition of TWC and BHN creates the opportunity to attract subscribers from rival MVPDs, giving rise for the first time to opportunity costs when those subscribers are served by unaffiliated MVPDs. These opportunity costs will be factored in the rates, terms, and conditions offered to rival MVPDs by Discovery and Starz in former TWC areas, and by Starz in former BHN areas. Second, the merger will likely increase the per-video subscriber profits for New Charter due, in part, to the efficiencies created by aggregating the combined programming buying power of Charter, TWC and BHN. This will enable New Charter to command greater volume discounts from programmers, thus lowering it's per video subscriber costs and raising its video-related profits. Increased profits to New Charter, in turn, will increase the incentives of New Charter-affiliated programmers to raise prices or demand more onerous terms and conditions from rival MVPDs in areas now served by Charter. No public interest benefits or arguments or conditions proffered by the Applicants will offset this transaction-specific harm.

IV. FLAWS IN THE REMEDIAL CONDITIONS THE COMMISSION TRADITIONALLY RELIES UPON TO ADDRESS SOME OF THE COMPETITIVE HARMS OF SIMILAR TRANSACTIONS HAVE LIMITED THEIR EFFECTIVENESS FOR SMALLER MVPDS

As demonstrated above, the Charter-TWC-BHN transaction will cause vertical harm to competition in the MVPD marketplace and to consumers of MVPD services. The Commission has recognized similar vertical harms in its review of previous transactions involving distribution and programming assets, and has attempted to address such harms through remedial conditions.[58]

To date, in crafting remedial conditions for transactions uniting programming and MVPD distribution assets, the Commission has largely relied on a combination of a non-discriminatory access condition and a commercial "baseball-style" arbitration remedy to lessen the ability of vertically-integrated programmers to harm rivals of their affiliated MVPDs.[59] However, as ACA has previously demonstrated, neither the non-discriminatory access condition nor the baseball-style arbitration remedy have been fully effective in addressing the problems created by the instant transaction, particularly for small and medium-sized MVPDs.[60] In view of these facts, and since this transaction increases existing harms of Charter affiliation with Discovery and Starz, and BHN's affiliation with Discovery, the remedial conditions imposed on New Charter must go beyond those previously used by the Commission.

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[58] News-Hughes Order, ¶ 223; Liberty-News-DirecTV Order, ¶ 64; Adelphia Order, ¶¶ 140, 155; Comcast-NBCU Order, ¶¶ 116, 121.

[59] *See* Comcast-NBCU Order, Appendix A; Adelphia Order, Appendix B; Liberty-News-DirecTV Order, Appendix B; News-Hughes Order, Appendix F.

[60] *See* ACA Comcast-TWC Comments at 31-39; *Applications of Comcast Corporation and Time Warner Cable Inc., Charter Communications Inc. and SpinCo for Consent to Assign Licenses or Transfer Control of Licenses, Comments of the American Cable Association*, MB Docket No. 14-57, Reply Comments of the American Cable Association at 50-52 (filed Dec. 23, 2014); ACA AT&T-DirecTV Comments at 21-28; ACA AT&T-DirecTV Reply Comments at 40-42.

A. The Commission Has Traditionally Relied on a Combination of a Non-Discriminatory Access Condition and a Commercial Arbitration Remedy to Address the Harmful Effects of Transactions Combining Multichannel Video Distribution and Programming Assets.

Starting with its News-Hughes Order, the Commission found that the combination of highly important and "must have" programming and MVPD distribution assets would increase the incentive and ability of the cable-affiliated programmer to engage in anticompetitive strategies with respect to the sale of its programming to other MVPDs, and that such strategies would lead to higher fees for this programming.[61] To ameliorate these competitive harms, the Commission relied on a combination of a non-discriminatory access condition fashioned on the existing program access rules aimed at preventing exclusive contracts and requiring non-discriminatory terms and conditions, and a commercial "baseball-style" arbitration remedy, aimed at preventing uniform pricing strategies by requiring that an arbitrator apply a "fair market value" test to disputes brought by aggrieved MVPDs or their bargaining agents concerning rate levels.[62] Although the Commission was most concerned about the ability of News Corp. to harm DirecTV's rivals with regard to "must have" programming, which included its broadcast stations and RSNs, the Commission applied the non-discriminatory access condition broadly to include all of News Corp.'s national and regional programming services.[63] For enforcement purposes, the Commission specified that aggrieved MVPDs could bring complaints against News Corp. using the same procedures as those contained in the Commission's rules governing program access complaints.[64]

In two successive MVPD transaction reviews involving ownership of "must have" programming, the Commission has used the same approach, relying on a nondiscriminatory

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[61] News-Hughes Order, ¶ 163.

[62] *Id.*, ¶ 162.

[63] *Id.*, ¶ 113.

[64] *Id.*, ¶ 128.

access condition to prevent the imposition of discriminatory prices, terms and conditions together with baseball-style arbitration to address the ability of the merger parties to obtain above fair market value rate levels through a uniform pricing strategy.[65] In each instance, the Commission imposed a non-discriminatory access prohibition, regardless of whether the programming was already subject to the program access rules, and a commercial arbitration remedy applicable to all "must have" programming affiliated with the MVPD.[66]

In its Comcast-NBCU transaction review, the Commission found that the transaction would create similar harms, but departed, without explanation, from its previous approach in fashioning conditions to mitigate the transaction's public interest harms.[67] Nonetheless, this departure should be seen an aberration, and should not serve as the model for the Commission's approach to conditions with respect to this transaction. Purchasers of New Charter-affiliated programming must have both forms of protection against the post-transaction increase in the incentive and ability of vertically integrated programmers to both discriminate and extract above fair market pricing through a strategy of uniform price increases.

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[65] Adelphia Order, ¶¶ 155-160; Appendix B, Remedies and Conditions, Section B.1.a; *see* Liberty-News-DirecTV Order, Appendix B, Conditions, Section III, ¶¶ 1, 7.

[66] Adelphia Order, ¶¶ 155-160 (as a condition of approval, Comcast, TWC and their affiliated RSNs were placed under a program access conditions, regardless of the means of delivery of the RSN and a commercial arbitration remedy); Liberty-News-DirecTV Order, ¶¶ 77, 82-83 (as a condition of approval, Liberty Media and DirecTV were required to make existing or future national and regional cable programming available to MVPDs on a non-exclusive and nondiscriminatory basis, and subject to complaints under the procedures of the program access rules).

[67] *See* Comcast-NBCU Order*,* ¶¶ 37-38. This was the first time the Commission found that some national cable programming could be "must have" programming. As before, the Commission concluded that protections beyond those offered against discrimination by the program access rules were required to protect unaffiliated MVPDs from the harm of uniform price increases with respect to certain classes of must-have programming but instead of applying both a non-discriminatory access condition and a commercial arbitration remedy as it had done previously, the Commission imposed only its baseball-style arbitration remedy. *Id.*, ¶ 49.

B. Reliance on the Procedures Set Forth in the Commission's Program Access Rules to Enforce the Non-Discriminatory Access Condition Imposed in Previous Mergers Has Left MVPDs Without Effective Redress.

The non-discriminatory access condition offers vital protections for rival MVPDs and should be applied to the instant transaction. This condition, however, depends upon the program access complaint procedures contained in the Commission's rules to permit MVPDs to seek redress.[68] Unfortunately, the procedures for enforcing the prohibition on discriminatory practices under the program access rules have flaws that limit their utility for MVPDs, particularly small and medium-sized MVPDs. To the extent the Commission relies on a non-discriminatory access condition enforced through its program access complaint process to protect MVPDs from the harms of this transaction, it must adopt special modifications to the complaint process to facilitate effective enforcement of the condition. Without significantly improving the functionality of the processes for enforcing the non-discriminatory access condition, they will be not protect MVPDs from the harms of the transaction. This is particularly true for small and medium-sized MVPDs.

Below, ACA highlights the main flaws in the Commission's program access complaint procedures, solely for the purpose of illustrating the types of improvements that must be included in remedial conditions if the program access complaint process is to be used to enforce a non-discriminatory access condition to address the harms of the instant transaction.[69]

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[68] The primary aim of the prohibition on discrimination in the prices, terms, and conditions of sale of cable-affiliated programming in the program access rules is to limit the ability of cable-affiliated programmers to act on its incentive to charge its rivals higher license fees. Aggrieved entities may file a complaint with the Commission. Remedies for violations of the rules may include the imposition of damages and the establishment of reasonable prices, terms, and conditions for the sale of programming. *See* 47 C.F.R. § 76.1000 *et seq*.

[69] As discussed below, ACA is not seeking amendments to the Commission's rules themselves. Rather, just as the Commission has included modifications the American Arbitration Association rules for use solely in arbitrations brought pursuant to its prior remedial conditions, it must also include in its remedial conditions here modifications to its program access complaint rules for use solely in program access complaints filed to enforce the remedial conditions.

1. The requirement that a discrimination complaint must compare the deal offered the complainant to that offered a "competing" MVPD severely limits any protection for small and medium-sized MVPDs.

The program access complaint rules unduly restrict the universe of MVPDs that a complainant may use as a comparison to demonstrate discrimination by an MVPD-affiliated programmer. The Commission's pleading rules require an MVPD alleging discrimination to present evidence showing that the rates, terms or conditions charged or offered by a cable-affiliated programmer to it are different than those charged or offered to a "competing multichannel video programming distributor;"[70] for purposes of defining a "competing MVPD," the complaining MVPD to show that its service area and that of the competing MVPD have some overlap and that the complainant has the same geographic scope of operations as the competing distributor.[71] While these limitations may have been considered appropriate in 1993, the predominant factor in determining prices, terms, and conditions in today's market is the number of households that will receive the video programming from the MVPD.

Thus, an MVPD who wishes to demonstrate discrimination by a programmer that is affiliated with a competing MVPD may be prohibited from comparing itself with distributors that serve a comparable number of subscribers, the most critical factor in determining prices, terms, and conditions, simply because the otherwise similarly situated MVPD is not a direct competitor of the complainant. This is a particular problem for small and medium-sized cable operators who often compete against only one other local MVPD that often serves a far greater number of subscribers. For MVPDs meeting this fact pattern, it is much more difficult to identify and prove

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[70] *Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, ¶ 96, 125 (1993) ("1993 Program Access Order"); *see also* 47 C.F.R. § 76.1003(c)(4).

[71] 1993 Program Access Order, ¶ 96. The geographic scope can be local, regional or national, depending on how the MVPD buys and distributes programming.

that the programmer is impermissible demanding different prices, terms, and conditions in order to disadvantage its affiliate MVPD's competitors.[72]

The problem created by the requirement that complainant MVPDs compare themselves to a competing MVPD is exacerbated by the volume discount defense, which makes identifying unjustifiable discrimination nearly impossible for most small and medium-sized MVPDS who only compete against far larger MVPDs.[73] Volume discounts are a common feature of programming agreements. Assuming two MVPDs are equal in all other ways, an MVPD with many subscribers will pay lower per-subscriber fees for the same programming compared to an MVPD with fewer subscribers. Due to the widespread use of non-disclosure provisions in programming agreements, data demonstrating that significant volume discounts exist is not available, but the spread between prices charged the largest and smallest MVPDs is generally believed to be at least 30 percent.[74] A negligible amount of this differential may be explained by differences in costs associated with delivering a programming stream to an MVPD or an MVPD's credit worthiness. Most of the difference, however, arises because small or medium-sized MVPDs have less bargaining power than larger ones.

Given that significant volume discounts exist, the lack of publicly available information about the size of the discounts creates an enforcement issue for MVPDs relying on the program

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[72] Of course, MVPDs seeking to enforce the non-discrimination prohibition of the program access rules may believe a cable-affiliated programmer is discriminating against them for other reasons, and in these cases too, the MVPD may wish to compare itself against other MVPDs that serve a similar number of customers.

[73] Once a small or medium-sized MVPD files a complaint alleging discrimination in comparison to the rates charged to a competing MVPD, the burden shifts to the cable-affiliated programmer to justify the price differential between what it is offered or charged the complaining MVPD and what is charged the competing distributor. The Commission considers four factors that may justify discrimination: (i) cost differences at the wholesale level among distributors; (ii) volume differences; (iii) creditworthiness and financial stability; and (iv) differences in the offering of service. 1993 Program Access Order, ¶ 105. Of the four, the volume differences factor, due to its vagueness, presents a significant and unfair barrier to obtaining redress from unjustified discriminatory prices for small and medium-sized MVPDs.

[74] *See* Statement of Ross J. Lieberman, Senior Vice President of Government Affairs, ACA, before Subcomm. on Regulatory Reform, Commercial and Antitrust Law, Comm. On the Judiciary, U.S. House of Representatives, Jun. 24, 2014, *available at* http://1.usa.gov/1E3L4r8.

access rules.[75] To properly determine whether rates, terms, and conditions offered by the cable-affiliated programmer to the complainant MVPD are unfairly discriminatory, the Commission ideally would compare the terms offered by the cable-affiliated programmer to the rates, terms, and conditions charged by a non-cable-affiliated programmer to MVPDs of varying sizes to examine whether the differential was unjustified. With this data and information, the Commission could determine whether the differentials offered by the vertically integrated programmer exceed industry standards for volume discounts among programmers who have no anticompetitive incentive to charge the complainant higher prices. Because confidentiality provisions keep the prices, terms and conditions charged by the programming industry out of the hands of the Commission and others, however, the data necessary to reach these conclusions are not available.

Of the four factors that programmers are permitted to use in justifying price differentials, the volume discount factor is easiest to put forth because it permits programmers to justify a volume discount by citing non-cost economic benefits, such as increased revenue from delivering more viewers and advertising revenue.[76] Many of these factors are difficult to quantify, and, due to non-disclosure agreements, the Commission lacks access to critical industry-wide information that might be used to determine whether the volume discount justifications by the programmer are reasonable in the marketplace.

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[75] The problem most clearly arises when a small MVPD believes that a programmer affiliated with a rival cable operator, such as New Charter, is unfairly discriminating against it, and the MVPD only competes against larger MVPDs. In that case, the complainant MVPD's argument can only be that the rates, terms, or conditions being offered or charged are discriminatory in comparison to those charged to a competing distributor that has far more subscribers. The difficulty for the Commission in these types of complaint cases is to determine whether the difference in price charged to the small or medium-sized MVPD is otherwise unfairly discriminatory.

[76] These include "economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." 1993 Program Access Order, ¶ 108. We are unable to find any explanation for why the Commission chose to include non-cost benefits in its analysis, since they represent revenues to the programmer, not a cost of delivering programming.

In summary, the volume discount standard is so porous that the Commission would have difficulty determining whether a higher price charged to a small or medium-sized MVPD is justified (or not) compared to the price charged to a larger competing distributor. In one of the few cases decided to date, the Commission described the difficulty of putting this rule into practice, explaining, "[i]n order to decide allegations of price discrimination, the record must be able to reflect how these elements demonstrate legitimate additional costs that the programmer would not otherwise have incurred. Just as significant, a quantitative value must be related to these elements. In both areas this has proved a difficult challenge to the parties and to us in our attempt to decide this matter."[77]

Accordingly, the unduly restrictive requirement that MVPDs must file complaints alleging discrimination as compared against competing distributors, combined with the permissible volume discount defense and the Commission's inability to access industry-wide data to properly evaluate complaints, significantly reduces the rules' value and effectiveness. It is particularly useless to small and medium-sized MVPDs who typically only compete against – and thus must allege discrimination in comparison to – far larger MVPDs, giving the programmer subject to the complaint the opportunity to defend its pricing under the volume discount factor. If these operators could compare themselves to similarly sized non-competing MVPDs, the programmer would be prevented from defending its pricing differentials based on volume discounting. By reducing the significance of the volume discount factor, the Commission would have an easier time identifying unjustified discrimination and preventing vertically-integrated programmers from acting in an unjustified discriminatory manner, particularly against small and medium-sized MVPDs who are rivals to their affiliated-MVPD.

[77] *Turner Vision, Inc. v. Cable News Network, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 12610, ¶ 5 (1998).

It is therefore evident that the Commission's program access complaint procedures are ineffective at permitting the Commission to distinguish legitimate grounds for price differentials from illegitimate grounds. A cable-affiliated programmer understands that the Commission lacks an effective means to determine whether the price charged a small or medium-sized MVPD is justified in comparison to a large competing distributor, and therefore has no fear of acting on its incentive to charge its rivals a higher price consistent with economic theory. The risk to a programmer of losing a program access complaint based on this set of facts is extremely low.

2. The Commission's rules fail to ensure MVPDs have information necessary to determine whether a programmer is acting in a discriminatory manner.

In implementing the program access rules, the Commission recognized that MVPDs as potential complainants may not always have access to information necessary to properly evaluate whether a programmer is charging discriminatory prices, and that this may impair the effectiveness of the rules in preventing cable-affiliated programmers from offering or charging discriminatory prices. Therefore, the Commission established rules aimed at ensuring that an MVPD's lack of information would not impede the filing of a complaint. However, as discussed below, under these procedures a potential complainant is still left without adequate information, leaving it without an effective means of taking action against discriminatory practices.

At the time the program access rules were implemented, the Commission recognized that the type of information an MVPD would need to determine whether it's being charged a discriminatory price may include a programmers' "rate card," standard contracts, or other pricing information regarding the programmers' service.[78] Believing that different programmers employ different sales practices and that programmers require flexibility in how they present their pricing information to an MVPD, the Commission also thought the programmer should have the choice

[78] 1993 Program Access Order, ¶ 112.

of “whether to use a ‘rate card’ as well as the format and relevant pricing factors … with the proviso that such pricing information will play an integral role in a vendor’s ability to justify rate differences.”[79]

To resolve these competing interests, the Commission permitted an MVPD to make a certified request for information from programmers for such pricing information, and if the request is rejected or not enough information is provided to make a comparison, the MVPD is permitted to file a complaint without such information. Although the Commission thought this approach would “facilitate the process of resolving disputes by creating an incentive for vendors to use standard sales techniques and to make pricing information available as necessary to distributors,” this has not occurred.[80] Today, the combination of the programming industry’s practice of keeping MVPDs in the dark regarding the rates, terms, and conditions charged to other MVPDs with the right of the programmer to ignore an MVPD’s certified request for information or to provide insufficient information makes it nearly impossible for an MVPD to determine whether a programmer is dealing with it in a non-discriminatory fashion.

In the event that the programmer does not respond, the rules grant MVPDs the right to file a complaint without citing specific data or information demonstrating that discrimination is occurring.[81] In such a case, however, the MVPD is still required to base its discrimination complaint on a comparison to a competing distributor, but without the information necessary to make an informed decision as to which competing distributor will provide the best comparative for success on the complaint. Considering the problems with the complaint process described in the preceding section, this further reduces the likelihood that an MVPD would believe that filing a complaint will be resolved in a favorable manner.

[79] *Id.*

[80] *Id.*

[81] 47 C.F.R. § 76.1003(a)(4).

As previously noted, both Congress and the Commission presume that vertically integrated programmers have the incentive and ability to discriminate against their rivals. In light of this presumption, the Commission's rules impose an unreasonable burden on an MVPD to prove that it is experiencing discrimination, rather than more appropriately placing the burden on the programmer to prove that it is not discriminating. Vertically integrated programmers understand the problems with the complaint process and the burdens that the rules place on complainants. At worse, a non-responsive programmer may find itself subject to a program access complaint where their risk of losing the complaint is low due to flaws in the complaint process discussed above.

If the MVPD elects to file a complaint, it bears the burden of correctly guessing which competing distributor offers the best comparable to itself for its complaint, and may only really verify whether and to what extent it is being discriminated against by the programmer in the discovery phase of the complaint. In the aggregate, the lack of a requirement that the programmer provide a requesting MVPD with specific information that would allow the MVPD to assess whether it is being discriminated against prior to filing a complaint significantly undermines the effectiveness of the rules and gives the programmer wide latitude to engage in discriminatory behavior with little fear of getting caught.

* * *

To be clear, ACA is <u>not</u> asking the Commission here to amend its program access pleading rules. ACA is asking that, to the extent the Commission relies on its program access rules and complaint procedures as the means of enforcing its non-discriminatory access condition, it take into account the ineffectiveness of these procedures in preventing or ameliorating the merger-specific harms of the instant transaction. For the reasons stated above, the Commission must not only adopt a non-discriminatory access condition but also include in its remedial conditions modifications to its program access complaint rules for use solely in program access complaints filed to enforce the remedial conditions imposed on this transaction.

C. The Baseball-Style Arbitration Conditions Adopted in Prior Mergers Are Ineffective for Small and Medium-Sized MVPDs.

To date, the last set of arbitration conditions adopted by the Commission, which were intended to limit the vertically integrated programmer's ability to implement a uniform price increase strategy and charge rates above fair market value, have not proven effective for small and medium-sized cable operators. The Comcast-NBCU arbitration conditions implicitly rested on, among other things, the following key assumptions:

- During its negotiations, the small or medium-sized MVPD would have some sense whether the vertically-integrated programmer is offering rates that are above fair market value; and

- The MVPD would have sufficient information about market rates for the negotiated programming to formulate a final offer that would have at least as good a chance of winning the arbitration as the programmer, a prerequisite to going forward.

Neither of these assumptions has proven to be correct.[82]

Underlying both of the incorrect assumptions is a single problem that also undermines the effectiveness of the rules and procedures of the program access rules: small and medium-sized MVPDs do not have the critical information about the prices, terms, and conditions that the programmer charges other MVPDs in the market. The lack of information about how a programmer charges other MVPDs for its programming makes it nearly impossible for the MVPD to identify when it is being charged above fair market value, or to formulate an appropriate best and final offer in baseball style arbitration.

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[82] ACA Comcast-TWC Comments at 35-36, Exhibit B, Declaration of Rich Fickle ("Fickle Declaration"); s*ee also Applications of Comcast Corp., General Electric Co. and NBCUniversal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket 10-56, Letter from Barbara Esbin to Marlene H. Dortch (filed Dec. 22, 2010) (providing declarations of Colleen Abdoulah, Chairwoman and Chief Executive Officer of WOW! Internet, Cable & Phone, and Steve Friedman, Chief Operating Officer of WaveDivision Holdings, LLC d/b/a Wave Broadband, describing the difficulty and extraordinary cost of pursuing arbitration. ("Abdoulah Declaration" and "Friedman Declaration" respectively). *See* Abdoulah Declaration, ¶¶ 5, 9 and Friedman Declaration, ¶¶ 5, 8.

For example, neither an ACA member nor its bargaining agent can effectively determine in negotiations whether the any New Charter-affiliated programming is being offered at rates above fair market value. MVPDs lack this information, as noted above, because it is the programming industry's practice – one followed by Discovery and Starz – to keep prices charged various MVPDs under tight wraps. As a result, a negotiating MVPD has no understanding of whether an offered price reflects fair market value, or whether the price is higher due to these programmers' affiliation with New Charter.

Making matters worse, during the negotiation and prior to the start of the arbitration there is a wide disparity between the information available to a programmer affiliated with a large MVPD and the smaller MVPD negotiating the purchase of the cable-affiliated programming, which tilts power in the vertically integrated programmer's favor. It is manifestly unreasonable to expect a party to invest in arbitration with no understanding of key information and knowing that the opponent understands that same information. Without more information from the programmer, a small MVPD cannot accurately assess whether it is being charged fair market value or not. This undermines their perceived likelihood of success in arbitration, and indeed their ability to even formulate an appropriate final offer in baseball-style arbitration. For this reason, the baseball-style arbitration condition has never lived up to its expectations as an effective remedy against the incentive and ability of vertically-integrated programmers to charge rates above fair market value.

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As discussed above, the Commission has depended on both a non-discriminatory access condition that expressly prohibits exclusive deals and discriminatory practices, and on a commercial arbitration remedy to address the incentive and ability of vertically integrated providers to unjustifiably raise rivals' costs through a uniform pricing strategy in nearly every transaction review that involved a combination of video programming and MVPD distribution assets. Applicants themselves appear to recognize the value of program access protections and cite to New Charter's continued compliance with them as a reason why the transaction is consistent with the Communications Act and Commission rules post-transaction.[83]

ACA submits that the Commission not only must return to its pre-Comcast-NBCU approach of imposing a non-discriminatory access condition and a commercial arbitration condition for New Charter-affiliated programming, it must also significantly bolster the enforcement mechanism for the non-discrimination access condition to better ensure that small and medium-sized MVPDs are not left unprotected from increases in New Charter affiliated programmers' bargaining positions post-transaction. Moreover, modifications to the commercial arbitration remedy are necessary to make sure this mechanism is a realistic option for small and medium-sized operators so that the competitive harms of the transaction are not realized.

V. CONCLUSION

The proposed transaction involving the combination of Charter, TWC and BHN into the 3rd largest MVPD in the country is a momentous deal, and a significant portion of the industry and consumers will be harmed if it is approved without sufficient, effective, and long-lasting remedial conditions applicable to New Charter and its affiliated cable programming assets. Although the combined entity's affiliated programming holdings may be dwarfed by those of other industry players, the programming assets that they will control are competitively significant to rival MVPDs serving in New Charter markets. The Commission must adopt remedial conditions targeted to address the demonstrable harms of the transaction, and the flaws and shortcomings with the types of remedial conditions the Commission has imposed in the past. Such conditions are utterly essential to protect MVPD consumers and competition of MVPD services should the parties go forward with their transaction.

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[83] Public Interest Statement at 61.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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