

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

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

RESPONSE OF STARZ

Starz responds to the limited comments and petitions to deny in this proceeding suggesting that the proposed transaction “will cause increased vertical harm arising from the enhanced affiliation of...Starz programming with New Charter distribution assets.”¹ As the Commission repeatedly has recognized in multiple transactions, its program access rules prevent this claimed potential “vertical harm” for nationally-distributed programming services such as Starz. Consequently, no prophylactic conditions are warranted.

Petitioners claim that “New Charter may engage in anticompetitive strategies such as temporary or permanent foreclosure of access to affiliated programming or limiting on demand licensing of affiliated programming....” WGAW Petition at 12-13. They simply assert that “anticompetitive behavior is possible” because John C. Malone owns “large stakes” in Starz and New Charter. *Id.* at 13. While discussing Dr. Malone’s attributable voting interests, Petitioners fail to mention his much smaller attributable equity interests and offer no

¹ Comments of American Cable Association at 17 (“ACA Comments”); *see* Petition to Deny of Writers Guild of America West, Inc. (“WGAW Petition”) at 11-16; Petition to Deny of Public Knowledge, Common Cause, Consumers Union, and Open MIC at 19-20; Comments of Cincinnati Bell Extended Territories LLC (“Cincinnati Bell Comments”) at 6-7.

explanation regarding his purported incentive to somehow favor New Charter. Starz respectfully submits that Dr. Malone has neither the economic incentive nor ability to cause Starz to disadvantage its own interests in favor of New Charter's interests.

However, a detailed economic analysis and review of corporate governance principles to demonstrate the absence of such incentive and ability are unnecessary. The Commission has concluded repeatedly that, regardless of the potential for persons or entities affiliated with cable operators to exercise "undue influence" in the decisions and operations of video programmers, the Commission's program access rules are sufficient to prevent the exercise of such influence to harm competing distributors or, at the very least, to remedy its results.

The Commission recognized earlier this year in approving the AT&T/DIRECTV transaction that its program access rules protect against the very kinds of vertical integration harms that the petitioners and commenters again allege:

Congress enacted the program access provisions of Section 628 of the Act as part of the 1992 Cable Act to address concerns that vertically integrated program suppliers have the incentive and ability to favor their affiliated cable operators over unaffiliated MVPDs. Specifically, Congress was concerned that a vertically integrated programmer may exclude rival distributors, including new entrants and new technologies, from access to its programming, or raise programming prices to harm competition in the video distribution market. Thus, the program access rules adopted by the Commission pursuant to Section 628 provide several important protections to unaffiliated MVPDs.

Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 14-90, FCC 15-94 (rel. July 28, 2015) ("AT&T/DIRECTV Order") at ¶168. As the Commission noted in extending its program access rules to terrestrially-delivered programming, "[t]hose rules are a success." *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements (First Report and Order)*, 25 FCC Rcd 746 (2010) at ¶4.

Thus, the Commission concluded that its program access rules “will be sufficient to eliminate any potential for anticompetitive conduct due to the vertical relationship” with national programming services in the News Corp., Liberty Media, and AT&T proceedings.² Notwithstanding the Commission’s explicit and repeated finding, commenters such as ACA criticize the adequacy of the Commission’s program access rules and complaint procedures and seek additional conditions. ACA Comments at 21-29. The Commission has rejected these kinds of criticisms, finding that they “are industry-wide, not merger specific:”

We acknowledge the concerns raised by parties regarding the effectiveness of the Commission’s existing program access and program carriage rules; however, we believe that such concerns are industry-wide, not merger specific, and therefore are better addressed in a separate proceeding.

AT&T/DIRECTV Order at ¶170, n. 476 (citations omitted); *see* Liberty Media Order at ¶84. Although Starz believes that ACA’s many and varied criticisms of the program access rules are unfounded, those criticisms must be addressed in a rulemaking, not this proceeding.

Contrary to ACA’s claim that the “Commission has almost invariably imposed a commercial arbitration remedy” when presented with potential harms from vertical integration (ACA Comments at v), the Commission expressly declined to impose arbitration remedies or a variety of other conditions urged by commenters for national programming services in the News Corp., Liberty Media, and AT&T proceedings.³ Most recently, in its AT&T/DIRECTV Order at ¶170, the Commission concluded “that it is unnecessary to impose arbitration or any

² *General Motors Corp. and Hughes Electronics Corp. (Transfer of Control to News Corp.)*, 19 FCC Rcd 473 (2004) (“News Corp. Order”) at ¶¶124-126; *see News Corp. and the DIRECTV Group Inc., Transferors, and Liberty Media Corp., Transferee, for Authority to Transfer Control*, 23 FCC Rcd 3265 (2008) (“Liberty Media Order”) at ¶¶66-83; AT&T/DIRECTV Order at ¶¶167-170.

³ *See* News Corp. Order at ¶131; Liberty Media Order at ¶86; and AT&T/DIRECTV Order at ¶170.

other additional program access conditions to address concerns regarding access to RSNs or other programming owned or controlled by the combined entity.”⁴

ACA also appears to suggest that a “non-discriminatory access condition...should be applied to the instant transaction,” incorporating the Commission’s rules. ACA Comments at 21. No such condition is necessary or appropriate in the context of this proceeding. In the News Corp. and Liberty Media proceedings,⁵ the Commission adopted a separate program access condition because DIRECTV, as a DBS operator, was not subject to the Commission’s program access rules. Here, any purported vertical integration concerns arise from an attributable interest associated with a cable operator. No other DBS operator or non-cable distributor is involved. Consequently, if there were no attributable cable interest in Starz, there would be no basis for application of the program access rules.

Finally, one commenter has claimed that “Starz withheld its programming from Netflix.” Cincinnati Bell Comments at 6. Starz purportedly engaged in such withholding to “disadvantage competitors” -- a strategy which is unexplained and competitors which are unidentified. Contrary to Cincinnati Bell’s characterization and claim, Starz made approximately “2,500 Movies, TV Shows and Concerts” available for streaming at Netflix in

⁴ In the Comcast/NBCU proceeding, the Commission did adopt an arbitration remedy for both regional and national programming services. *Applications of Comcast Corp., General Electric Co., and NBC Universal, Inc. for Consent to Assign Licenses and Transfer of Control of Licenses*, 26 FCC Rcd 4238 (2011) at ¶¶29-54. The Commission found that “without Comcast-NBCU’s *suite* of RSN, local and regional broadcast and national cable programming, other MVPDs likely would lose significant numbers of subscribers to Comcast...” *Id.* at ¶37 (emphasis added). Comcast wholly owned 5 of the 11 national programming networks and had substantial ownership interests in the others. *Id.* at ¶10. The Commission also concluded that “past problems in defining the limits of remedies prescribed for particular categories of programming” justified extended the arbitration remedy “to all Comcast-NBCU affiliated programming.” *Id.* at ¶52. Clearly, that is not the circumstance in this proceeding. Charter has no ownership interest in Starz, and Dr. Malone’s attributable equity interest is only 6%.

⁵ See News Corp. Order at ¶132; Liberty Media Order at ¶77-81. The Commission explained in the AT&T/DIRECTV Order at ¶169 that, “[a]s a DBS service, DIRECTV is not currently subject to the program access rules under Section 628,” but would be after AT&T’s acquisition.

2008.⁶ Contrary to the claim that Starz “sought to stunt the growth of Netflix” (Cincinnati Bell Comments at 6), Netflix’s Chief Content Officer described its agreement with Starz as “an important step forward for both companies and for consumer choice.” Netflix Release. After Starz and Netflix failed to agree to terms and conditions during renewal negotiations, that agreement expired. Far from withholding its content, Starz made its programming available to Netflix when Netflix was a developing service.⁷

Conclusion

Starz, which is not a party to this proceeding or to the transaction before the Commission, respectfully requests that the Commission refrain from adopting any additional conditions directed at Starz to address a speculative potential vertical harm. The Commission repeatedly has found that its program access rules “will be sufficient to eliminate any potential for anticompetitive conduct due to the vertical relationship.” To the extent that there is a cable

⁶ See Netflix Media Center, *Netflix and Starz Entertainment Announce Agreement to Make Movies from Starz Play Available for Instant Streaming at Netflix* (Oct. 1, 2008) (“Netflix Release”) <https://pr.netflix.com/WebClient/getNewsSummary.do?newsId=728> (Oct. 30 2015).

⁷ The fact that Netflix’s subscribership has continued to increase substantially, that Netflix has entered into license agreements with studios and other licensors of movie titles, and that Netflix is producing its own programming since expiration of the Starz agreement in 2012 makes clear that Starz programming was not “must have” programming for Netflix.

attributable interest in Starz, which is the source of the vertical integration concern, the program access rules will be applicable. No further regulatory intervention is necessary or appropriate.

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Respectfully submitted,

STARZ

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