

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

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

REPLY COMMENTS OF HAWAIIAN TELCOM SERVICES COMPANY, INC.

Hawaiian Telcom Services Company, Inc. (“Hawaiian Telcom”) hereby replies to the Opposition filed by Charter, Inc. (“Charter”), Time Warner Cable, Inc. (“TWC”), and Advance/Newhouse Partnership (“Advance”) (collectively referred to as “Charter/TWC/Advanced” or “New Charter”).¹ New Charter barely responds to Hawaiian Telcom’s stated concerns, simply asserting that the problems specified are not merger specific, and hence should be ignored by the Commission.² In fact, New Charter’s arguments sound strikingly familiar, since these are similar to the arguments made in previous mergers in which significant conditions have been imposed because the FCC disagreed with the arguments.³ In

¹ Charter Communications Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership, Opposition to Petitions to Deny and Response to Comments, MB Docket No. 15-149 (filed Nov. 2, 2015) (“Opposition”).

² *Id.* at 80.

³ *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*

refusing to seriously respond to Hawaiian Telcom's allegations, New Charter has utterly failed to meet its burden of proof that the merger is in the public interest without the imposition of significant conditions.

Hawaiian Telcom's allegations that the Charter/TWC/Advanced consolidation will further risk undermining competition in the markets for video programming, and video and broadband distribution, particularly in Hawaii, are specifically related to the instant merger. As Hawaiian Telcom demonstrated in its comments, TWC is already the dominant market participant for both video and broadband distribution in Hawaii, holding a market share of 76 and 69 percent share, respectively, in those submarkets in the State.⁴ Charter/TWC/Advanced does not dispute these market share figures. This already serious market imbalance in Hawaii risks becoming even more pronounced when the combined entity will be able to bring to bear its juggernaut of national broadband and video subscribers and affiliated programming against smaller players such as Hawaiian Telcom.

The FCC has recognized that a more powerful combined merger entity is motivated, and has the ability, to engage in anti-competitive conduct that is more severe than the pre-merger entities, which is a public interest harm. Therefore, a consolidated company does raise merger-specific public interest issues notwithstanding the fact that one of the acquisition targets is already operating in a particular geographic market.

Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee, MB Docket No. 05-192, Memorandum Opinion & Order, 21 FCC Rcd 8203, ¶¶ 113-14 (2006) (“*Adelphia Order*”); *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion & Order, 26 FCC Rcd 4238, ¶¶ 32, 36-38 (2011).

⁴ Comments of Hawaiian Telcom Services Company, Inc., MB Docket No. 15-149, 9, 22 (filed Oct. 13, 2015) (“Hawaiian Telcom Comments”).

For instance, even when pre-merger firms do not directly compete in a local geographic market, an overall increase in market power nationwide can indeed impact the ability to obtain programming in the vertical market.

We find that there is a potential that Comcast's or Time Warner's market power could increase the price consumers will have to pay for programming, as TCR suggests, if an unaffiliated network is denied carriage and exits the market as a result, and if Comcast or Time Warner then buys the distribution rights, creates its own network, and withholds the programming from competitors, reducing retail competition.⁵

Thus, a merger entity with increased market power can have greater incentives and ability to deny competing MVPDs to access programming, both affiliated and unaffiliated programming alike. Such a foreclosure strategy would be profitable by weakening rivals to the point where they would have to exit the market, thereby freeing the combined entity to raise prices and have increased subscribership. In addition, anti-competitive behavior that amounts to less than outright foreclosure could substantially weaken competitors and produce the same impact without ever risking any of New Charter's profits, which are sizable.

Charter/TWC/Advanced's economic arguments just do not hold water. The record in this proceeding is replete with comments regarding these same anti-competitive consequences of the instant merger. The American Cable Association ("ACA") demonstrates that the instant transaction "will result in competitive harm to purchasers of cable programming affiliated with

⁵ *Adelphia Order*, ¶ 114. In that Order the FCC imposed significant conditions requiring the new merger entities to offer programming subject to mandatory arbitration, and potential Commission review. See also *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, CC Docket No. 98-141, ¶ 186 (1999) (combining previously non competing companies can raise public interest concerns and increased chances for anti-competitive behavior).

New Charter and to consumers” despite the fact that the three cable TV companies were not previously operating in each other’s territories.⁶ The combination poses significant merger-related issues giving New Charter the ability to disadvantage smaller competitors.⁷ “A bigger and stronger Charter will extract even greater concessions from all-important content providers to the detriment of smaller MVPDs.”⁸

As Hawaiian Telcom indicated in its comments, New Charter will become as dominant a player as Comcast and Time Warner were to become after the *Adelphia* transfers.⁹ Thus, it does not matter that Charter and Advanced do not currently operate in Hawaii. The combined entity will be stronger, and be significantly better able to practice a foreclosure strategy in the vertical programming market. Hawaiian Telcom is particularly vulnerable to such a foreclosure strategy because it is relatively new, and much smaller than New Charter.

New Charter has spent pages proving that New Charter will be able to reduce programming costs for all of its entities, including TWC, which it cites as a merger benefit.¹⁰ The ability to reduce programming costs, including in Hawaii, will further seriously disadvantage its smaller MVPD rivals, which already have significantly higher programming costs than other large cable TV companies. Although New Charter claims such cost reductions are lawful,

⁶ Comments of American Cable Association, MB Docket No. 15-149, ii (filed Oct. 13, 2015).

⁷ Petition to Deny of DISH Network Corp., MB Docket No. 15-149, 65 (filed Oct. 13, 2015).

⁸ Comments of Cincinnati Bell Extended Territories LLC, MB Docket No. 15-149, 2 (filed Oct. 13, 2015).

⁹ Hawaiian Telcom Comments at 15-16.

¹⁰ See, e.g., Opposition, Exhibit A, Statement of Dr. Fiona Scott Morton re the Merger of Charter, TWC, and BHN, ¶¶ 214, *et seq.*, Exhibit B, Reply Declaration of Michael L. Katz, ¶¶ 9-10, 13-39.

because antitrust law only protects competition not competitors,¹¹ the ability to drive competitors from the market is a serious concern. Such an impact would free New Charter to raise consumer prices, thereby seriously harming consumers, which is not in the public interest.¹² New Charter says nothing about the ability of smaller rivals to remain in business in the face of these reduced programming costs.

New Charter’s claim—that even as a monopoly it would reduce consumer prices—is pure speculation, and in the end counter-intuitive. The Commission has in the past, and must continue to, impose conditions when significant motivation and opportunity to engage in anti-competitive conduct is present. As stated in Hawaiian Telcom’s comments, Charter/TWC/Advance should be required to provide nonaffiliated MVPDs in Hawaii with access to Regional Sports Networks (“RSN”),¹³ “must have” national programming, local social interest channels, as well as amateur Hawaii high school sports on a live basis at fair market rates and conditions, subject to compulsory arbitration.¹⁴

¹¹ Opposition at 79.

¹² *Adelphia Order*, ¶ 59.

¹³ The Opposition cavalierly opines that OCSports “is not an RSN.” Opposition at 80. OCSports constitutes “non-broadcast video programming” which carries live more than 10 percent of the games of the University of Hawaii, NCAA Division I football and basketball games. OC Sports is therefore an RSN as defined by applicable FCC precedent. *See, e.g., Adelphia Order*, Appendix B, § A, *cited in Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, MB Docket No. 07-198, First Report & Order, 25 FCC Rcd 746, ¶ 69 n.249 (2010) (“2010 Program Access Order”), *aff’d in relevant part, Cablevision Systems Corp. v. FCC*, 649 F.3d 695 (D.C. Cir. 2011). Even the Applications classify OCSports as an RSN. Applications 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, Appendix G, 1 (filed Jun. 25, 2015) (“Applications”).

¹⁴ Hawaiian Telcom Comments at 12-17.

The Opposition does not even address the second major argument of Hawaiian Telcom's comments: that new Charter has the incentive and ability to act anti-competitively by harming Hawaiian Telcom's ability to purchase new technologies, acquire skilled maintenance workers, and have access to customers in multiple dwelling units.¹⁵ The Commission should not allow New Charter to just ignore concerns of rivals and should impose significant conditions in the instant merger to protect competition in video and broadband distribution markets in order to protect consumers. This is especially necessary given the unique circumstances of the Hawaii marketplace because of TWC's dominant position, which will only be enhanced through the instant merger.

The Charter/TWC/Advance merger will further stifle competition and harm Hawaiian Telcom and other competitors in the video programming and wired broadband markets in Hawaii unless conditions are imposed. Thus, Hawaiian Telcom strongly urges the Commission to approve the transactions only with conditions that, consistent with the recommendations outlined in Hawaiian Telcom's comments, address the identified anti-competitive concerns.

Respectfully submitted,

By: /s/ Gregory J. Vogt

Gregory J. Vogt
Law Offices of Gregory J. Vogt, PLLC
103 Black Mountain Ave., Suite 11
Black Mountain, NC 28611
(828) 669-2099
gvogt@vogtlawfirm.com

*Counsel for Hawaiian Telcom
Services Company, Inc.*

Steven P. Golden
Vice President External Affairs
Hawaiian Telcom, Inc.
1177 Bishop Street
Honolulu, Hawaii 96813

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¹⁵ *Id.* at 21-24.