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**REDACTED—FOR PUBLIC INSPECTION**

November 12, 2015

## Via ECFS

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: **Reply of the Alliance for Community Media and the Alliance for Communications Democracy to Opposition to Petition to Deny, MB Docket No. 15-149 (REDACTED VERSION)**

Dear Ms. Dortch:

Please find enclosed for filing under MB Docket No. 15-149 the Redacted Version of the *“Reply of the Alliance for Community Media and the Alliance for Communications Democracy to Opposition to Petition to Deny”* (REDACTED CONFIDENTIAL FILING).

Pursuant to the Protective Order in this proceeding, the Highly Confidential Version of this filing has been hand-delivered under separate cover, and a copy has been provided to Vanessa Lemmé of the Media Bureau.

Very truly yours,

*/s/ James N. Horwood*

James N. Horwood

JNH:vev  
Enclosures  
cc: Vanessa Lemmé

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

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

**REPLY OF THE ALLIANCE FOR COMMUNITY MEDIA AND  
THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY  
TO OPPOSITION TO PETITION TO DENY**

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**REPLY OF THE ALLIANCE FOR COMMUNITY MEDIA AND  
THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY  
TO OPPOSITION TO PETITION TO DENY**

**INTRODUCTION AND SUMMARY**

On behalf of public, educational and governmental (“PEG”) access organizations and community media centers across the nation, the Alliance for Community Media (“ACM”) and the Alliance for Communications Democracy (“ACD”) submit this reply to the Opposition to Petitions to Deny and Response to Comments<sup>1</sup> filed by Charter Communications, Inc. (“Charter”), Time Warner Cable, Inc. (“TWC”) and Advance/Newhouse Partnership, which was filed in response to ACM and ACD’s Joint Petition to Deny.<sup>2</sup>

Like the Application’s Public Interest Statement,<sup>3</sup> which does not even mention PEG or localism,<sup>4</sup> the Opposition gives the back of its hand to PEG, devoting only the last three of its 88 pages to PEG.<sup>5</sup> And the Opposition devotes even less to responding to the Joint Petition—a single page.<sup>6</sup>

As a result, the Opposition fails to respond meaningfully to, much less refute, the facts and arguments in our Joint Petition. Rather than confront the Joint Petition’s evidence, the Opposition seeks to divert attention by making generalized, but wholly unsupported, claims about Charter’s alleged compliance with cable franchise PEG obligations, pointing to a

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<sup>1</sup> Opposition to Petitions to Deny and Response to Comments, MB Docket No. 15-149 (filed Nov. 2, 2015) (“Opposition”).

<sup>2</sup> Joint Petition to Deny of the Alliance for Community Media and the Alliance for Communications Democracy, MB Docket No. 15-149 (filed Oct. 13, 2015) (“Joint Petition”).

<sup>3</sup> *Application of Charter Comm’ns, Inc., Time Warner Cable, Inc., & Advance/Newhouse P’ship for Consent to the Transfer of Control of Licenses & Authorizations*, MB Docket No. 15-149 (“Application”), Public Interest Statement (June 25, 2015) (redacted “Public Interest Statement”).

<sup>4</sup> Joint Petition at 2 & 11.

<sup>5</sup> Opposition at 85-88.

<sup>6</sup> *Id.* at 87.

smattering of letters in the record that Charter claims support its position, and by arguing that the PEG issues raised in the Joint Petition are not transaction-related. But each of the Opposition’s attempts to sidestep the Joint Petition fails.

1. *The Opposition Does Not Even Respond To The Joint Petition’s Localism Concerns.*

The Joint Petition pointed out that the increased cable industry consolidation that would occur as a result of the proposed transaction would increase New Charter’s economic incentive and ability to engage in practices designed to reduce PEG access support and viewership—and the vital public interests of localism and diversity that PEG uniquely well serves—in at least three ways.<sup>7</sup> In essence, the transaction would exacerbate Charter’s, TWC’s, and Bright House Networks’ (“BHN”) incentives to reduce PEG support and viewership and thereby to (1) free up capacity for broadband use, (2) free up capacity for New Charter’s affiliated or otherwise-favored programming, and (3) maximize the New Charter’s advertising revenue by reducing PEG viewership.<sup>8</sup>

The Opposition does not respond to, much less attempt to refute, any of these arguments. Indeed, the word “localism” nowhere appears in the entire 88-page Opposition. And by claiming that “local, regional, and national advertisers will all be better served by New Charter than they have been by the three Applicants standing alone,”<sup>9</sup> the Opposition succeeds only in underscoring the Joint Petition’s argument that the transaction will increase New Charter’s incentive and ability to stifle PEG channels as a potential viewer alternative to advertiser-supported programming.

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<sup>7</sup> Joint Petition at 5-13.

<sup>8</sup> *Id.* at 12-13.

<sup>9</sup> Opposition at 32.

2. *The Anecdotal Support For The Transaction Cited In The Opposition Does Not Come To Grips With The Joint Petition’s Unrefuted Evidence of Charter’s Widespread Practices Harming PEG.*

The Opposition asserts that Charter “meets all PEG programming commitments contained in its local and state franchise agreements” and that Charter “has strong relationships with the vast majority of its PEG providers.”<sup>10</sup> But the Opposition only offers meager support for these blanket assertions.

First, the Opposition points to how much it has paid in cable franchise fees and in PEG fees over the past twelve months.<sup>11</sup> But that proves nothing. As Charter well knows, the Cable Act specifically provides that cable franchise fees may be used for any purpose, not just for PEG,<sup>12</sup> and most cash-strapped local governments do not use a significant portion of franchise fee revenue to support PEG. As for the PEG fees that Charter claims it does pay, that amount is nothing more than a rounding error when compared to Charter’s cable service revenues, and a tiny rounding error at that.<sup>13</sup>

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<sup>10</sup> *Id.* at 85.

<sup>11</sup> *Id.*

<sup>12</sup> 47 U.S.C. § 542(i). *Accord* H.R. Rep. No. 98-934, at 26 (1984), *reprinted in* U.S.C.C.A.N. 4655, 4663 (franchise fees are compensation for a cable “operator’s use of public ways,” and “[t]he FCC is stripped of the authority . . . to specify the manner in which the income from such fees may be spent.”).

<sup>13</sup> Charter reported \$4.443 billion in video service revenues in 2014. Charter Commc’ns, Inc., Annual Report at 46 (Form 10-k) (Feb. 24, 2015) (“Charter 10-K”), <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTc3OTI1fENoaWxkSUQ9MjgyMTE0fFR5cGU9MQ==&t=1>.

Charter’s claimed [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

[END HIGHLY

CONFIDENTIAL INFORMATION] represents less than [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [REDACTED] [END HIGHLY CONFIDENTIAL INFORMATION] of

Charter’s video service revenues. Moreover, Charter’s reported 2014 programming costs of \$2.5 billion, Charter 10-K at 48, are [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [REDACTED]

[END HIGHLY

CONFIDENTIAL INFORMATION]. And even these tiny percentages overstate the true amount of Charter’s PEG contributions relative to its cable service revenue, because Charter’s reported 2014 video service revenues do not include advertising revenue, which are reported separately, Charter 10-K at 46, even though much of Charter’s advertising revenue is from “cable service” and thus subject to franchise and PEG fees, *see City of Dallas v. FCC*, 118 F.3d 393, 397 (5<sup>th</sup> Cir. 1997).

Second, the Opposition points to what it claims are “[n]umerous PEG programmers in Charter communities across the country [that] support Charter and the Transaction.”<sup>14</sup> “Numerous,” however, turns out to be a grand total of three—a PEG programmer in Kalamazoo, Michigan, a government access channel in Loudon County, Tennessee, and a city manager in Kingsport, Tennessee.<sup>15</sup>

What neither the Opposition nor these isolated comments do, however, is dispute, much less refute, the evidence furnished in the Joint Petition about Charter’s significant history of hostile treatment of PEG. Thus, there is no dispute that Charter moved all PEG channels on at least 31 of its Wisconsin systems, PEG channels in four towns in Massachusetts, PEG channels in two cities in Minnesota, and all PEG channels in Missouri, from lower channel numbers in close proximity to local broadcast channels to high-numbered channels far away from other basic tier channels, in some cases in direct violation of its franchise agreement.<sup>16</sup>

Likewise, the Joint Petitioners’ evidence that Charter often refuses to permit inclusion of PEG programming information in its electronic program guides (“EPG”) stands unrefuted.<sup>17</sup> To be sure, the Opposition asserts (in a footnote) that whether PEG programming is included in Charter’s EPG is “a contractual matter,”<sup>18</sup> but that claim is belied by the unrefuted evidence in

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<sup>14</sup> Opposition at 85.

<sup>15</sup> *Id.* at 85-86. In a footnote, the Opposition also cites to comments filed by the Northeastern Connecticut Cable Advisory Council and, seemingly desperate to find more support, refers to a motion filed by the Vermont Access Network more than a year ago in a Vermont Public Service Board proceeding concerning the since-abandoned Comcast/TWC/Charter transaction. *Id.* at 86 n.325.

<sup>16</sup> Joint Petition at App. 4. The Opposition’s only response (at 87 n.328) is that Charter groups PEG channels with other PEG channels, just as it groups sports channels together. But this is no response at all, for it singles out PEG channels as a separate group for disfavored treatment. Charter ignores that the obviously relevant grouping is not PEG, but local programming—in other words, PEG channels should be placed in close proximity to local broadcast channels. Charter also overlooks that even the “sports channels” grouping to which it refers typically receives more favorable channel placement from Charter than PEG.

<sup>17</sup> Joint Petition at App. 4.

<sup>18</sup> Opposition at 87 n.328.

the Joint Petition that Charter charges PEG programmers high fees to be included in its EPG and that Charter has misled PEG programmers by overstating the minimum requirements its EPG vendor imposes for inclusion in the EPG.<sup>19</sup> The Opposition also ignores evidence that Charter has refused to pay PEG fees that California law requires it to pay, and to provide upstream connection between PEG origination points and Charter’s headends.<sup>20</sup>

In sum, the Opposition offers no refutation to the Joint Petition’s evidence showing Charter’s persistent history of hostile treatment of PEG. It would not serve the public interest—and, indeed, it would disserve localism—for the Commission to permit Charter to expand its cable footprint, and thereby to expand its disdain for PEG and localism, by consenting to the proposed transaction.

3. *The PEG-Related Harms Identified In The Joint Petition Are Transaction-Related.*

The Opposition argues that any PEG-related harms identified in the Joint Petition “have nothing to do with the Transaction.”<sup>21</sup> This is so, according to the Opposition, because PEG requirements “are generally governed by state and local franchising laws and agreements,” and PEG programmers “have adequate recourse through local franchise negotiations and enforcement of franchise agreements.”<sup>22</sup>

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<sup>19</sup> Joint Opposition at App. 4.

<sup>20</sup> *Id.*

<sup>21</sup> Opposition at 87.

<sup>22</sup> Opposition at 87-88. To support this assertion, the Opposition cites (at 88 n.331) *Amendment to the Commission’s Rules Concerning Effective Competition Implementation of Section 111 of the STELA Reauthorization Act*, Report & Order, 30 FCC Rcd 6574, 6583-84 (rel. June 3, 2015) (“*STELAR Order*”), for the proposition that “there is no evidence PEG channels need the kind of protections that petitioners’ conditions would impose.” But the *STELAR Order* addresses only the record before the Commission in that proceeding, *not* the record here. And the unrefuted record here shows that, regardless whether Charter may nominally keep PEG channels on the basic tier, it does shuttle them off to “channel Siberia,” deny them EPG access, fail to pay PEG fees, and fail to provide interconnection between PEG origination points and Charter’s subscriber network. Joint Petition at 5.

The Opposition, perhaps intentionally, misses the point. The issue before the Commission is whether granting the Applications permitting Charter to acquire TWC and BHN is in the public interest.<sup>23</sup> The proposed transaction’s potential adverse impact on localism and diversity—public interests which the Commission has found PEG serves<sup>24</sup>—is directly relevant to that public interest analysis. As we have shown in the Joint Petition and in the discussion above, the unrefuted evidence demonstrates that Charter has followed a consistent and widespread practice of taking actions designed to minimize PEG viewership and support. Permitting Charter to substantially expand its cable footprint, and thus substantially expand the threat its practices pose to PEG, localism and diversity, is therefore a transaction-related harm to the public interest.<sup>25</sup>

### CONCLUSION

For the foregoing reasons, the Commission should deny the Application. If the Commission nevertheless determines to grant consent to the license transfers relating to the Transaction, it should impose the following PEG-related conditions on that consent:

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<sup>23</sup> 47 U.S.C. § 310(d).

<sup>24</sup> Joint Petition at 2-4 (citing and quoting *Applications of AT&T, Inc. & DirecTV for Consent to Assign or Transfer Control of Licenses & Authorizations*, 30 FCC Rcd 9131, ¶¶ 239 & 243 (rel. July 28, 2015) (“*AT&T/DirecTV Order*”).

<sup>25</sup> Elsewhere in the Opposition, in its response to the arguments of Zoom, the Opposition cites the *AT&T/DirecTV Order* as “reject[ing]” the argument that “any allegation of a preexisting harm would be transaction-specific, on the theory that the transaction would cause the ‘offender’ to grow.” Opposition at 73 & n.288. But that is *not* what the *AT&T/DirecTV Order* said. It merely stated that the issue raised—the applicants’ compliance with Section 629 of the Act and Sections 76.1201, 76.1203 and 76.1205 of the Commission’s rules—were “broader regulatory policy questions that are more appropriately addressed in the rulemaking context.” *AT&T/DirecTV Order*, 30 FCC Rcd at 9229, ¶ 253. Unlike the specific statutory and rule issues referred to in the *AT&T/DirecTV Order*, Charter’s history of PEG mistreatment is not an issue that the Commission can more appropriately address in a rulemaking context. It is instead an issue specific to Charter, and one that is also specific to the public interest impact of the proposed transaction. The Opposition cites no precedent—nor are we aware of any—suggesting that the localism and diversity practices of an applicant seeking to acquire other licensees are irrelevant to the public interest or not transaction-related.

PEG Condition No. 1: New Charter should be required to make all PEG channels on all of its cable systems universally available on the basic service tier, in the same format as local broadcast channels, unless the local government specifically agrees otherwise.

PEG Condition No. 2: The Commission should protect PEG channel positions.

PEG Condition No. 3: The Commission should prohibit New Charter from discriminating against PEG channels, and ensure that PEG channels will have the same features and functionality, and the same signal quality, as that provided to local broadcast channels.

PEG Condition No. 4: The Commission should require that all PEG programming is easily accessed on menus and easily and non-discriminatorily accessible on all New Charter platforms.

PEG Condition No. 5: The Commission should require that channels have the ability to be distributed on HD tiers.

Respectfully submitted,

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*/s/ James N. Horwood*

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November 12, 2015

**CERTIFICATE OF SERVICE**

I, James N. Horwood, certify that today, November 12, 2015, I have served copies of the foregoing Redacted version of the Reply of the Alliance for Community Media and the Alliance for Communications Democracy to Opposition to Petition to Deny on the following:

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November 12, 2015