Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 Transfer Control of Licenses and Authorizations	)	
	)	

REPLY OF
CINCINNATI BELL EXTENDED TERRITORIES LLC

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REPLY OF
CINCINNATI BELL EXTENDED TERRITORIES LLC

Cincinnati Bell Extended Territories LLC ("Cincinnati Bell"), a local independent telephone company that has transformed itself into a head-to-head competitor with Time Warner Cable, Inc. ("TWC"), submits this Reply ("Reply") to the Response to Comments filed by Charter Communications, Inc. ("Charter"), Time Warner Cable Inc. ("TWC") and Advance/Newhouse Partnership ("A/N") (collectively "Merger Parties") with respect to their proposed transaction ("Transaction") to create an combined new entity referred to as "New Charter."[1]

The Merger Parties attempt to shrug off critical concerns expressed by Cincinnati Bell in its Comments,[2] as well as those filed by other parties as "not merger specific." This is simply not accurate. The Comments introduce facts into the record that speak for themselves and do not require any additional defense. However, with respect to the impact that the Transaction will have on the programming costs of New Charter's direct competitors, the Merger Parties' assertions cannot stand unrebutted.

The attempts to deflect concerns over abusive and harmful increases in volume discounts for programming as not being merger specific simply defies reality. Importantly the Merger Parties never fully deny the specific harms that Cincinnati Bell identifies. In fact, Charter acknowledges that it too has fought for relief from discriminatory discounts afforded larger

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[1] *In the Matter of Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Transfer Control of Licenses and Authorizations*, Opposition to Petitions to Deny and Response to Comments, MB Docket No. 15-149 (Filed November 2, 2015) ("Response").
[2] *In the Matter of Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to Transfer Control of Licenses and Authorizations*, Comments of Cincinnati Bell Extended Territories LLC, MB Docket No. 15-149 (Filed October 13, 2015) ("Comments").

multichannel video programming providers ("MVPD"). Now, conveniently, when Charter is about to piggyback on those very discounts about which it complained, it claims that a rulemaking is the appropriate forum.[3]

Programming cost disparities between larger and smaller MVPDS are real. They impact local competition. And, as described in detail below, the Transaction will make them worse. Much worse. The Commission cannot continue to turn a blind eye towards this problem as this particular merger will significantly and immediately harm competition.

DISCUSSION

I. THE PROGRAMMING COST REDUCTIONS TO NEW CHARTER ARE BOTH SIGNIGFICANT AND WILL INCREASE THE COST OF PROGRAMMING INPUTS FOR CINCINNATI BELL AND OTHER TERRESTRIAL COMPETITORS.

The Response ignores the reality of the marketplace today, the very real and merger-specific effects that the Transaction will have on the programming costs of Cincinnati Bell and other Terrestrial Competitors.[4]

A. TWC's and A/N's Existing Programming Cost Advantages over Charter are Real and Significant.

Although the Merger Parties avoid quantification in their Response, the fact remains that TWC currently pays about 25% less for programming than Charter, or about $12 per month per video subscriber.[5] Thus, immediately post-Transaction, migration of Charter's subscribers to TWC's

[3] Response at fn. 186 citing Charter's filing in MB Docket No. 10-71 (June 26, 2014).
[4] Cincinnati Bell defined "Terrestrial Competitors" in its Comments as those terrestrial MVPDs that have fewer customers than New Charter and compete directly with Charter, TWC or A/N. See Comments at 2.
[5] Comments at 12.

programming agreements will yield New Charter a cost savings of about $51.6 million *per month every month*.[6] Although Charter claims that this cost reduction will "generate immediate consumer savings by reducing New Charter's video programming costs," the reality is that this financial windfall strengthens New Charter and will make it that much more formidable as a competitor as it will have considerable additional financial resources for use against competitors in places like Greater Cincinnati. Cincinnati Bell raises this not as a global industry issue, but as a very real consequence that flows directly from the Transaction. This is as merger-specific as it gets.

B. The Merger Will Increase New Charter's Ability to Negotiate Even More Favorable Rates Compared to Other Terrestrial Competitors.

The amalgamation of Charter's, TWC's and A/N's subscriber platforms will immediately provide New Charter with significant and likely growing influence (implicit and explicit) over programming providers. Thus, the Commission must address the merger-specific impact on not only current programming cost disparities but also on the creation of a new "must-have" platform for programmers. Programmers cannot go without distribution on New Charter's platform - a combination of the second, third and sixth largest cable MVPDs. Immediately after closing, New Charter will serve approximately 31.8% of all cable MVPD customers.[7] The Merger Parties essentially acknowledge the need to have such a larger "must-have" platform to gain economies of scale to negotiate programming agreements to compete with the likes of Google, Apple and Amazon.[8]

[6] *Id* at 12-13.
[7] *Id.* at 3.
[8] Response at 60.

In justifying its actions to prepare New Charter to compete with Google, Apple and Amazon, the Merger Parties ask the Commission to permit existing Terrestrial Competitors to be permissible collateral damage. That is not in the public interest. Ask the more than 100,000 households in Greater Cincinnati so far who found a high-quality and affordable alternative to TWC from Cincinnati Bell.[9] We think they would agree.

C. **Discounts Extracted by Large MVPDs are Recovered Through Higher Rates from Smaller MVPDs.**

The Merger Parties have it backwards. They claim that it would be illogical to offer one MVPD lower rates because another has agreed to pay higher rates.[10] We agree. But that is not what happens. Rather, it is *because* a larger "must-have" platform has *extracted* lower rates that other, smaller MVPDs pay higher rates. The programmers do not voluntarily offer discounts to large MVPDs, but necessity of having their programming included on those platforms means that the large MVPDs can obtain significant discounts. The existence of volume discounts (that simply are not justified by cost savings) has been complained about by Charter in the past.[11] Why, because Charter currently pays higher rates as a result. The same is true for smaller MVPDs.

The Merger Parties reference something called "tailored negotiations" – the notion that program providers bargain with each distributor to gain the highest fees possible.[12] This is absolutely what happens, but what the Merger Parties fail to acknowledge is that the program providers set the starting point for rate negotiations. The starting point for a TWC rate

[9] Comments at 8.
[10] Response at 60.
[11] Response at fn. 186.
[12] Response at 59.

negotiation is not anywhere near the starting point for a Cincinnati Bell negotiation. It is not inconceivable that Cincinnati Bell might be thrilled to pay only the opening rate offer that a programmer offers TWC.

These opening rates are based on a revenue budget, a budget that must be met or bad things happen.[13] To the extent that budget is not satisfied by larger MVPDs with significant negotiating power due to the size of their platforms, the balance of the budgets must be recovered from smaller MVPDs. Because much of programming is not fungible, to compete effectively, smaller MVPDs need access to marquis programming such as Discovery.[14] Thus, they must pay whatever price programmers demand with little opportunity for significant price negotiation.

The fact remains that the immediate revenue loss to programmers from this Transaction is a loss of $51.6 million of recurring monthly programmer revenue - $619 million in the first year alone. The loss must be measured in terms of the marketplace for programming as it exist now, post AT&T's acquisition of DirecTV. Even if the Merger Parties want to argue that the Transaction will merely result in lost programmer profits, the ability to absorb that type of loss seems doubtful especially considering that the same programmers just lost 20% of their fees from AT&T customers as a result of the DirecTV merger. That loss is estimated to be in the hundreds of millions of dollars annually.[15] The Commission must consider the incremental impact of this merger on the programming cost marketplace as it exists following approval of the

[13] Consider ESPN that faced a revenue shortfall from declining subscriber fees resulting in significant layoffs. Stephen Battaglio, *ESPN cuts 300 jobs as subscriber fee growth slows*, Los Angeles Times, October 21, 2015 (http://www.latimes.com/entertainment/envelope/cotown/la-et-ct-espn-layoffs-20151021-story.html).

[14] Cincinnati Bell finds the assertion that "[t]here are numerous substitutes for the broad array of programming carried on The Discovery Channel and other [Discovery Communications] channels" beyond naïve (Response at 47).

[15] Comments at 12.

DirecTV/AT&T transaction. The effects are cumulative. Programming costs will shift. Competition will be harmed.

D. Cincinnati Bell has Documented Significant Existing Pricing Differentials and the Commission Must More Closely Examine the Impact of this Transaction on Programming Cost Disparities Between Terrestrial Competitors.

Programming, the most critical of essential inputs for cable MVPDs, is the single largest cost of providing service. Today TWC already pays on average 30% less for essentially the same programming than Cincinnati Bell pays.[16] Affordability of programming is necessary to compete effectively with New Charter. The combination of Cincinnati Bell's analysis coupled with Charter's overt effort to avoid any discussion of this issue mandates that the Commission's inquiry of the Transaction include evaluation of its impact on programming rates, terms and conditions for both New Charter and the Terrestrial Competitors. The Commission should expand its information requests to include these issues, as well as production of affiliate and unaffiliated programming agreements for each Charter, TWC and A/N.

II. THE COMMISSION SHOULD GRANT THE CONDITIONS OUTLINED BY CINCINNATI BELL.

Cincinnati Bell outlined a number of simple provisions that would help alleviate harm to Terrestrial Competitors that would otherwise result from the Transaction. Most importantly, the Commission needs to examine thoroughly the discriminatory and harmful pricing differentials in the single largest cost to cable providers – programming. The fact that they exist is undisputed. The magnitude of such differentials needs to be fully understood by the Commission because, as

[16] Comments at 11.

evidenced in this Reply and in the prior Comments, the Transaction will directly and adversely impact those differentials and will harm Terrestrial Competitors and local competition.

Respectfully submitted,

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