Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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 Assign or Transfer Control of Licenses and Authorizations	)	

To: The Commission

REPLY BRIEF
OF
ENTRAVISION COMMUNICATIONS CORPORATION

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November 12, 2015

I. INTRODUCTION

Entravision Communications Corporation ("Entravision") respectfully submits this Reply in response to the joint Opposition to Petitions to Deny and Response to Comments, filed November 2, 2015, by Charter Communications, Time Warner Cable ("TWC"), and Advance/Newhouse Partnership ("Bright House Networks") (collectively "Charter").

Fundamentally, Entravision and Charter agree on one key factual point: programmers who make and sell diverse content for distribution on broadcast and cable networks will receive less compensation for their efforts if this proposed three-way merger is allowed to proceed. Charter, of course, then proceeds to argue this diminution of revenue for program providers should not matter to the public interest, because, as it asserts, it is possible that some of this wealth will be "passed-on" to consumers (by Charter) and there is insufficient evidence that programmers over all will suffer sufficiently to harm the public interest.

But this approach is backwards. Once Charter has conceded that program providers will be harmed by a loss of revenue, it is Charter that should bear the burden of showing, through good empirical evidence, that harm is de minimis and there will remain a healthy program creation marketplace in the context of the proposed deal that serves the subscribing public. That is what the public interest requires—a healthy and diverse marketplace of program providers—including smaller, independent networks like LATV that are focused upon the important and growing Latino market. Charter's rebuttal, largely provided though the Reply Declaration of Michael Katz, fails to support that case, and, as critiqued by Entravision's expert, Professor John Kwoka, contains several flaws in its economic reasoning and lacks sufficient evidence on key points.[1] Given the record, the application should be denied or, alternatively, subject to conditions as described below.

II. WHAT WILL NEW CHARTER DO WITH ITS INCREASED PROFITS AND BARGAINING POWER?

Charter embraces the concept that the proposed transaction will lower its cost of acquiring programming. While Charter's expert, Prof. Katz, likely underestimates the degree of wealth transfer from program providers to the New Charter—both because of his admitted "conservative assumptions" as well as his failure to apply the economic bargaining model that Charter and Entravision agree should be applied here[2]—it appears that Charter's position is these "cost savings" are significant.

Charter, however, goes on to argue: "[a]s the Commission recognized in AT&T-DirecTV, programming cost reductions are likely to be 'passed through to subscribers' and to support broadband investment, and thus constitute public interest benefits."[3] But the Commission, in the AT&T – DirecTV proceeding, was careful to note that "[a]s the Commission has found previously, to the extent a change in video programming costs of this nature is a transfer of surplus between video programmers and video distributors, it generally is not a public interest benefit."[4] Moreover, the Commission found that in that matter, that there was sufficient evidence to support "some" pass through of consumer surplus that would benefit consumers.[5]

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[1] Professor Kwoka's Reply Comments are attached as Exhibit A (hereinafter "Kwoka Reply" or "Statement").

[2] Kwoka Reply, ¶¶11-12.

[3] Charter Opp. pp. 2-3 (citing *Applications of AT&T Inc. and DirecTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, 30 FCC Rcd 9131, 9243 ¶¶ 290-291 (2015) ("AT&T-DirecTV Order")).

[4] AT&T-DirecTV Order, ¶ 290.

[5] *Id.*

But whatever the record in that matter, there are reasons to doubt that significant pass through and public intent benefits would occur here. [6]

As Professor Kwoka explains, pass through will not happen when increased revenue takes the form of a lump-sum payment, rather than a reduction in marginal costs.[7] A lump-sum payment is like a side payment. It does not alter operating costs or incentives to produce. It does not alter the marginal cost curve that, together with demand, determines the quantity produced. That is, economic theory implies that an MVPD will benefit consumers less through lower prices or increasing quantity if there is no effect on marginal costs. In short, fixed payments do not alter incentives to lower price--only marginal cost changes do.

Here, Charter's argument, practically speaking, is that the revenue it estimates it will gain is merely the result of "stepping" into existing contractual relations. [8] In reality, the cost savings that Charter identifies are just a "transfer of surplus," which the Commission does not recognize as a public interest benefit.

Moreover, MVPDs, like Charter or TWC, have been historically and, largely remain, insulated from price competition as a result of the Franchising agreements of the MVPDs and the

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[6] For example, as some regulators and commentators have noted, any resulting "cost savings" could simply be used to service the substantial debt load—estimated to be $24 billion in additional indebtedness—that Charter is accepting in order to finance this deal or, alternatively, "pocket" the proceeds, enriching its shareholders or management. See, e.g., Comments of the New York State Dep't of Public Serv. Staff regarding Joint Pet. of Charter Comm'n & Time Warner Cable for Approval of a Transfer of Control of Subsidiaries & Franchises, Pro Forma Reorganization, & Certain Financing Arrangements, No. 15-M-0388 (N.Y. Pub. Serv. Comm'n), pp. 35-39; Public Knowledge Petition to Deny.

[7] Kwoka Reply, ¶¶ 6-10.

[8] Moreover, there are no manufacturing or distribution efficiencies related to this shift in revenue. For example, for a network that is already carried on Charter and TWC, the merger will gain it no new viewers and hence no increased scope or scale economies. Nor has Charter attempted to identify any practical efficiencies that would occur for it in serving such a network.

resulting lack of competition. Despite Charter's absurd claim that there are thousands of MVPDs, the reality, as the Commission is well aware, is that MVPDs face limited competition for subscribers in the DMAs in which they operate. MVPDs have used this industry reality to argue that there are little or no horizontal overlaps in particular deals and therefore no competitive concerns.[9] Despite Prof. Katz's argument that "even a monopolist … would be expected to pass some portion of its cost savings through to consumers in the form of lower quality-adjusted prices,"[10] the opinions of the Charter executives that Prof. Katz's relies upon are telling: Charter's view is that current prices are "unsustainably low," and Charter likely will be "commercially compelled to raise its prices" in the future.[11] The business reality here—as opposed to economic theory—is that because of the traditional lack of competition on price in marketing to potential subscribers, there is little competitive pressure on MVPDs—here the new Charter—to lower prices or improve quality to gain subscribers and the business instinct is to raise them.

In addition, Charter's argument is premised on the assertion that its "incentives" will be to pass through this revenue windfall, through either lower subscriber prices or expanded program carriage. But this is the same tired argument about what economic incentives will be created that are the stock in trade of merging parties before this Commission. If any large fraction of them actually came to fruition, the public interest would be well served, but in point

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[9] Charter notably adopts this line of argument in its support of its application here. Charter Public Interest Statement, p. 5 ("**No Horizontal Concerns**. The Transaction raises no horizontal concerns, as the merging companies do not compete in the same geographic markets.").

[10] Katz Reply Decl., ¶ 40 (emphasis added).

[11] *Id.*, ¶ 55 (referencing Interview with David Andreski, Vice President, Market Analysis &Forecast, Charter Communications, Inc., October 29, 2015). Notably, also, the real world examples of Charter "pass through" Prof. Katz's relies upon all involve price increases. *Id.* ¶¶ 51-54.

of fact, most either do not occur or at least we have no evidence that they do. So in this case we should not rely upon a theoretical possibility when a detailed, binding commitment will assure the result. Charter, for example, argues in its Public Interest Statement that it is committed to expanding its broadband offerings.[12] Charter could make a similar and binding commitment to expand the carriage of independent networks that serve unique markets, such as Latinos, and therefore ensure that these supposed cost savings will be used to expand output. If Charter would engage in such behavior anyway—as it argues in its Opposition—Charter should have no real problem in assuring those public benefits will occur post-merger. (Professor Katz goes so far as to opine that "New Charter's marginal cost savings will in fact create incentives for the firm to purchase *additional* programming." [13]) Indeed, Charter appears to make a such commitment, albeit in vague terms, when it submits that it will "embrace Time Warner Cable's commitment to diversity and inclusion in … procurement" [14] and make a "*[c]ommitment to increasing engagement with minority ... businesses that can supply it with the high quality materials and <u>programming</u> its customers demand.*"[15] If Charter indeed is making such a commitment—rather than mouthing generalities—the Commission should confirm the parameters of the commitment and document it, as a binding commitment, in any order consenting to the transfer of the licenses at issue here.[16]

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[12] A list of detailed commitments can be found at pages 17-20 of Charter's Public Interest Statement.

[13] Katz Reply Decl., ¶10, at p. 8 (emphasis in the original).

[14] Charter Pubic Interest Statement, p. 20.

[15] *Id.* p. 41 (emphasis in original) .

[16] At one point, Charter complains that Entravision is petitioning to deny consent in this transaction when it filed comments in the proposed, but failed, Comcast/TWC deal, which included certain proposed structural remedies. *See* Charter Pubic Interest Statement, p. 24. To be clear, Entravision, despite addressing Charter's vague commitment to expand programming,

III. HARM TO PROGRAM PROVIDERS

Entravision, in its Petition, noted that a reduction in revenue for program providers—or opportunity to earn such revenue—would harm small, independent program providers and make it even harder for such networks to be formed or survive. While it is admittedly hard to measure empirically such likely effects, there is myriad real world evidence of how smaller Latino-oriented networks (or Latino owned or controlled networks) are struggling now, including the fact that networks like Fuse/NuvoTV, sponsored and presumably paid license fees by Comcast as part of the Comcast/NBCU deal, are struggling.[17] Less opportunity to earn fees cannot be a positive for the smaller, diverse program providers. Moreover, these effects are economically predictable. As Professor Kwoka noted and now again reiterates, economic theory shows that: "Latino viewers can expect to find programming that has been subjected to downward pricing pressure and consequent compromises in its quality, novelty, and other improvements that would otherwise have occurred."[18]

Charter attempts to minimize the predictable effect of decreased revenue for marginal program providers by citing statistics that treat program providers as a monolithic group. For

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is petitioning to deny, but if Charter is suggesting that it is prepared to accept structural remedies in order to address Entravision's objections, a structural remedy comparable to those proposed in Comcast/TWC by Entravision would be Charter agreeing to divest cable assets in key Latino DMAs.

[17] *See* Alex Sherman, Jennifer Lopez-Backed Fuse Cable Channel Said to Be on the Block, Bloomberg Business (Oct. 30, 2015) (reporting on the financial difficulties of Fuse the problem with NuvoTV, the Jennifer Lopez Latino-oriented channel that is reportedly for sale, even though it is securing compensation from cable operators), *available at* http://www.bloomberg.com/news/articles/2015-10-30/jennifer-lopez-backed-fuse-cable-channel-said-to-be-on-the-block; Nathalie Tadena, Fuse Media Looks to Target 'New Young Americans', CMO Today, Wall Street Journal (Mar. 4, 2015) (reporting on the phasing out of the NuvoTV brand), *available at* http://blogs.wsj.com/cmo/2015/03/04/fuse-media-looks-to-target-new-young-americans/

[18] Kwoka Reply, ¶ 1.

example, Charter notes that license fees have increased over time for program providers as a whole.[19] But this is an obfuscation —not a clarification. As Professor Kwoka explains, for example, an "industry-wide" increase in programming fees is likely to be the result of payments to ESPN and other sports-focused networks.[20] It says little to nothing about the financial health of independent networks serving distinct markets, like Latino viewers.

Likewise, Charter, through Prof. Katz, argues that Latino- oriented networks can always turn to other distributors to negotiate and earn revenue. But neither Over-the-Top delivery,[21] nor small or even de minimis cable systems or cable operators are a viable, current substitute for distribution over one of the few remaining major MVPDs that will be serving a number of the significant Latino DMAs.[22] Indeed, this proposed transaction continues the trend of solidifying the bargaining power of MVPDs over small program providers and uniquely affects such Latino-oriented networks by concentrating control of program distribution to Latino audiences in such key DMAs such as Los Angles and New York. As Professor Kwoka summarizes: "Failing to reach those audiences would make its programming all but irrelevant to major advertisers that provide the necessary revenue streams to sustain Latino-focused programmers, many of which are not provided license fees by the MVPDs."[23]

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[19] Katz Reply Decl. at d. ¶87.

[20] Kwoka Reply, ¶ 15.

[21] *Id.* ¶ 14 (arguing whatever the future of cord-cutting, that future is "not now"). Notably, at least one research firm estimates that the rate of cord-cutting has slowed. *See* TDG Research Predicted Quarterly Decline in Cord Cutting, *available at* http://tdgresearch.com/q3-cord-cutting-decline-anticipated-by-tdg-research/.

[22] *Id.* ¶ 19.

[23] *Id.* ¶ 20.

V. CONCLUSION

Harms to the public interest, especially harms that fall disproportionately on an important class of citizens, must be considered if the public interest is to be promoted. The public interest requires that both competition and diversity be protected. If Charter truly believes that it will have reduced costs that will be used to benefit consumers, it should be willing to make a binding commitment to use those funds—which it apparently calculates as significant—or, if those funds do not materialize, other funds at Charter's disposal, directly for the public interest, including committing funds to license and carry a material number of new, independent programmers that serve diverse markets, including the growing Latino marketplace. If this cannot be incorporated into a binding obligation upon Charter, then for the forgoing reasons described in its Petition and this Reply, Entravision respectfully submits that the record shows that the public interest is not served by the proposed merger and that the Commission must deny consent to the proposed transfer of control.

Respectfully submitted,

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REPLY COMMENTS BY JOHN KWOKA

ECONOMIC ANALYSIS OF THE EFFECTS OF THE PROPOSED MERGER OF CHARTER COMMUNICATIONS, TIME WARNER CABLE, AND ADVANCE/NEWHOUSE PARTNERSHIP

ON PROGRAM PROVIDERS SERVING THE LATINO MARKET

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November 12, 2015

I. INTRODUCTION

1. On November 2, 2015, Charter Communications, Time Warner Cable (TWC), and Advance/Newhouse Partnership (Bright House Networks) submitted their joint Opposition to Petitions to Deny and Response to Comments ("Response"), in part challenging my analysis and conclusions previously offered on behalf of Entravision Communications Corporation ("Entravision") in opposition to this proposed merger ("Statement"). In my Statement[1] in analyzing the proposed transaction and reaching my conclusion about its likely effects, I made the following observations:

- "[T]his merger will further reduce the number of buyers and increase concentration among buyers of video programming";
- "[T]hese effects are especially pronounced with respect to programming oriented toward Latino audiences, since the post-merger 'New Charter'...will dominate a number of markets that are heavily populated with Latino households";
- "Bargaining theory and empirical evidence serve to underscore the concern that an MVPD that becomes a larger buyer of a genre of programming will be able to tilt the balance of bargaining power in its favor and will use that bargaining power to secure programming on terms more favorable to it and unfavorable to programming providers"; and
- "Latino viewers can expect to find programming that has been subjected to downward pricing pressure and consequent compromises in its quality, novelty, and other improvements that would otherwise have occurred."

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1 "Economic Analysis of the Effects of the Proposed Merger of Charter Communications, Time Warner Cable, and Bright House Networks on Program Providers Serving the Latino Market," October 13, 2015.

2. The parties' Response to these specific points is largely to be found in the Reply Declaration of Prof. Michael Katz. In that Declaration, Prof. Katz accepts my analytical framework of bargaining theory for purposes of analysis.[2] He also accepts the evidence that I cite regarding cable operator size and programming costs.[3] He nonetheless declares that my analysis is subject to "several serious flaws."[4] While Prof. Katz has identified some areas where additional evidence would certainly be useful, nothing in his critique disproves the points I have made, and indeed, his alternative views are not well supported. My basic points stand as does my ultimate conclusion that this proposed merger "would adversely affect the quality, viability, and competitiveness of Latino-oriented programming and the audiences that they seek to serve."

3. In what follows, I explain why Prof. Katz's critique does not alter my analysis or conclusion.

II. REPLY TO PARTIES' RESPONSE

4. Charter, TWC, and Bright House Networks ("BHN") (collectively, the "Parties") advance three broad arguments in response to my economic analysis. First, they argue that as a result of the merger, programming costs will fall and at least some of those cost savings will be passed through to subscribers. Second, they argue that the programming industry is healthy and will not be harmed by this merger. Third, they argue that MVPD providers in television markets—and, specifically, television markets with significant numbers of Latinos—are not especially concentrated and will not become significantly more so as a result of this merger. I take these up each in turn.

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[2] Katz, 50

[3] Katz, 12

[4] Katz, p. 70.

A. Programming Costs And Consumer Savings

5. There seems to be unanimous agreement that programming prices paid by Charter—that is, the cost of acquiring programming—will fall as a result of the merger. Prof. Katz presents data illustrating size-related differences in per-subscriber costs, and explicitly states that he was instructed by counsel for Charter simply to "assume [that]...New Charter will be entitled to apply the terms of TWC's contracts with programmers to legacy Charter systems." Although program cost savings to Charter are revenue losses to the program sector, Prof. Katz rejects the notion that these will harm the program provider sector and instead argues that these cost savings will benefit consumers (at least in principle). He states that the cost savings to Charter "will...create incentives to charge lower prices to consumers than otherwise"[5]

6. In arriving at this conclusion, Prof. Katz's analysis glosses over several issues that demonstrate its inadequate foundation.

7. First, although in ordinary markets where prices are posted and consumers make incremental decisions with respect to quantity, it is the case that certain cost reductions will indeed lead to price reductions, the final consumer effects of a shift in transactions price predicted from the bargaining model are not straightforward. In discussing downstream effects, for example, Goppelsroeder and Schinkel observe that "auction and bargaining solutions...have first and foremost an effect on distribution [of gains], and not necessarily so much on efficiency and total welfare."[6] Inderst and Wey note that "The buyer power defense [to a merger] asserts that lower input prices due to higher purchasing power are passed (partially) on to consumers....[S]uch a conclusion has only been theoretically sustained if supply contracts are linear and retailers [that is, sellers to final consumers]

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[5] Katz, p. 5.

[6] Goppelsroeder, Marie and Schinkel, Maarten Pieter. "On the Use of Economic Modeling in Merger Control," in Modelling European Mergers, P.A.G. Bergeijk and E. Kloosterhuis, eds., Edward Elgar, 2005.

compete in local outlet markets."[7]

8. One important issue on which Prof. Katz and I agree is therefore to what extent the price reductions that will result from this merger constitute changes in marginal cost vs. changes in fixed costs. Prof. Katz concedes that the MVPD cost change is to some degree a fixed cost change, but his analysis understates that degree. I understand, and Prof. Katz acknowledges,[8] that program license contracts have significant nonlinearities, so that price shifts down at discrete intervals. This characteristic of supply contracts results in revenue transfers from program suppliers to MVPDs that have lump-sum properties rather than marginal cost properties. As a result, characterizing the nature of the cost savings as marginal vs. fixed requires much closer examination of the revenue transfers than I find in Prof. Katz's Reply.

9. Moreover, in the context of this particular merger, there is additional reason to view the cost savings as a lump-sum transfer. The Parties' presumption that Charter will "step into TWC's contracts"[9] implies that Charter will enjoy benefits exactly equal to the assumed cost difference multiplied by the number of Charter subscribers, which is precisely that calculated by Prof. Katz. But this calculation even more clearly emphasizes the lump-sum nature of the transfer. In short, the Parties have not offered clear and convincing evidence why the shift of revenues from programmers to Charter should not be treated primarily as a transfer and certainly no convincing evidence that it will in fact increase "incentives to lower price," much less actually lower prices to subscribers. [10]

10. By contrast, the adverse effects on program suppliers of such a transfer are straightforward.

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7 Inderst, Roman, and Christian Wey, "Bargaining, Mergers, and Technology Choice in Bilaterally Oligopolistic Industries," Rand Journal of Economics, Spring 2003, p. 2.

8 Katz, p. 24.

9 Katz, p. 6

10 Even if some significant degree of pass-through were established, the net price effect would still have to factor in any adverse effects on upstream or downstream competition.

Revenue losses to the program production sector will handicap that sector's ability to invest, improve quality, and successfully compete. I discussed these consequences in my original Statement and cited a supplier whose experiences illustrated them in concrete terms. Prof. Katz protests that this is inadequate support for this proposition, but these effects have long been understood. In their report to the UK Office of Fair Trade, for example, Dobson, Waterson, and Chu note that "buyer power reduces prices for suppliers, and thus their income, making it difficult for them to finance required investments, which might then be postponed or even foregone completely...Supplier efficiency might suffer which might ultimately feed through to higher prices for consumers than would otherwise be the case."[11] These effects will be felt especially acutely by the smaller, marginal suppliers relative to any larger ones that may exist.

11. I would also note that the magnitude of the transfer calculated by Prof. Katz understates the extent of the revenue reduction that this merger will inflict on the programming sector. The reason is that the difference he was instructed to use is simply the arithmetic difference between Charter's and TWC's program costs per subscriber multiplied by the number of Charter subscribers. But that difference does not take into account the economic implications of the very bargaining model that he urges should be used. As I had explained in my Statement, that model predicts that larger buyer size will result in a lower cost due to the buyer's greater bargaining leverage, where the latter could result from changes in disagreement points or in raw bargaining power. One indisputable result of this merger is that the entity that used to be TWC will in fact grow in size, and for reasons described in my Statement, size is generally viewed as conferring greater bargaining power.

12. In the present case, TWC's subscriber base and market share will grow by 56 percent relative to

[11] Paul Dobson, Michael Waterson, and Alex Chu, The Welfare Consequences of the Exercise of Buyer Power, UK Office of Fair Trade, Research Paper 16, September 1998, p. 16.

TWC's premerger levels.[12] This will enhance its bargaining power and predictably result in lower programming prices than those presently paid by TWC. Hence, measuring the transfer effect of the merger by simply replacing Charter's programming costs with TWC's current costs, as assumed by Prof. Katz, overlooks the further reduction in fees and the further extraction of revenues from the programming sector that will result from this merger.

B. Financial Health of the Program Sector

13. Prof. Katz portrays the program sector as healthy and growing and, by implication, not at risk from any reduction in program revenues. In support of this proposition, he references the rise of alternative distribution media, faster Internet speeds, a supposed increase in investment in programming, and an overall increase in program revenues. Most of these facts, even taken at face value, do not speak to the circumstance of Latino-oriented program suppliers. As I originally noted, while a few are large and well known, most are small independent programmers that operate at the financial margin. For them, any revenue reduction can be decisive to operations, investment, and even viability.[13]

14. Beyond that, the other facts noted by Prof. Katz do not imply that the programming industry is doing well generally. He cites, for example, an estimate that the share of households that "rely solely on Over-the-Top ("OTT") delivery of television shows or movies is projected to rise from 4.6 percent in 2013 to 10.2 percent in 2018."[14] Of course, this is only one estimate and from a single source, but more importantly, it actually demonstrates that OTT, like other technologies,

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12 Premerger TWC has 11.1 percent of MVPD subscribers, rising to 17.3 percent after consolidation with Charter and BHN—a 56 percent increase.

13 Prof. Katz can only offer that Charter's cost savings will comprise only a "small change" in programmer revenues, so small that is it "unlikely" to "materially" affect their incentives and operations (Katz, p. 67). As described below, if this reduction affects marginal suppliers, it can be expected to alter their immediate operations and their longer-term ability to improve quality and to invest in new programming, as observed by Dobson et al., supra.

14 Katz, p. 59.

represents a nascent alternative—available to and utilized by a small minority of viewers now and for some time, and hence not a viable competitive alternative for most audiences and programming interests. It is easy to enumerate such technologies, easy to project expansion of their markets, and even possible to envision some future date when they may represent broad competitive alternatives to viewing audiences and as buyers of programming for those audiences. But that date is not now and, hence, such speculation does not address the relevant question of the market power of incumbent MVPDs in general and especially those currently serving significant Latino audiences.

15. Prof. Katz emphasizes that program revenues have grown over time, but the actual reason for this growth makes clear that this fact is essentially irrelevant to this matter. It is widely understood to result largely from sports programming and, perhaps, almost uniquely from ESPN.[15] The financial health of the programming industry in general is scarcely measured by the singular success of ESPN. Finally, Prof. Katz attempts to dismiss the impact of the loss of program revenues on the programming sector by comparing it to such things as the total revenues earned by programmers from all sources, including advertising. Even if apt—which they are not—these comparisons gloss over the obvious point that for marginal program suppliers, any revenue reduction can be decisive, especially where they are dependent on MVPD license fees. As I just noted, revenue streams are an especially compelling issue for Latino-oriented programming interests since few of them fit the profile of large, growing, and financially successful program companies that Prof. Katz focuses on.

C. Concentration Among MVPDS

16. Prof. Katz makes the further argument that MVPD markets are not especially concentrated, and this merger does not appreciably alter whatever degree of concentration that exists. Prof. Katz quotes my Statement as saying that "The market for Latino-oriented programming consists, on the supply

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[15] Among countless sources, see for example: "Your Cable Bill is Increasing in 2015 and You Can Blame It on Sports," forbes.com, Dec. 24, 2014, citing ESPN and regional sports channels as the cause.

side, of many mostly small providers, and on the buying side, a handful of large and diversified media companies." He disputes that characterization with data and interpretations suggesting that, by contrast, the MVPD sector actually is highly fragmented and the programming sector and the Latino-oriented programming sector in particular, is far more concentrated. This alternative view, however, rests on an incorrect accounting for the relevant market within which the programming transaction occurs and so mischaracterizes marketplace realities.

17. The programming market involves a negotiation over price and carriage between a program supplier and each MVPD. Each MVPD measures demand for such programming that arises from its status as, typically, the sole cable operator and one of only three MVPDs customarily in most franchise areas (the others being satellite-based services). While there are some cable overbuild areas as well as telco-based distribution systems in some areas, these represent a distinct minority. Hence the relevant question for a video programmer is: in order to reach its audience, how many relevant alternative distribution services—that is, program buyers—are there?

18. That number is not 5208 or 660—the numbers of "cable systems" and "cable operators," respectively, reported by Prof. Katz. Video programmers do not negotiate with thousands of individual cable systems, nor with hundreds of individual cable operators. In the relevant market for programming, the actual number of buyers is quite small. As documented in Tables 1 and 2 in my Report, more than 73 percent of all household subscribers in this country are served by exactly four providers: Comcast, DirecTV, DISH, and TWC. Another 20 percent are served by five others and two of those are proposing to merge with TWC.[16] If consummated, that would leave 79.3

[16] Prof. Katz disputes my treating BHN as a separate MVPD, citing BHN itself for the propositions that BHN "has a contractual right to rely on TWC" for program acquisition, and "routinely takes advantage of that opportunity." I am fully aware of this arrangement but would note considerable ambiguity in its operational meaning. Its Response to the FCC's Interrogatory Request 14 to Advance/Newhouse states that "BHN's video operations face considerable competition, and BHN <u>may</u> consider how its programming line-up compares with competitors," citing executives "principally involved in programming decisions." (emphasis added). Even if BHN is not fully independent, the competitive concerns associated

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percent of all subscribers in the hands of four MVPDs.

19. Beyond that, of course, the audiences for Latino-oriented programming are geographically quite concentrated. As I documented, two-thirds of all Latino viewing households in this country are located in just twenty DMAs. Prof. Katz correctly notes that I had reported the merged entity would account for only 15.5 percent of all subscribers in those areas. In focusing on that, he overlooks my key argument: a subset of those twenty DMAs comprise the crucial markets for Latino-oriented programming and in those markets the competitive effects are "more pronounced...[since] the post-merger 'New Charter' will dominate a number of markets that are heavily populated with Latino households."[17] New Charter would become the leading MVPD in six of these top twenty Latino DMAs. It would combine TWC's dominance of the Los Angeles, San Antonio, McAllen, and El Paso DMAs with BHN's dominance of the Orlando and Tampa DMAs. In those six DMAs, that account for 3.4 million Latino households, the merged company will hold a 43.3 percent market share, well above its national average. The merged company would, in addition, dominate three of the five boroughs of New York City, thereby producing an additional 1.1 million Latino subscribers in the second largest Latino market in this country.

20. The implication of these data is straightforward: no programmer seeking to serve a Latino-oriented market would succeed without an audience that includes Los Angeles, New York City, and several others with large Latino populations, markets that would become dominated by the combined New Charter. Failing to reach those audiences would make its programming all but irrelevant to major advertisers that provide the necessary revenue streams to sustain Latino-focused programmers,

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with this merger remain. I also note that this discussion assumes that the proposed Cablevision-Suddenlink acquisition proceeds successfully.

17 Kwoka, p. 2

many of which are not provided license fees by the MVPDs.[18]

21. Finally, Prof. Katz references SNL Kagan data to the effect that there are "just 47 Spanish-language broadcast and cable networks in the U.S., owned by 26 companies," and emphasizes the large size of Univision in particular. I had already noted the "small number of networks with substantial Latino viewership with familiar brand names such as Univision, Telemundo, and MundoFox [now MundoMax] ...." But I also noted that the rest of the industry is comprised of fledgling networks, small domestic providers, and "innumerable foreign program suppliers." As evidence that this is a correct statement, I note that Prof. Katz's source counts 47 Spanish language networks, whereas the most recent Guide to U.S. Hispanic Networks reports that "The number of U.S. channels targeting Hispanics now tops 140."[19] Clearly it is the case that these are indeed hard to enumerate. Most are far less familiar than Univision or Telemundo. These other, numerous networks are individually much smaller, less well financed, and most certainly less able to bargain successfully against the large MVPD buyers of their programming.

III. CONCLUSION

22. The Opposition of Charter, Time Warner Cable, and Bright House Networks, including the Reply Declaration of Prof. Katz, describe a transaction paradigm involving a large program supplier and some significant number of cable and other distributors of video programming. In that scenario, MVPDs are being forced to pay ever more for programming they must acquire, and then to pass those costs onto subscribers. This merger would supposedly rein in those powerful program

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[18] It is for this reason that Prof. Katz's observation that New Charter's share in any of the top 20 Hispanic DMAs would differ little from the largest share of each of the companies from which it is comprised misses this point: New Charter's domination of ever more DMAs adds to its bargaining position against Latino-oriented programmers that need to reach audiences in those markets in order to succeed. Katz, p. 74.

[19] Broadcasting & Cable, October 15, 2015,

suppliers, permitting MVPDs to lower their costs and thus reduce prices to consumers.

23. If that scenario accurately describes any part of the market for video programming, it is perhaps sports programming, but most certainly not the Latino-oriented programming segment. With few exceptions, the Latino-oriented sector in fact consists of small entities, at the financial margin, struggling merely for carriage in the hope of securing sufficient advertising to maintain operation. Even a major Latino-oriented broadcaster, such as Entravision, faces substantial obstacles to carriage and compensation for any programming that it seeks to license to MVPDs, other than the flagship Univision network for which Entravision provides the largest affiliate group of television stations. Despite Prof. Katz's comments, the reality is that for Entravision's non-network programming, and for the vast majority of Latino-oriented programmers, the consolidation of three of the top ten MVPDs in the country (or two of nine, in the Parties' view) will further consolidate the program buying sector, and as I said in my original Statement, it will "predictably tilt the terms of the transaction to the further disadvantage of Latino-oriented program providers and the viewers that look to them for video programming that serves their interests."