

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

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

REPLY



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REPLY COMMENTS



I. INTRODUCTION AND SUMMARY

The American Cable Association (“ACA”) submits this Reply to responses concerning the application filed by Charter Communications, Inc. (“Charter”), Time Warner Cable Inc. (“Time Warner Cable” or “TWC”), and Advance/Newhouse Partnership (“Advance/Newhouse”) (collectively, “Applicants”) seeking consent to transfer control of various Commission licenses in connection with a series of proposed transactions through which Charter, Time Warner Cable and Advance/Newhouse’s Bright House Networks (“BHN”) will merge (“the transaction”) into “New Charter.”

In its comments, ACA demonstrated that the transaction has the potential to result in competitive harm to consumers and multichannel video programming distributors (“MVPDs”)

that purchase cable programming affiliated with New Charter.¹ The transaction involves companies with significant roles in both the downstream video distribution market and the upstream video programming industry, which provide this programming to MVPDs. Their combination will create the second largest cable television operator with 17.3 million video subscribers. New Charter will be affiliated with national cable programming assets that are highly important to competitive MVPDs through ownership and positional interests held by Dr. John Malone and Advance/Newhouse in Discovery Communications, Inc. (“Discovery”) and Starz, Inc. (“Starz”).

Specifically, the transaction will create a new incentive and ability of New Charter-affiliated programmers Discovery and Starz to impose higher prices and more onerous terms and conditions for MVPDs whose service areas overlap with those of TWC and BHN to the extent these distributors were not previously affiliated with these programmers. As a result, ACA members whose systems today compete against TWC will be for the first time purchasing Discovery programming from a direct competitor – New Charter. Similarly, ACA members whose systems today compete against TWC and BHN will be for the first time purchasing Starz programming affiliated with this competitor. Moreover, the transaction will increase Discovery’s and Starz’s existing incentive to raise prices in areas that overlap with Charter and BHN systems to the extent that they are currently affiliated with these programmers. Accordingly, even current rivals of Charter will see prices rise.

¹ *Application 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, Comments of the American Cable Association at 7-17 (filed Oct. 13, 2015) (“ACA Comments”).

		
MVPD Rivals of 	New Incentive to Raise Costs	New Incentive to Raise Costs
MVPD Rivals of 	New Incentive to Raise Costs	Existing Incentive to Raise Costs Grows
MVPD Rivals of 	Existing Incentive to Raise Costs Grows	Existing Incentive to Raise Costs Grows

In their Response, Applicants failed to disprove these basic facts. They devote the bulk of their arguments to refuting claims of vertical harms by demonstrating that Discovery and Starz would not have an incentive to permanently or temporarily withhold their programming from their affiliated MVPD's rivals. ACA's economic analysis, however, is not based on a foreclosure theory, but rather on a bargaining model analysis, which posits not that cable-affiliated programmers will withhold programming from rivals, but rather will charge them more. To the extent the Applicants' economic experts address ACA's analysis, they do so with a study that only evaluates the impact on national MVPDs. They ignore the impact on regional and local MVPDs, which is the focus of ACA's concerns. Yet still, they agree with ACA that the transaction will cause prices to rise; the only dispute is how much for each impacted MVPD. ACA believes that *any* increase that results from vertical harm is unacceptable if not remediated, and that the increase in this case will be substantial and will harm competitors and consumers, as the higher prices charged competitors are flowed through to consumers.

Further, the web of interlocking ownership and positional interests of Dr. John Malone and the Liberty family of companies that he controls or maintains in Charter, Discovery, Starz and related properties discredits the Applicants' and their affiliated programmers' claims that Dr. Malone will not exert undue influence because corporate controls are in place to prevent

conflicts of interest. Economic theory supports ACA's position that prices for Discovery and Starz programming will rise simply because New Charter, Discovery, and Starz are able to coordinate their actions to take advantage of opportunities to maximize their combined profits. Contrary to the claims of Applicants and Discovery, given Dr. Malone's control and positional interests in New Charter, Discovery and Starz – both direct and indirect – his close relationships with the leaders of these companies, and recent public statements, there is ample reason to believe that there will be coordination, and that the "specific precautions" in place to prevent conflicts of interest will fail to address this behavior.

Also unavailing are their arguments that the program access rules offer sufficient protections against the potential harms of the transaction. The transaction will exacerbate the harms of Discovery's existing vertical integration with Charter and BHN and Starz's existing vertical integration with Charter in areas served by Charter and BHN today, spreading these harms across New Charter's vastly expanded footprint. These transaction-specific harms will not be adequately remedied by the program access rules. The program access rules do not address the harm of uniform price increases, but rather are targeted at overt discrimination against rivals, and have other flaws that make them ineffective for smaller cable operators as a means of redress. Accordingly, the Commission must adopt remedial conditions to ameliorate these harms and provide adequate and useful protections for smaller MVPDs.

II. APPLICANTS HAVE FAILED TO REBUT CLAIMS THAT THE TRANSACTION HAS THE POTENTIAL TO RESULT IN PROGRAMMING PRICE INCREASES FOR MVPDS AND THEIR CUSTOMERS

In its initial comments, ACA demonstrated that the transaction will involve the vertical integration of important programming assets – Discovery and Starz – with the distribution assets of TWC and BHN.² As a result, ACA members whose systems today overlap with TWC

² Discovery and Starz are attributable to Charter under the Commission's rules through the ownership and positional interests of Malone. Discovery is currently also attributable to BHN through the ownership interests of Advance/Newhouse.

systems will be purchasing Discovery and Starz programming affiliated with a direct competitor for the first time. Similarly, ACA members whose systems today overlap with BHN also will, for the first time, be purchasing Starz programming affiliated with a direct competitor. If the transaction is approved, Discovery will have a new incentive and ability to charge rivals of TWC higher prices. The same will be true for Starz with respect to rivals of TWC and BHN. To the extent that the transaction creates efficiencies that benefit New Charter, which Applicants readily tout as a significant transaction-specific benefit,³ it will incentivize Discovery and Starz to charge higher rates and impose more onerous terms and conditions for its programming on existing rivals of Charter and BHN with whom the programming is already affiliated. MVPDs charged higher prices for this programming than they would have but for the transaction will pass these increases on to subscribers in the form of higher retail rates. Competition and consumers will suffer.

Applicants spend many pages refuting claims that the increased vertical integration resulting from the transaction will not harm competition because New Charter will own “virtually no national programming content,” and neither New Charter-affiliated programmers nor Dr. Malone or Advance/Newhouse will have the incentive or ability to keep their affiliated programming from competitors.⁴ Applicants argue further that Discovery is not the type of marquee programming that has concerned the Commission in previous media mergers.⁵ Discovery and Starz maintain that, to the extent the transaction engenders any vertical integration harms, the program access rules offer sufficient protection against any potential

³ *Application 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, Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership Opposition to Petitions to Deny and Response to Comments at 25-28 (filed Nov. 2, 2015) (“Joint Opposition”) (discussion of public interest benefits associated with post-transaction programming cost savings to New Charter).

⁴ Joint Opposition at 44-50.

⁵ *Id.* at 47.

vertical integration harms arising from the vertical relationship of New Charter, Discovery and Starz.⁶

These rebuttal arguments miss the mark. ACA's claims of vertical harms are *not* premised on a theory of input foreclosure, as Applicants and their programming affiliates appear to believe.⁷ Applicants and Discovery mischaracterize ACA's position by suggesting that ACA is arguing that vertical harms will occur as a result of the use of foreclosure strategies.⁸ This is incorrect.

ACA's analysis of the transaction's vertical harms is based on the Nash "bargaining model" or Nash Bargaining Equilibrium ("NBE"). The NBE projects increases in price based on bilateral negotiations in which the seller will set prices that reflect, among other factors, the profitability of serving a customer and the opportunity cost of not serving that customer directly. The model predicts that so long as New Charter, Discovery and Starz are able to coordinate their actions to take advantage of opportunities to maximize their combined profits, they will collectively make decisions with that goal in mind. John Malone's ownership and positional interests in New Charter, through Liberty Broadband and Liberty Interactive, and in Discovery and Starz directly, together with Advance/Newhouse' ownership and positional interests in New Charter and Discovery, suggest that these entities will set their prices to achieve common goals of maximizing the profits of both their distribution and content assets.⁹ Programming fees will

⁶ *Application 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, Discovery Communications, Inc. Response to Comments at 3 (filed Nov. 2, 2015) ("Discovery Response"); Response of Starz at 2-3 (filed Nov. 2, 2015) ("Starz Response").

⁷ Joint Opposition at 46-48, *citing* Exhibit C, Dr. Steven C. Salop, Professor of Economics and Law at Georgetown University Law Center and Senior Consultant to Charles River Associates; Robert Stillman, Vice President of Charles River Associates; Serge X. Moresi, Vice President of Charles River Associates; Jarrod R. Welch, Senior Associate of Charles River Associates, Analysis of Video Programming Foreclosure Issues Involving Dr. John Malone and Advance/Newhouse Partnership (Nov. 2, 2015) ("Salop Declaration").

⁸ Discovery Response at 7; Joint Opposition at 47-48.

⁹ Dr. Malone is the leading shareholder in both Discovery and Starz. See Dave McNary, *Lionsgate Sells 3.4% Stakes to John Malone's Discovery, Liberty Global*, VARIETY, Nov. 10, 2015, available at

rise because Discovery and Starz will seek to recoup – through their negotiations for program carriage – the opportunity cost of New Charter not acquiring new customers from rival MVPDs. They will also increase in proportion to the rise in the per-video subscriber profits that New Charter will realize due to the efficiencies created by the transaction – in particular the reductions in programming costs due to volume discounting as New Charter’s video subscriber count increases to 17.3 million.

As Applicants’ economic experts acknowledge, the NBE includes a calculation based on the projected rate of subscriber departures to the programmers’ affiliated cable operator if the affiliated programmers fail to reach agreement with the operator’s MVPD rivals,¹⁰ but the harm asserted by ACA using the NBE does not depend on the programmer and its affiliated cable operator collectively benefiting from an actual occurrence of foreclosure. Rather, the bargaining model projects that the cable-affiliated programmer will continue to supply the programming while simply raising rivals’ costs to capture a portion of the lost opportunity for its affiliated operator to serve subscribers they would have expected to gained if the programming was withdrawn.¹¹

<http://variety.com/2015/film/news/lionsgate-stake-john-malone-1201637247/> (describing a deal that will triple the size of Malone’s stake in Lionsgate to about 10% through the coordinated purchases of three of his companies – Discovery, Starz and Liberty Global; “Malone is the leading shareholder at Discovery with a 28% stake and at Liberty Global with a 25% holding.”); Leon Lazaroff, *What John Malone Is Planning With Latest Media Stock Roll-Up*, THE STREET, Nov. 10, 2015, available at <http://www.thestreet.com/story/13359569/1/what-john-malone-is-planning-with-latest-media-stock-roll-up.html> (“This latest transaction comes nine months after Malone engineered a stock swap between Lions Gate and Starz Networks, the premium cable TV channel, of which Malone is the largest stakeholder.”).

¹⁰ Salop Declaration, ¶ 77.

¹¹ In employing the NBE to analyze the potential vertical harms of the Comcast-NBCU transaction, the Commission assumed that the profit derived from obtaining a customer from a rival did not depend on which rival it came from, that the diversion rate did not change due to the merger, and that following the bargaining model, each dollar increase in the opportunity cost would result in a 50-cent increase in the cost of programming. See *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, ¶ 46; Appendix B, Technical Appendix, Section I.B (2011). That is, the vertically integrated MVPD would capture one half the gains from the increase in opportunity cost when negotiating with a rival MVPD. A similar dynamic can be expected when New Charter-affiliated programmers negotiate with their affiliate’s rivals.

Applicants' economic experts' analysis of the impact of the transaction on equilibrium affiliate fees fails to rebut ACA's case that the transaction creates new incentives for Discovery to charge higher prices to MVPDs with overlaps in TWC areas, and of Starz to charge higher prices to MVPDs with overlaps in TWC and BHN areas. Although their analysis focuses primarily on video input foreclosure issues involving Dr. Malone and Advance/Newhouse, to the extent the analysis addresses ACA's bargaining model claim at all, it does so through an oblique analysis of how the proposed transaction will impact the gain from a Discovery carriage agreement realized by three national MVPDs as a result of (i) the influence of Dr. Malone and Advance/Newhouse raising the minimum price that Discovery will find acceptable from these MVPDs and (ii) from the efficiency benefits from the merger leading to larger increases in the equilibrium affiliate fee.¹²

The Applicants' economic experts' analysis fails on many counts, including the fact that it ignores the harm likely to impact regional and local smaller MVPDs. With respect to the new vertical integration of Discovery with TWC, Applicants' experts analyzed the impacts on only three large national MVPDs, Verizon, DISH, and AT&T/DirectTV, which have limited overlaps in TWC territories compared to their overall footprint. For MVPDs like ACA's small and medium-sized members, many of whom compete head-to-head and have substantial overlaps with TWC systems compared to their overall footprint, a proper NBE analysis would reveal the potential impact on many of these operators to be far greater. The incomplete analysis of Applicants' economic experts severely limits the probative value of its conclusions in establishing the magnitude of the likely vertical harms caused by the transaction, particularly to competition and consumers in specific local and regional markets of the country.

Significantly, the Applicants' economic experts do not dispute that the transaction would increase Discovery's existing incentives to charge higher prices to MVPDs with overlaps in

¹² Salop Declaration, ¶¶ 74-76 and Appendix C.

Charter and BHN areas, and for Starz to charge higher prices to MVPDs with overlaps in Charter areas. Their analysis of the impact on equilibrium affiliate fees as a result of increases in Dr. Malone's and Advance/Newhouse's existing incentive and ability to influence the bargaining positions taken by Discovery in carriage negotiations with MVPDs shows a rise in the estimated incremental effect on the affiliate fees that Verizon, DISH and AT&T/DirectTV would be charged.¹³ ACA believes the transaction will result in even greater increases for many regional and local smaller MVPDs that have an even greater competitive overlap with the Applicants.

So too, Applicants' experts' NBE analysis agrees with ACA that the transaction will also cause programming prices to rise as a result of merger efficiencies:

*The ACA has suggested that efficiency benefits from the merger will lead to larger increases in the equilibrium affiliate fee. To the extent that efficiency benefits reduce New Charter's costs or raise its quality so that its quality-adjusted margin rises, the equilibrium affiliate fee may increase.*¹⁴

There is no dispute in the record that New Charter will realize significant efficiencies as a result of the transaction, a portion of which are attributable to programming cost savings resulting from increased volume discounts that New Charter will be eligible to receive.¹⁵ Applicants' experts aver prices will not rise enough to matter.¹⁶ No price increase that is caused by vertical integration should be considered acceptable; the price increases that will result from this merger are likely to be considerable enough to matter. ACA encourages the Commission to perform its own analysis of the data submitted in the record.

¹³ See *id.*

¹⁴ See *id.*, ¶ 77 (emphasis added).

¹⁵ Joint Opposition at 25-28; *Application 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, Charter Communications Response to FCC's Information and Data Request at 262-272 (filed Oct. 16, 2015) ("Charter Response to FCC Data Requests").

¹⁶ See Salop Declaration, ¶ 77.

The fact that New Charter itself will own virtually no national cable programming networks at the close of the transaction, or the fact that the number of video programming networks that will be affiliated with New Charter post-transaction is small, as claimed by Applicants, is irrelevant.¹⁷ Whether Applicants own or are affiliated with one cable network or many, the overarching issue is whether the transaction serves the public interest, which requires an evaluation of whether it will cause harm to competition and consumers. Applicants' suggestion that one can determine whether a transaction is harmful simply by counting the number of programming networks owned or affiliated with them is wrong. The analysis requires an examination of many factors, including the degree to which a network or a suite of networks affiliated with an MVPD is desired by pay television customers. With respect to Discovery and Starz, they are.¹⁸

Applicants go to great lengths attempting to demonstrate that the level of affiliation between New Charter and its affiliated programmers is not enough to matter, and that there are

¹⁷ Joint Opposition at 44. In this regard it is noteworthy that, having orchestrated the further consolidation of cable properties through the merger of Charter, TWC and BHN, Dr. Malone is now turning his sights to content consolidation through the acquisition of Starz by Lionsgate, another of his content properties. See David Lieberman and Anita Busch, *Where Do Lionsgate and John Malone Go From Here?*, DEADLINE HOLLYWOOD, available at <http://deadline.com/2015/11/lionsgate-liberty-media-john-malone-next-move-1201617088/> (speculating about Malone's further intentions with respect to Lionsgate, a studio which he effectively controls with a 9.8% share when adding the 3% he bought in February with the 3.4% that Discovery and Liberty Global each bought in a deal announced on Nov. 10th, and describing him as a "consolidator" of entities he controls, including Discovery and Starz, and Liberty Broadband, "Charter's No. 1 backer with 25.8% of its voting shares"); Shalini Ramachandran and Ben Fritz, *Liberty's John Malone Eyes Content Consolidation, Cable investor envisions Lions Gate buying Starz, among other deals*, THE WALL STREET JOURNAL, June 3, 2015, available at <http://www.wsj.com/articles/libertys-john-malone-eyes-content-consolidation-1433360774?alg=y> (describing Malone's plans for Lionsgate to buy Starz "and potentially other free radicals in the industry"). In reviewing the potential vertical harms of the Charter-TWC-BHN tie-up, the Commission must be cognizant of the fact that although only a small number of cable programming entities today are vertically integrated with New Charter through Dr. Malone, that situation could change dramatically, even before the ink dries on the instant transaction.

¹⁸ In attempting to rebut foreclosure-based harms arguments, Applicants argue that although Discovery programming is widely viewed, it is not marquee programming like the broadcast stations, regional sports networks or suite of cable programming networks that concerned the Commission in the Comcast-NBCU transaction and that adequate substitutes exist. Joint Opposition at 47. ACA disagrees. See ACA Comments at 13-15. See also Chairmen of Discovery and Liberty Media Stay Tuned on Television, VANITY FAIR (Oct. 8, 2015), available at <https://thescene.com/watch/vanityfair/chairmen-discovery-liberty-media-stay-tuned-on-television> (remarks of Discovery's David Zaslav concerning the high value of Discovery content and brand name).

adequate safeguards to ensure that they cannot act on their incentives to raise programming prices.¹⁹ However, the Commission has found that vertical ownership interests of as little as 5% in a programmer are competitively significant, and Dr. Malone's ownership interests in Discovery and Starz far exceed these levels, as does Advance/Newhouse's interest in Discovery.²⁰ These interests provide Dr. Malone with more than adequate incentive and ability to influence the pricing decisions of Discovery and Starz when negotiation carriage agreements with rivals of New Charter, and more than adequate incentive and ability for Advance/Newhouse to influence the pricing decisions of Discovery as well. The fact that Dr. Malone will have only a 11.7% indirect ownership interest in New Charter²¹ through Liberty Broadband and Liberty Interactive is irrelevant; Dr. Malone controls the Liberty entities, will be a leading shareholder in New Charter, holds dominant voting interests in Discovery (28.7%), and even greater voting interests in Starz (47.2%).²² Similarly, post-transaction, in exchange for its BHN properties, Advance/Newhouse will be in a position to own 13 to 14% of New Charter and 24.9% of

¹⁹ Joint Opposition at 44-51; Charter Response to FCC Data Requests at 97-101, 102-113; Discovery Comments at 8-9; Starz Comments at 1-2.

²⁰ *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, ¶¶ 31-32 (1993) (“We will not adopt the single majority shareholder aspect of the broadcast attribution rule. In addition, all officer and director positions and general partnership interests will be attributable, as will limited partnership interests of five percent or greater, regardless of insulation ... [W]e have determined that 5% ownership is an appropriate threshold for identifying the point at which ownership in a publicly traded entity may create the potential for influence or control.’ We are concerned that a standard of more than five percent could allow cable operators to exert significant influence over their affiliated programmers without being subject to the statute.”).

²¹ Charter Response to FCC Data Requests at 79, n.134. While the Joint Opposition claims that Dr. Malone will only have a 1.7% indirect interest in New Charter, this appears to directly conflict with Charter's Response to Data Request 6, which reports that Dr. Malone could be deemed to have an attributable interest of up to 11.7% in New Charter. See Joint Opposition at 46. For purposes of this analysis, the 11.7% stake in New Charter is relevant.

²² Joint Opposition at 46. Conversely, Charter's Response to FCC Data Request 15 reports that Dr. Malone has a 31.8% voting interest in Starz. Charter Response to FCC Data Requests at 99. Nonetheless, today, Dr. Malone's interests in Charter through Liberty Broadband reportedly make him “Charter's biggest shareholder, after Warren Buffett's Berkshire Hathaway Inc., which holds 7.56 percent.” See Todd Shields, *Cable Magnate Malone's Stakes Scrutinized in Charter-TWC Deal*, BLOOMBERG NEWS, Nov. 9, 2015, available at <http://www.bloomberg.com/news/articles/2015-11-09/cable-magnate-malone-s-stakes-scrutinized-in-charter-twc-deal>.

Discovery.²³ In connection with the BHN portion of the transaction, Liberty Broadband will acquire approximately 17 to 19% of New Charter (and have additional voting rights – up to an additional 7%).²⁴ It is inconceivable that this interlocking web of Dr. Malone relationships will not affect the prices, terms, and conditions that Discovery and Starz set post-transaction for their programming sales to rivals of New Charter, especially given that Dr. Malone has openly acknowledged that as an investor in media properties, he seeks to “coordinate” the behavior of his investments for mutual benefit.²⁵

The question here is not one of corporate controls preventing conflicts of interests between distribution and content entities, but rather coordination of these properties for the mutual benefit of their owners, among which Dr. Malone predominates. For this reason, the “specific precautions in place” cited by Applicants as ensuring that Liberty Broadband and Advance/Newhouse cannot improperly influence New Charter offer no protection against the actions of Dr. Malone or Advance/Newhouse in influencing Discovery and Starz’ decisions when

²³ *Application 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, Public Interest Statement at 15 (filed Jun. 25, 2015) (“Public Interest Statement”); Charter Response to FCC Data Requests at 99-100 (describing that Advance/Newhouse owns preferred stock in Discovery, which if converted to common stock, would give Advance/Newhouse approximately 32.8% of the Series A and 35.2% of the Series C common stock, representing approximately 24.9% of the voting power on all matters).

²⁴ Public Interest Statement at 15; Charter Response to FCC Data Requests at 102-103.

²⁵ See *Chairmen of Discovery and Liberty Media Stay Tuned on Television*, VANITY FAIR, Oct. 8, 2015, available at <https://thescene.com/watch/vanityfair/chairmen-discovery-liberty-media-stay-tuned-on-television>. In Dr. Malone’s words: “I’m an investor, I don’t control these things, I invest in them. I try to coordinate their behavior, OK, if I can, you know.” One example of this coordination he mentioned was to have his Liberty Media, which has vast European cable holdings, reach an agreement with David Zaslav, President and CEO of Discovery, about 15 years ago to push Discovery content to the “rest of the world.” It is clear from the dialog and interactions contained in the linked video interview of Dr. Malone and Mr. Zaslav by Walter Issacson that Dr. Malone wears both cable distribution and content “hats” at various times during the day, and that Malone and Zaslav have had a long and close working relationship where mutual interests in building integrated content/distribution platforms predominate. This lends further credence to ACA’s premise that so long as New Charter, Discovery and Starz are able to coordinate their actions to take advantage of opportunities to maximize their combined profits, they will collectively make decisions with that goal in mind. The recently announced investments of Liberty Global and Discovery in Lionsgate are a perfect example of this close coordination and cooperation through interlocking ownership interests. No amount of corporate precautions, controls, or related party transaction controls is going to significantly change that fundamental reality. ACA strongly encourages Commission staff to view this interview in its entirety as part of its investigation of the relationships at issue in this transaction.

setting the prices, terms and conditions for the sale of their programming to New Charter's rivals in former TWC areas, and that Starz' decisions in setting prices, terms and conditions for the sale of its programming to MVPD rivals in former TWC and BHN areas.²⁶ The precautions cited are largely aimed at preventing conflicts of interest between the programmers and their affiliated distributor, whereas ACA's concern lies with pricing decisions that further the mutual interests of New Charter-affiliated programmers in optimizing profits by raising the costs of rivals to New Charter – benefits that will ultimately flow to Dr. Malone and Advance/Newhouse through both New Charter and its affiliated programmers.

Applicants' attempt to distinguish the Commission's analysis in the Liberty-News Corp.-DirecTV Order in support of their claim that, unlike in the case where Liberty Media was found to have "*de facto* control" over DirecTV and Dr. Malone was Chairman of the Board and CEO of Discovery Holding Company, there is no possibility of harm flowing from Dr. Malone's less substantial ownership in programming and distribution interests and therefore no need for similar program access conditions, is also unavailing.²⁷ While Dr. Malone's various interests in the Liberty transaction were substantial, in this transaction Dr. Malone's interests are also substantial in that he will be in a position to substantially "coordinate" the behavior of his investments for mutual benefit. Further, Dr. Malone regularly changes the corporate structures of his various distribution and content investments to accomplish his goals of profit maximization and tax reduction.²⁸ The one constant is that Dr. Malone remains at the top orchestrating their behaviors.

²⁶ Charter Response to FCC Data Requests at 97-101, 102-113; Joint Opposition at 50-51.

²⁷ Joint Opposition at 49.

²⁸ See Leon Lazaroff, *What John Malone Is Planning With Latest Media Stock Roll-Up*, THE STREET, Nov. 10, 2015, available at <http://www.thestreet.com/story/13359569/1/what-john-malone-is-planning-with-latest-media-stock-roll-up.html> ("The Lions Gate stock sale is likely to heighten speculation that Malone is looking for the best and -- given his long history in the business -- the most tax-free means of combining his various media properties."); see also Bruce Wright, *Who is John Malone? Charter-Time Warner Merger Spearhead By 'Cable Cowboy'*, INTERNATIONAL BUSINESS TIMES, May 26, 2015, available at <http://www.ibtimes.com/who-john-malone-charter-time-warner-merger-spearheaded-cable-cowboy->

ACA is pleased that the Commission is exploring the ownership and positional interests that will permit Dr. Malone to exert influence or control over the programming prices, terms and conditions for the Discovery and Starz programming networks affiliated with New Charter through his various Liberty properties, and believes that a thorough exploration of this web of interests will confirm ACA's concerns.²⁹

III. THE COMMISSION MUST ADOPT REMEDIAL CONDITIONS THAT OFFER SMALL AND MEDIUM-SIZED MVPDS MEANINGFUL PROTECTIONS AGAINST THE HARMS OF THIS TRANSACTION

In its initial comments, ACA observed that the Commission has traditionally relied on a combination of (i) a non-discriminatory access condition that expressly prohibits exclusive deals and discriminatory practices, and (ii) a commercial "baseball-style" arbitration remedy to address the incentive and ability of vertically integrated providers to unjustifiably raise rivals' costs through a uniform pricing strategy by lessening the ability of vertically integrated programmers to harm rivals of their affiliated MVPDs. ACA also described the various shortcomings of each of these approaches,³⁰ and provided a critique of the efficacy for smaller MVPDs of each remedy.³¹

In view of the fact that this transaction spreads the harm of Starz' affiliation with Charter to areas served today by TWC and BHN and the harm of Discovery's affiliation with Charter and BHN to areas served today by TWC, while increasing the existing harms of Discovery's and

[1938298](#). To be clear, there is nothing nefarious in seeking to achieve these goals, but they should not come at the expense of New Charter's MVPD rivals.

²⁹ See *Application 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, Letters from William T. Lake, Chief, Media Bureau, to Robert L. Hoegle, Nelson Mullins (filed Nov. 2, 2015) (requesting responses from Liberty Media Corporation, Liberty Broadband and Liberty Interactive by Nov. 16, 2015). ACA reserves the right to supplement its reply after these responses are submitted.

³⁰ ACA Comments at 18-20; see also ACA Comments at 20 and *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Reply Comments of the American Cable Association at 23-25 (filed Jan. 7, 2015) ("ACA AT&T-DirectTV Reply") (discussing the changes and requesting that the Commission return to its pre-Comcast-NBCU practice of imposing both).

³¹ ACA Comments at 21-30.

Starz' affiliation with Charter, the Charter-TWC-BHN transaction calls for the imposition of conditions more effective than those used by the Commission in previous cases, particularly with respect to the protection of small and medium-sized MVPDs. Applicants, Discovery and Starz all recognize the value of program access protections and point to them as a reason why the transaction is consistent with the Communications Act and Commission rules post-transaction and why no additional remedies are required to protect rival MVPDs.³² Discovery argues further that ACA's proposed conditions are not designed or tailored to address merger-specific harms, reflect nothing more than ACA's longstanding issues with the scope, operation and efficiency of the Commission's program access rules, and are not appropriate for consideration here but rather belong in a rulemaking.³³

The program access rules, standing alone, are not sufficient to address the potential harms posed by this transaction. The Commission has long recognized that although the program access rules address overt discrimination in the rates, terms and conditions of the sale of cable-affiliated programming, they do not address the use of uniform price increases strategies, and therefore must be supplemented by an arbitration remedy aimed at ensuring the sale of programming at fair market value.³⁴

Moreover, while Discovery's new found enthusiasm for program access reform is refreshing, Discovery has been a vocal opponent of program access reforms sought by ACA to ensure that the rules work for all MVPDs, and particularly that small and medium-sized MVPDs

³² Public Interest Statement at 61; Discovery Response at 11; Starz Response at 2.

³³ Discovery Response at 14. Discovery's arguments against ACA's "proposed conditions" are perplexing insofar as ACA did not propose conditions in its initial comments, but only went so far as describing flaws in the remedial conditions the Commission has used to remedy similar transaction-specific harms in the past. ACA's proposed remedial conditions are being submitted for the first time in this reply.

³⁴ See, e.g., *General Motors Corporation and Hughes Electronics Corporation, Transferors, and The News Corporation Limited, Transferee*, Memorandum Opinion and Order, 19 FCC Rcd 473, ¶ 84 (2004) .

receive the protections Congress intended.³⁵ Although ACA agrees that the Commission's program access rules themselves require substantial improvements and should be reformed through the rulemaking process, to the extent the Commission uses its program access enforcement mechanisms to enforce non-discriminatory access merger conditions, it must ensure that those conditions include refinements to ensure that they provide smaller MVPDs more than a remedy in name-only. ACA therefore recommends that the Commission adopt the remedial conditions described below that will address the flaws it identified with the Commission's traditional merger conditions in its initial comments and offer meaningful protections against the potential vertical harms of this transaction.³⁶

Non-Discriminatory Access Condition. The Commission must not only impose a non-discriminatory access condition to prohibit New Charter-affiliated programmers from engaging in discriminatory practices with respect to all classes of programming, including assets acquired in the future, regardless of means of distribution, it also must ensure that procedures for enforcing this condition are effective for small and medium-sized MVPDs. To address the shortcomings ACA has identified, the Commission must include in its remedial conditions these added protections and features:

³⁵ *Revision of the Commission's Program Access Rules; News Corporation and the DIRECTV Group, Inc, Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control; 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, et al.*, MB Docket Nos. 12-68, 07-18, 05-192, Reply Comments of the American Cable Association at 17-18 (filed Jul. 23, 2012); Comments of Discovery Communications, LLC at 11-16 (filed Jun. 22, 2012); Letter from Tara M. Corvo, Counsel for Discovery, to Marlene Dortch, Secretary (filed Jul. 19, 2013) (describing Discovery's concerns about the impact of proposals to expand the program access rules by changing the definition of buying group); Letter from Tara M. Corvo, Counsel for Discovery, to Marlene Dortch, Secretary (filed Aug. 12, 2013) (reiterating Discovery's opposition to ACA's proposed buying group reforms); see also *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68, Reply Comments of Discovery Communications, LLC (filed Jan. 14, 2013) (describing Discovery's continued opposition to the proposed buying group changes).

³⁶ ACA has, as Discovery notes, requested that the Commission impose similar conditions on the AT&T-DirecTV merger. Discovery Response at 14. A more complete explanation of the reasons why these proposals will cure the flaws in the Commission's previous non-discriminatory access and arbitration remedies can be found in ACA's filing in that docket. See ACA AT&T-DirecTV Reply at 42-60.

- An aggrieved MVPD seeking to enforce the non-discriminatory access condition must have the right to bring a complaint comparing itself to an MVPD that is similarly situated regardless of whether the MVPD is the complainant's direct competitor or has the same geographic scope of operations.
- New Charter-affiliated programmers must provide requesting MVPDs evidence that the rates, terms, and conditions offered are non-discriminatory compared to those charged similarly situated distributors.
- MVPDs must have the opportunity to audit New Charter-affiliated programmers on an annual basis to ensure against discrimination, including post-agreement discrimination.
- A bargaining agent designated by an eligible MVPD shall have the protections under, and the rights to utilize, the non-discriminatory access condition just as it has protections and rights under the commercial arbitration remedy.
- New Charter-affiliated programmers shall not withdraw any programming from an MVPD during the pendency of a non-discriminatory access complaint.

Commercial Arbitration Remedy. Not only must an MVPD have protections against a New Charter-affiliated programmer acting on its incentive and ability to impose discriminatory prices, terms and conditions for its programming, but an MVPD must have protections against the programmers extracting prices, terms and conditions above fair market value through a uniform price increases strategy. The Commission must adopt a set of targeted reforms to its baseball-style arbitration remedy to render it effective, particularly for small and medium-sized MVPDs.

- Upon request of an MVPD, a New Charter-affiliated programmer must provide data and information that permits an MVPD to determine whether the offered prices, terms, and conditions are equivalent to fair market value and to formulate an informed "final offer" to initiate an arbitration.
- The baseball-style arbitration process should be modified to require the New Charter-affiliated programmers to submit the first final offer that may then be reviewed by the MVPD before submitting its own final offer.

Duration of Conditions. It is vital that any conditions are long lasting because the potential vertical harms resulting from this transaction are unlikely to dissipate over time. Moreover, after the term of the conditions, New Charter should be required to return to the Commission and apply for relief, making the case at the time that conditions have changed sufficiently to warrant relief from one of more of the conditions, rather than allow the conditions to expire by their terms.

* * *

For nearly all ACA members who compete directly in New Charter's expanded footprint and who purchase New Charter-affiliated programming, meaningful and enforceable conditions with active oversight are essential to maintaining a competitive marketplace and keeping them in place for an extended period of time.³⁷

IV. CONCLUSION

The proposed transaction involving the creation of New Charter from the distribution assets of Charter, TWC and BHN, and the increased vertical integration of Discovery and Starz will significantly alter the competitive landscape in the affected markets. The transaction spreads the harm of Starz' affiliation with Charter to areas served today by TWC and BHN, and

³⁷ Dr. Malone has recently intimated that, as he has done in the past when antitrust authorities have raised concerns about his being in both the distribution and content aggregation businesses, he "could exit Charter" so that Charter could go forward with its proposed acquisition of TWC and BHN. See Unofficial transcript excerpts by CNBC's "Squawk on the Street," CNBC Exclusive: CNBC Excerpts: Liberty Media Chairman John Malone & Charter Communications CEO Tom Rutledge Speak with CNBC's David Faber Today, Nov. 12, 2015, *available at* <http://www.cnbc.com/2015/11/12/cnbc-exclusive-cnbc-excerpts-liberty-media-chairman-john-malone-charter-communications-ceo-tom-rutledge-speak-with-cnbc-david-faber-today.html> ("John Malone: I've always taken the position – for instance in DirecTV, you know, when my ownership and participation in DirecTV became an issue, an antitrust issue, right, I negotiated an exit for me so that DirecTV could go forward without these issues. So, you know, my phone number is well known; David Faber: Yeah, but you aren't going to exit Discovery to allow Charter to buy Time Warner Cable; John Malone: No, but I could exit Charter. I mean, why would I exit Discovery when that is a double bank shot, if you want to call it that; Faber: I know. Well, I would never expect you to. I just wanted to understand what you were saying; Malone: But if Charter has – if the problem of Charter being able to do this transaction is me, I don't have to be part of Charter controller ownership"). Short of requiring divestiture to eliminate New Charter's attribution with Discovery and Starz, concerns about the vertical harms resulting from the Charter-TWC-BHN transaction raised by ACA surely require the imposition of remedial program access conditions by the Commission.

the harm of Discovery's affiliation with Charter and BHN to areas served today by TWC, while also increasing the existing harms of Discovery's and Starz' affiliation with Charter. As a result, prices charged to rivals of New Charter will increase and these cost increases will be flowed through to their subscribers.

The non-discriminatory access and arbitration conditions ACA proposes are targeted to address the demonstrable harms of the transaction, crafted to address flaws and shortcomings with the types of remedial conditions the Commission has imposed in the past, and utterly essential to protect MVPD consumers and competition of MVPD services should the parties go forward with their transaction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alma Hoxha, do hereby certify that on November 12, 2015, I caused true and correct copies of the foregoing to be served by electronic mail to the following:

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