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January 27, 2016

BY ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: Notice of Ex Parte Meeting, Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 15-149

Dear Ms. Dortch:

Representatives of INCOMPAS on January 22, 2016 spoke via teleconference with Jonathan Sallet, Owen Kendler, Adam Copeland, Betsy McIntyre, and Brendan Holland of the Federal Communications Commission regarding the above-referenced docket ("Transaction"). Participating for INCOMPAS were Chip Pickering, Chief Executive Officer, INCOMPAS; Angie Kronenberg, Chief Advocate and General Counsel, INCOMPAS; Karen Reidy, Vice-President, Regulatory Affairs, INCOMPAS; and Markham C. Erickson, Partner, Steptoe & Johnson LLP. This letter provides an overview of the *ex parte* presentation.

We discussed INCOMPAS's findings that the proposed Transaction would result in net public interest harm due to the resulting adverse effect it would have on local residential broadband Internet access service competition in at least one-third of the country. Specifically, the proposed Transaction would result in a significant increase in prices that video programmers pay for distribution to households served by the parties to the Transaction. Further, the increased market power over video programming resulting from the Transaction would raise barriers to entry and reduce competition in the local residential broadband Internet access service marketplace.[1]

[1] Applicants have the burden of affirmatively proving that the Transaction would serve the public interest and would be beneficial to competition. 47 U.S.C. § 309(e). *See* INCOMPAS, Petition to Deny, MB Docket No. 15-149, at 2-4 (Oct. 13, 2015).

We noted that Charter's economist, Professor Michael Katz, raised in his Declaration the possibility of Charter joining a video-purchasing cooperative ("Cooperative") to achieve terms from programmers similar to those that would be possible as a result of the Transaction. We urged the Commission to further explore as a remedy to the harms caused by the proposed Transaction the establishment of a Cooperative, which would include Applicants and small multichannel video programming distributors ("MVPDs"). Such a Cooperative would mitigate the harm to local residential broadband Internet access service competition from the Transaction by providing a structural, market-based remedy that would incentivize smaller, competitive MVPDs to compete against incumbent MVPDs, including by incentivizing competition in New Charter's proposed footprint.

We also compared INCOMPAS's findings regarding the harm posed by the proposed Transaction to those found by the Commission in the AT&T/DIRECTV transaction ("ATT/DTV Transaction"), as well as to the benefits claimed by Charter in the current docket. We highlighted several points of comparison:

- Professor Katz's findings in the ATT/DTV Transaction[2] directly support INCOMPAS's position that this Transaction would result in greater market power of New Charter over video programmers. In a declaration submitted in the ATT/DTV Transaction, Professor Katz concluded that AT&T's ability to extract better terms from programmers is, among other things, the function of its increased size and control over access to more households. He stated that such scale effects may arise because the loss of a large buyer "is more than proportionally disruptive to the content owner's business model."[3]

- In the current Transaction, Professor Katz finds that New Charter would pass through to its subscribers a portion of its video programming cost savings.[4] INCOMPAS agrees that there likely would be a pass-through to some extent. The Commission in its order approving the ATT/DTV Transaction agreed that AT&T likely would pass through to its

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[2] Professor Katz also submitted econometric analyses in the ATT/DTV Transaction. *See* Declaration of Michael Katz (June 11, 2014) and Reply Declaration of Michael Katz (Oct. 15, 2014), *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90.

[3] Katz AT&T/DIRECTV Declaration at ¶¶ 112-113; *see also* David S. Evans, *Economic Analysis of the Impact of The Proposed Merger of Charter, Time Warner Cable, And Bright House Networks on Broadband Entry and Competition*, MB Docket No. 15-149, ¶¶ 35, 53-54 (Jan. 15, 2016) ("Evans Declaration") (finding that video programming cost reductions are a function of size, because a larger MVPD can impose greater harm on a programmer if the programmer loses such MVPD's customer base).

[4] *See* Reply Declaration of Michael L. Katz, *Charter-TWC-BHN: Efficiencies Analysis*, MB Docket No. 15-149, at 36-37 (Nov. 2, 2015) ("Katz Declaration").

customers some of its video programming cost reductions.[5] But INCOMPAS concurs with the Commission's doubt about Professor Katz's predictions on the amount of the pass-through.[6]

- In the ATT/DTV Transaction, the Commission rejected Professor Katz's finding that increased cost savings from programming would incentivize AT&T to build out fiber to 2 million more premises.[7] Applying its own merger simulation, the Commission concluded that AT&T's acquisition of DIRECTV would result in a net disincentive for AT&T to increase its build-out, because of the cannibalization effect from its ownership of DIRECTV.[8]

- When the cannibalization effect from DIRECTV is removed, we can infer that the Commission would have found that increased cost savings from video programming would have incentivized AT&T, in cases where it is not the dominant residential broadband Internet access service provider, to increase fiber deployment, even with some consumer pass-through.[9] Therefore, we can conclude that the Commission's analysis in the ATT/DTV Transaction is consistent with INCOMPAS's findings that competitive broadband providers would increase deployment of fiber if their video programming costs were lower.[10]

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[5] *Applications of AT&T Inc. and DirecTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd 9131, 9243 ¶ 287 (2015) ("*AT&T-DirecTV Order*").

[6] *See* Evans Declaration at ¶ 129 ("I agree that New Charter would pass on some portion. Based on my review, and discussions Competitive ISPs, I think it is more likely that New Charter would use the increased margins to engage in primarily targeted price cuts to limit local competition."). The Commission expressed skepticism about Professor Katz's predictions on the precise amount of pass-through. *See AT&T-DIRECTV Order* at ¶¶ 288-289 (calculating revised programming reductions).

[7] *See AT&T/DirecTV Order* at ¶ 326.

[8] *Id.* at ¶ 335. Because of this public interest harm, the Commission imposed a condition to require AT&T to build out fiber to an additional 2 million homes (on top of the pre-merger plans to build out to 10.5 million homes), despite the disincentive for it to do so. *See id.* at ¶ 344 ("To address this transaction-specific harm, we impose a condition to preserve the pre-transaction FTTP buildout plans, future projections, and the transaction-specific incremental commitment.").

[9] In the ATT/DTV Transaction, this cannibalization analysis negated Professor Katz's argument, and the consumer pass-through further supported the Commission's findings. *Id.* ¶ at 344.

[10] In this Transaction, there is no cannibalization effect, and therefore, the *AT&T-DIRECTV Order* does not conflict with our claim that smaller broadband providers would increase

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- A market-based solution such as the Cooperative is superior to any proposed build-out commitment that could be imposed upon Charter, because a build-out commitment does not address the lack of residential local broadband Internet access service competition. As the Commission has acknowledged, the availability of competitive options for residential broadband Internet access service is lacking.[11] The Applicants must demonstrate that their proposed Transaction will promote competition, including residential broadband Internet access service competition. Given the Applicants' current positions as the leading providers of residential broadband Internet access service in their respective regions, it is critical that the Commission address the availability of competitive options to consumers.[12]

- Creating incentives for greater residential local broadband Internet access service competition is consistent with the Commission's findings in the ATT/DTV Transaction that competitive fiber deployment has significant price effects and results in a significant public interest benefit.[13]

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deployment if their video programming costs were lower. Further, our analysis does not hinge on the amount of consumer pass-through of video programming cost reductions. In fact, we would assume that the expanded margin would enable smaller, competitive MVPDs to be able to better match price reductions from larger MVPDs.

[11] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, FCC 15-10, ¶ 83 (rel. Feb. 4, 2015) ("Only 12 percent of households have 3 or more options for 25 Mbps/3 Mbps broadband service; 27 percent of households have two provider options for this service; and 45 percent of households have only a single provider option for these services. Approximately 16 percent of households are in areas without a single provider of 25 Mbps/3 Mbps fixed broadband services.")

[12] The Applicants are in a different market posture relative to AT&T (in areas where AT&T is not the dominant provider for residential broadband Internet access services) for the delivery of residential broadband Internet access service. AT&T asserted that its merger with DIRECTV would help it better compete against cable for video and residential broadband Internet access service in its footprint. *See Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Public Interest Statement at 18 (June 11, 2014). *See also AT&T-DirecTV Order* at ¶ 8 ("[W]e acknowledge that a benefit of the transaction is the Applicants' ability to be a more effective competitor to cable providers.").

[13] The Commission cited to highly confidential information about Comcast's prices being lower when it faces fiber-to-the-premises ("FTTP") competition. *See AT&T-DirecTV Order* at ¶ 345. In

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Finally, we stated that while we are pleased that Charter has expressed willingness to work with various edge providers regarding its interconnection policy,[14] Charter has made several changes to its interconnection policy as a result of negotiations that should be reflected in the published policy itself. Additionally, we urged the Commission to make such policy an enforceable condition of the Transaction, if it is approved. Such a condition should remain in effect for at least seven years. A condition of seven years or more would foment the growth of a still-nascent OVD industry, and this timeframe was used in the order approving the merger between Comcast and NBCUniversal.[15]

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Please do not hesitate to contact me directly if you have any questions.

Sincerely,

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Counsel for INCOMPAS

CC: Jon Sallet
Owen Kendler
Elizabeth McIntyre
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addition, the Commission cited a study from Moffett Nathanson Research finding that where cable faces FTTP competition, cable's market share drops by 40%. *Id.* at ¶ 345 n.1040.

[14] *See* Charter Communication's IP Interconnection Policy and Requirements, https://www.charter.com/browse/content/peering.

[15] *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 MB Docket No. 10-56 at 143 (Jan. 20, 2011).