February 11, 2016

<u>Via Electronic Filing</u>

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

Re: *Ex Parte*, Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership For Consent to Transfer Control of Licenses and Authorizations, MB Dkt. No. 15-149; Media Bureau Request for Comment on DSTAC Report, MB Dkt. No. 15-64

Dear Ms. Dortch:

The Computer & Communications Industry Association (CCIA)[1] respectfully submits this *ex parte* letter in the above-referenced proceedings. As the Commission examines the proposed merger between Charter Communications, Time Warner Cable, and Advance/Newhouse Partnership (New Charter), the Commission should address Charter's practice of blocking competitive third-party device manufacturers from accessing downloadable cable applications (apps). These apps allow Charter customers to view select cable programming on third-party devices. However, in reality, Charter prevents some lawful, non-harmful third-party devices — particularly devices that most closely compete with its own set-top boxes — from accessing the authentication credentials necessary to utilize those apps.

If consummated, New Charter's footprint would expand over 300%, and it would become the second largest cable operator in the U.S., thus greatly expanding the number of cable customers harmed by Charter's current practices.[2] Furthermore, the increased market power of New Charter would give it *increased* incentive and ability to act anticompetitively toward third-party devices that New Charter believes compete with its own proprietary set-top boxes.

The National Cable & Telecommunications Association (NCTA), of which Charter is a prominent member, has touted the ability of consumers to access apps on myriad devices as proof of competition that mitigates the need to open up the third-party navigation device space:

> *"In each meeting [with Commission staff], they discussed how the video 'apps' published by multichannel video programming distributors enable consumers to enjoy their*

[1] CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of $540 billion.

[2] *See* Petition to Deny of Public Knowledge, Common Cause, Consumers Union, and Open MIC, Applications of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership For Consent to Transfer Control of Licenses and Authorizations, MB Dkt. No. 15-149, at 1-2 (Oct. 13, 2015) (finding that the combined New Charter would control about 18% of pay-TV market share and 35% of cable pay-TV, more than 21% of broadband market share and 36% of cable broadband, and Comcast already controls 23% of pay-TV nationwide, and 25% of the broadband market).

> *multichannel service on hundreds of millions of tablets, smart phones, streaming boxes, smart TVs and other connected devices…"*[3]
>
> *"Cable operators have been in the forefront of joining the new apps-based market..."*[4]
>
> *"The downloadable apps approach enables consumers to watch content from MVPDs and OVDs on an array of their own customer-owned and TV-attached devices..."*[5]

However, as the record in this docket makes clear,[6] Charter leverages its control of the authentication process for third-party devices to forestall competition with its own customer-premises equipment (CPE) offerings. Although the NCTA filings have been cleverly worded, reading between the lines – and looking at Charter's practices – tells a story not of a company making its apps available to all legal, non-harmful third-party devices, but instead of a company that meters access to those devices based on whether or not they compete directly with Charter's own set-top box offerings. This anticompetitive situation would only be made worse by the proposed merger — extending Charter's practices to a much broader number of consumers. At the very least, if the Commission were to allow this merger to proceed, the Commission should impose a condition that ensures that all lawful, non-harmful third-party devices are allowed access to authentication credentials to ensure that Charter customers can watch the programming they pay for through any non-harmful, lawful device they choose. After all, according to the NCTA, the cable industry is not "picking and choosing their competitors" and is committed to "extending apps to many more platforms."[7] Unfortunately, the facts in this docket tell a different story.

Regardless of the results of future proceedings, the Commission is empowered to protect the public interest and competition in this merger proceeding. Charter's customers, many of whom have few, if any, alternatives for high-speed broadband connections and MVPD video content,[8] are harmed when the company blocks third-party devices from accessing apps. The merged entity would have increased market power that would enable a more aggressive anticompetitive strategy toward these third-party devices that often are both more functional and less expensive than Charter's own set-top boxes. Making matters worse, this merger would

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[3] Notice of *Ex Parte* Presentation from Paul Glist, Davis Wright Tremaine LLP, MB Dkt. No. 15-64 (filed Feb. 5, 2016), http://apps.fcc.gov/ecfs/document/view?id=60001423499.

[4] Comments of NCTA, MB Docket 15-64, at 8 (filed Oct. 8, 2015), http://apps.fcc.gov/ecfs/document/view.action?id=60001328253.

[5] *Id*. at 14.

[6] Notice of *Ex Parte* Letter from Markham C. Erickson, Steptoe & Johnson LLP, MB Dkt. No. 15-149 (filed Jan. 20, 2016), http://apps.fcc.gov/ecfs/document/view?id=60001409363 [hereinafter NVIDIA *Ex Parte*].

[7] Reply Comments of NCTA, MB Docket 15-64, at 23-24 (filed Nov. 9, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001334610.

[8] *See* 2016 Broadband Progress Report, GN Dkt. No. 15-191 (rel. Jan. 29, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0129/FCC-16-6A1.pdf ("[O]nly 38 percent of Americans have more than one choice of providers for fixed advanced telecommunications capability.").

eliminate as a rival Time Warner Cable, a company that has been much more accommodating of third-party devices on its cable network as a way to differentiate itself.[9]

In Charter's response to the charges of it blocking authentication on third-party devices, the company curiously points the finger at the programmers with which it contracts:

> *"With respect to TVE apps, programmers that create an app will approach Charter to implement an authentication procedure and identify the devices on which they would like the app to run."*[10]

Many of the apps identified in the NVIDIA filing, including HBO Go, work fine on other MVPD's networks. In fact, as the HBO authentication page screenshot makes clear, HBO Go is available on the same device to the customers of the other two parties to this merger, Time Warner Cable and Bright House Networks.[11] If this were merely a decision by the programmers, why would those programmers arbitrarily request that their apps work on some MVPDs' networks and not others? It is Charter, not the programmers, that has the economic incentive to block third-party devices. It is the programmers, who created apps to more widely disseminate their content beyond cable set-top boxes, who want to expand the viewership of their content. And, if the programmers were alone in implementing a strategy in denying access to the apps (which were created for the sole purpose of allowing viewership of their content on third-party devices), it would not be difficult to contemplate a strategy in which they would want Time Warner Cable and Bright House Networks viewers to have expanded access to that content and not Charter's customers. As further testament to this supposition, the HBO Go authentication page screenshot in the NVIDIA *ex parte* filing notes:

> *"If your TV programmer is not listed, access to HBO Go on Android TV® is not offered as part of your HBO Go subscription. Contact your TV provider and ask for HBO Go on Android TV®."*[12]

As common sense dictates and evidence makes clear, it is not the programmers that are the problem, but the contracts negotiated with programmers by Charter, that present the problem.

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[9] *See* Comments of Roku, Inc., MB Dkt. No. 14-57, at 2 (Aug. 25, 2014), http://apps.fcc.gov/ecfs/document/view?id=7521820161 ("For example, Time Warner developed a Roku app that enables their cable customers to access virtually the entire Time-Warner cable service offering. By using this app on a Roku streaming player, a Time-Warner subscriber can eliminate the need to rent an additional cable set top box for a second or third television set. This innovative feature is a win-win for both Time Warner and its customers, as it cost-effectively increases the value of both the customer's cable subscription and Roku streaming player. Larger MVPDs such as Comcast have resisted this trend . . . [W]hile Time-Warner has authenticated the HBO Go app and the Showtime Anytime app on Roku's platform, Comcast has not authenticated either app.").

[10] Notice of *Ex Parte* Letter from Samuel L. Feder, Jenner & Block LLP, MB Dkt. No. 15-149, at 3 (filed Feb. 9, 2016), http://apps.fcc.gov/ecfs/document/view?id=60001425574 [hereinafter Charter *Ex Parte*].

[11] *Compare* NVIDIA *Ex Parte*, *supra* note 6, at 5 (showing an authentication page for a user attempting to access HBO Go through a smart TV with Charter, Time Warner Cable, and Bright House all available), *and id*. at 6 (showing an authentication page for a user attempting to access HBO Go on an NVIDIA tablet with Charter, Time Warner Cable, and Bright House all available), *with id*. at 7 (showing an authentication page for a user attempting to access HBO Go on NVIDIA SHIELD TV with Time Warner Cable and Bright House available but Charter absent).

[12] *Id*. at 7.

Given that content from many of those same programmers' apps are available on other MVPDs, one can logically assume that it is Charter that is erecting the barriers to third-party device competition. As the case of HBO Go illustrates, the fact that Time Warner Cable and Bright House are more accommodating of third-party devices illustrates plainly the merger-specific harm that should be rectified before this merger is allowed to proceed.

The fact that the Commission is considering new, open standards to facilitate a more competitive set-top box market,[13] a proceeding that CCIA supports,[14] should not preclude the Commission from addressing anticompetitive problems that would be made worse by the proposed merger. For one, the problem of selectively blocking competitive third-party devices from accessing cable apps is a much narrower issue than those to be considered in the set-top box proceeding. Furthermore, the outcome of the proposed set-top box proceeding is uncertain and the standards that arise from it will take time to implement, whereas Charter's behavior presents problems for devices on the market today. Finally, Charter's current strategy is anticompetitive, against the public interest, and the Commission should not allow it to be extended through this merger.

In a truly competitive market, cable providers would seek to ensure that consumers are capable of using any non-harmful third-party device on their networks as a way of increasing the value of their networks to their customers. Because of the competitive limitations in the MVPD market, cable companies like Charter can selectively make their apps available to a limited array of devices that pose little competitive threat to their own CPE while at the same time feigning commitments to cultivating a thriving ecosystem. To the extent that cable companies make downloadable apps available to be used on third-party devices, any non-harmful device that Charter's customers own should be allowed access to those apps. As this merger would greatly increase the size and market power of the company, and eliminate a potential maverick competitor – Time Warner Cable – from the playing field, the Commission should impose conditions that prevent the situation for competitive third-party device manufacturers (and Charter's customers who want a robust third-party device marketplace) from being made worse by this merger. At the very least, those conditions should last for several years, to give time for new open standards for third-party devices to be launched and for those standards to be incorporated into next generation products.

We also note the hypocrisy of positing the downloadable apps approach as a solution to the lack of competition in the third-party navigation market, while at the same time denying third-party devices access to those apps when they compete directly with the cable companies' own CPE equipment.

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[13] *See* FCC Chairman Proposal to Unlock the Set-Top Box: Creating Choice & Innovation, FED. COMMC'NS COMM'N (Jan. 27, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0127/DOC-337449A1.pdf.

[14] *See* Comments of CCIA, MB Dkt. No. 15-64 (filed Oct. 8, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001328327; Reply Comments of CCIA, MB Dkt. No. 15-64 (filed Nov. 9, 2015), http://apps.fcc.gov/ecfs/document/view?id=60001334443.

Respectfully submitted,

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