Anti-Competitive Practices Hindering Independent Programmers & Diversity

February 2016

<u>SUGGESTED ACTIONS</u>

- Encouraging further investigate into the anti-competitive environment faced by independent programmers and associated harms.

- Proposed "New Charter" Merger Conditions:
  - Require "New Charter" to negate ADMs provisions
  - Require "New Charter" to not retaliate against independent programmers that have raised its ADM anti-competitive practices.
  - Address ADM harms by Charter Communications against independent networks by requiring carriage of independent programmers on "New Charter" if specific conditions are met incl. ADM language in agreements.
  - Protect independent emerging **<u>news</u>** sources from numerous ***"Time Warner Cable News"*** services post merger.

- FCC to review AT&T/DirecTV post merger conduct, specifically:
  - Favorable expanded carriage of affiliated "***Audience Network***" compared to independent networks such as AWE.
  - Purging of video subscribers from AT&T's U-verse TV to DirecTV and associated harms to independent networks carried only on U-verse TV.

<u>CONTINUED FAVORITISM BY MVPDS OF THEIR OWN CHANNELS</u>

- There is a long history of favoritism by MVPDs of their own "affiliated" programming over independent providers.

- The Carriage Access Rules have proven to be ineffective in discouraging and enforcing such abuses. Why?

  - The process is too expensive and lengthy to offer relief to emerging independent networks.

  - Although a wide range of programmers with strong cases have filed carriage access complaints, not <u>one</u> has had a favorable outcome.

  - There is clear retaliation for filing a carriage access complaint.

    - Once an FCC complaint is filed, according to Time Warner's Melinda Witmer, EVP and Chief Programming Officer, ***"It is not our preference to enter into a relationship with someone who chose to litigate with us."*** WTV Tr, 4014. In other words, if one uses the FCC complaint process for relief, Time Warner will no longer deal with the network.

CURRENT EXAMPLE OF FAVORITISM – DIRECTV'S "*AUDIENCE NETWORK*"

- Specific Example: AT&T and DirecTV, Audience Network

- Post Merger, DirecTV's "Audience Network", a general entertainment channel, received broad carriage on AT&T U-Verse, announced October 1, 2015.

- Audience received broad carriage and preferred channel position, channel 1114 in HD, next to AMC and TBS (on U-200 lineup.)

- **For Q1 2016 (as of Feb 7), Audience UNDERPERFORMS Herring Network's AWE channel. AWE ranked 123 whereas Audience Network ranked 128 as measured by AT&T STB data.**

- **DirecTV refuses to entertain carriage of AWE but extended preferential treatment to its own affiliated network on U-verse.**

- Audience Network airs ***Big Knockout Boxing*** and MMA-themed drama series ***Kingdom***. AWE carries LIVE world title fight boxing (similar target audience).

TACTICS USED TO AVOID DEALING WITH INDEPENDENT PROGRAMMERS

- Refuse to take meetings.
  - When meetings are granted, no real consideration. Example: Refusal to view presentation materials (Ex. Charter Communications).
- Limit meetings to “program gatekeepers” with no real consideration extended. (Ex. Charter Communications)
- Prohibit escalation of carriage consideration to senior management and marketing decision makers. (Two Specific Examples: Herring Networks, Inc and Entertainment Studios inability to meet with anyone other than Allan Singer and staff at Charter Communications.)
- Claim no bandwidth.
  - Example: AT&T’s DirecTV claims “no bandwidth” yet at the same time is soliciting independents to PURCHASE 24/7 available channel space!

CONTRACT TERMS TO MARGINALIZE INDEPENDENT PROGRAMMERS

- Corporate issued “hunting license” agreements when “corporate” oversees programming additions and prevents “field” locations from making additions.
- Drop clauses for any/no reason.
- Limited deployment in only a handful of systems, not company wide. (Directly leads to less affiliate fee revenue and advertising revenue to enhance the programming service.)
- Low penetration tiers/isolated tiers.
- Prohibitive Exhibition Clauses (No OTT Deployment)
- MFNs that are non-sized base and all-inclusive.
- Renewal at the unilateral discretion of the MVPD.

PROHIBITED EXHIBITION CLAUSES

- Alternative Distribution Method (“ADMs”) clauses prevent the programmer from offering their content to OTT providers.

- ADMs are not “negotiated” but rather “forced” on independent programmers.

- ADMs are anti-competitive and have hurt independent programmers from gaining distribution.

- ADMs have prevented non traditional video companies such as Intel from launching OTT. Companies that have tried to launch OTT services but couldn't gain meaningful programming to make the service viable include SkyAngel (FAVE), Intel (On Cue), and Apple (Apple TV). (Even Dish faced challenges with ADMs when launching Sling)

- A number of non traditional video companies will be trying to launch OTT services in 2016. They will be hindered by ADM clauses.

<u>PROHIBITED EXHIBITION CLAUSES (Cont.)</u>

- Specific Example: Charter Communications has forced multiple independent programmers, such as Herring Networks, Inc., to accept ADM clauses.

- Small independents, such as Herring Networks, Inc. to large programmers such as HBO, The Walt Disney Company, and Fox Network Groups have filed OTT concerns and/or statements in Docket 15-149. ***(Past harms by Charter should be addressed as a merger condition.)***

- Proposed Actions:

  - ADMs appear to be a violation of the carriage access rules, Prohibited Practices, 76.1301 (b) Exclusive rights. The FCC should make ADMs a stated violation of 76.1301 and <u>negate all ADMs in existence</u>.

  - **<u>Independent Programmers which have been forced to accept ADM clauses by Charter Communications should be extended carriage on New Charter for a period of 10 years (length of Herring Networks, Inc. expiring agreement with Charter with an ADM provision) based upon terms and conditions per the largest MVPD carrying the Programmer.</u>**

MFNS – THE KISS OF DEATH FOR INDEPENDENTS

- Big MVPDs demand MFN clauses in their affiliation agreements.
- These clauses provide that once the programmer has signed an agreement with MVPD A, it cannot provide a better deal to MVPD B without going back and giving MVPD A the same improved terms.
- In practice MFN clauses operate to rob independent programmers of pricing flexibility that supports viability, it’s ability to gain further distribution and innovation.
- The rate structure and distribution of previously entered deals are reduced if a single more favorable term needs to be extended by the programmer to gain new distribution.
- MFNs have hindered independent networks from gaining reasonable distribution AND reasonable affiliate fees for survival.

HARMS TO INDEPENDENT PROGRAMMERS DUE TO MEGA MERGERS

- Affiliated/Associated Content Increases
  (Example: Charter/Time Warner will have a growing portfolio of content with tens of associated channels and control 17.5 million video subs!)

- Less MVPDs in the marketplace to solicit and gain a foothold.

- Consolidation of programming lineups.

- Nationalization to a single lineup.

- Overwhelming power to negate marketplace "negotiations" based on the merits.

- Enhanced **duopoly** control (Charter) of broadband to prevent NON authenticated OTT with history of ADM provisions.

AT&T / DIRECTV MERGER POST MERGER HARM TO HERRING NETWORKS

- Berstein October 1, 2015 Report: *AT&T: Yesterday's Sell-Side Event with Senior Management (Eight Takeaways in Eight Paragraphs)*

"By the beginning of next year, the company will make satellite its primary TV product, allowing the U-verse subscriber base to erode over time as customers transition to the satellite platform or churn to other providers."

"…simplifies the sales process by avoiding the confusion of having two video products in areas where U-verse video is currently offered."

AT&T / DIRECTV MERGER POST MERGER HARM TO HERRING NETWORKS

- Herring's AWE and One America News Network are broadly distributed by AT&T U-Verse but not distributed by DirecTV.

- One America News Network and AWE are the number 1 and 2 rated channels on U-Verse that are NOT carried by DirecTV.

- AT&T U-verse is purging subs off U-Verse to DirecTV.
  - Marginalizing the U-Verse video platform.
  - Hindering independent networks with existing AT&T U-verse agreement but not DirecTV agreements.

- AT&T is unwilling to consider carriage of AWE even though AWE outperforms Audience Network.

- We ask the Chairman to make an inquiry into AT&T's post-merger behavior.

COMCAST'S DESIRE TO INCREASE PROGRAMMING BUSINESS BY 7 TO 8 FOLD.

- According to Steve Burke, President of Comcast Cable and Chief Operating Officer of Comcast Corporation, Comcast's programming is currently 5% of its revenue. Comcast would like to increase its programming to 35-40%, a 7 to 8 fold increase. NFL Tr at 1689-1690.

COMCAST CORPORATION

CABLE DISTRIBUTION

Current:
95% of Revenue
Desired:
60-65% of Revenue

PROGRAMMING SERVICES

Current:
5% of Revenue
Desired:
35-40%

NEW CHARTER MERGER – POTENTIAL FAVORITISM

- Affiliated "New Charter" Programming Concern: ***Time Warner Cable News*** Holdings.

- Historically, the FCC has expressed concern about the diminishing number of independent news gathering organizations and the delivery of independent news viewpoints to the public.

- The concerns have come mainly in the field of radio and television broadcast consolidation, but the concern is equally valid in MVPD consolidation as the industry merges to an effective duopoly.

- Charter is about to become the second largest MVPD in the U.S. It will be acquiring cable news channels in the transaction, which certainly will enjoy continued and expanded carriage.

NEW CHARTER MERGER – POTENTIAL FAVORITISM (Cont.)

- In less than a 24 month period (9/12/2012 to 6/16/2014), five news networks launched services. The five news "emerging" networks are: One America News Network (7/4/13), Al Jazeera America (8/20/13), The Blaze (9/12/2012), Fusion (10/28/13), and Newsmax (6/16/2014).

- Four of the five are INDEPENDENT networks. (Fusion is a joint venture by Disney and Univision.)

- **NONE of the four independent news networks have received carriage on Charter Communications.**

- All four independent news networks have received broad carriage on Verizon FiOS.

- Two of the four independent news networks have received broad national carriage on AT&T U-Verse, namely One America News Network and Al Jazeera America. (Note Al Jazeera America is scheduled to shutdown on 4/30/15. It is believed that MFN concerns have played a role in Al Jazeera's decision to shutdown the network.)

NEW CHARTER MERGER – POTENTIAL FAVORITISM (Cont.)

- **Time Warner Cable News** provides local, national, and international news in numerous markets
  - (Time Warner Cable News) NY1, operates in NYC (NY1 is carried by Cablevision and Bright House in Orlando and Tampa.)
  - TWCN Rochester, Rochester, NY
  - TWCN Capital Region, Albany, NY
  - TWCN Austin, Austin, TX
  - TWCN Buffalo, Buffalo, NY
  - TWCN North Carolina, Raleigh, NC (Serves the ENTIRE State. State wide weather and news, plus national)
  - TWCN Syracuse, Syracuse NY
  - The New York channels simulcast Capital Tonight
- Bright House News services
  - Bay News 9 - Tampa
  - News 13 - (Orlando, servicing Central Florida)
  - Sister channel - InfoMas (Spanish News)
  - Sister channel - Bright House Sports Networks

NEW CHARTER MERGER – POTENTIAL FAVORITISM (Cont.)

- The Commission should therefore require New Charter, as a condition of approval of the merger, to agree to add three independent new channels within a year of the closing of the merger.

- **PROPOSED CONDITION:**

"No later than one year after the closing of the merger, New Charter shall certify to the Commission that each of no fewer than three independent, unaffiliated news services are available to no fewer than 75% of its subscribers on service tiers that are no less widely subscribed to than those on which Time Warner Cable-affiliated news services are carried as of the date of the Commission's approval of the merger."

DEFINITIONS

"Independent" shall mean not affiliated with any MVPD or broadcast licensee or any entity with a controlling interest in an MVPD or broadcast licensee.

"News service" shall mean a programming service that is offered in linear format and offers a 24/7 programming wheel substantially focusing on current events and topics of political or civic interest.

"Unaffiliated" shall mean that no MVPD or broadcast licensee, nor any entity with a controlling interest in an MVPD or broadcast licensee, has greater than a 5% ownership or voting interest in the news service.

SUGGESTED ACTIONS

- Encouraging further investigate into the anti-competitive environment faced by independent programmers and associated harms.

- Proposed "New Charter" Merger Conditions
  - Require "New Charter" to negate ADMs provisions
  - Require "New Charter" to not retaliate against independent programmers that have raised its ADM anti-competitive practices.
  - Address ADM harms by Charter Communications against independent networks by requiring carriage of independent programmers on "New Charter" if specific conditions are met incl. ADM language in agreements.
  - Protect independent emerging news sources from numerous ***"Time Warner Cable News"*** services post merger.

- FCC to review AT&T/DirecTV post merger conduct, specifically:
  - Favorable expanded carriage of affiliated "***Audience Network***" compared to independent networks such as AWE.
  - Purging of video subscribers from AT&T's U-verse TV to DirecTV and associated harms to independent networks carried only on U-verse TV.