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March 9, 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, NTCA—The Rural Broadband Association, and Rocket Fiber on March 7, 2016 met with Jonathan Sallet, Owen Kendler, Adam Copeland, Betsy McIntyre, Susan Singer, and Kiley Naas of the Federal Communications Commission regarding the above-referenced docket. Participating for INCOMPAS were Chip Pickering, Chief Executive Officer; Angie Kronenberg, Chief Advocate and General Counsel; and Karen Reidy, Vice-President, Regulatory Affairs. Shirley Bloomfield, Chief Executive Officer of NTCA attended. Marc Hudson, Chief Executive Officer of Rocket Fiber LLC, attended by teleconference. Participating for Steptoe & Johnson LLP were Damon Kalt, Andrew Golodny, and the undersigned. This letter provides an overview of the *ex parte* presentation.

Mr. Pickering discussed the importance of a video programming purchasing cooperative as a remedy to the harms of the proposed transaction previously identified by INCOMPAS and Dr. Evans.[1] A video programming purchasing cooperative would be a structural, market-based remedy to these harms. Having a large MVPD such as New Charter serve as the anchor member

[1] *See* Reply of INCOMPAS, MB Docket No. 15-149 at 6-14 (Nov. 12, 2015); David S, Evans, *Economic Analysis of the Impact of the Proposed Merger of Charter, Time Warner Cable, and Bright House Networks on Video Programming Prices and Broadband Entry and Competition* at 48-56 (Jan. 15, 2016); David S. Evans, *Economic Analysis of the Impact of the Proposed Merger of Charter, Time Warner Cable, and Bright House Networks On Video Programming Prices And Broadband Entry and Competition: A Response To Professor Katz* at 11-14 (February 12, 2016).

of the cooperative would give the cooperative the necessary scale to have an impact on programming prices to incent and enable small, competitive broadband providers to further invest in infrastructure.

Ms. Bloomfield discussed how NTCA members (small, community-based telecommunications companies in primarily rural areas) would benefit from a video programming purchasing cooperative. Many NTCA members lose money on the video side of their businesses. These losses create a barrier for such companies to invest and further build out their broadband plants. Absent a condition that Charter join INCOMPAS's proposed video programming purchasing cooperative, NTCA opposes Charter's application.

Mr. Hudson discussed how Rocket Fiber was started in 2014 to create a gigabit Internet network in Detroit, as part of a revitalization effort in the city where approximately 40% of the residents lack access to high speed broadband.[2] In November 2015, Rocket Fiber began offering a service to provide broadband speeds of up to 10 gigabits for residential customers and up to 100 gigabits for business customers in downtown Detroit. These speeds are up to 1,000 times faster than the current average residential speeds in Detroit. As a small provider, Rocket Fiber has had difficulty securing video programming distribution rights. Rocket Fiber needs to offer video programming to be competitive against incumbent MVPDs. Mr. Hudson stated that without the benefit of the proposed video programming purchasing cooperative, Rocket Fiber would be forced to sell video programming at close to cost or even at a loss to compete with pricing of incumbent providers. Mr. Hudson explained that the increased margin resulting from being able to offer a competitive video package would enable Rocket Fiber to increase the pace of its broadband infrastructure buildout in Detroit. Absent such a dynamic, Rocket Fiber is at a significant disadvantage against incumbent providers that can engage in targeted price discrimination and other tactics to impede Rocket Fiber's ability to build out its network in Detroit and the surrounding area.

The proposed video programming purchasing cooperative would provide a market-based, structural remedy to the harms identified by the proposed merger. It would enable broadband competition and incent broadband deployments across the country in residential markets of all sizes—rural, mid-sized, and urban. It would lay the foundation for a new chapter of true, broadband competition in the residential marketplace.

INCOMPAS representatives discussed the proposed cooperative in detail, as described in the PowerPoint presentation shared with Commission staff and enclosed with this letter. Because the cooperative would address the harm to broadband competition created by the

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[2] *See also*, Tom Wheeler & Mignon Clyburn, Detroit's Digital Divide, https://www.fcc.gov/news-events/blog/2015/10/27/detroits-digital-divide (Oct. 27, 2015) ("Detroit's digital divide is among the most extreme in the nation . . . For low-income households, the percentage offline is a whopping 63 percent.").

merger, INCOMPAS reiterated its request that the Commission require Charter join the cooperative as a condition of approval of its request to merge with Time Warner Cable and Bright House Networks. INCOMPAS provided proposed language to implement such condition, which is enclosed with this letter.

* * *

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

Sincerely,

Markham C. Erickson
Counsel for INCOMPAS

Cc: Jonathan Sallet
Owen Kendler
Adam Copeland
Betsy McIntyre
Susan Singer
Kiley Naas

Enclosures

INCOMPAS Proposed Video Programming Purchasing Cooperative

Presentation to Federal Communications Commission

March 7, 2016

MB Docket No. 15-149

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Agenda

- INCOMPAS Overview
- Summary
- Industry Background
- Proposed Video Programming Purchasing Cooperative
- The Proposed Cooperative Increases Competition in the MVPD and Residential Broadband Markets

INCOMPAS Overview

- INCOMPAS is the leading national trade association for competitive communications networks and service providers
- INCOMPAS represents competitive broadband Internet access service providers
  - Including providers in rural areas across the country
  - Some act as the only competition against the incumbent cable residential BIAS provider or phone company

INCOMPAS
THE FUTURE OF COMPETITION

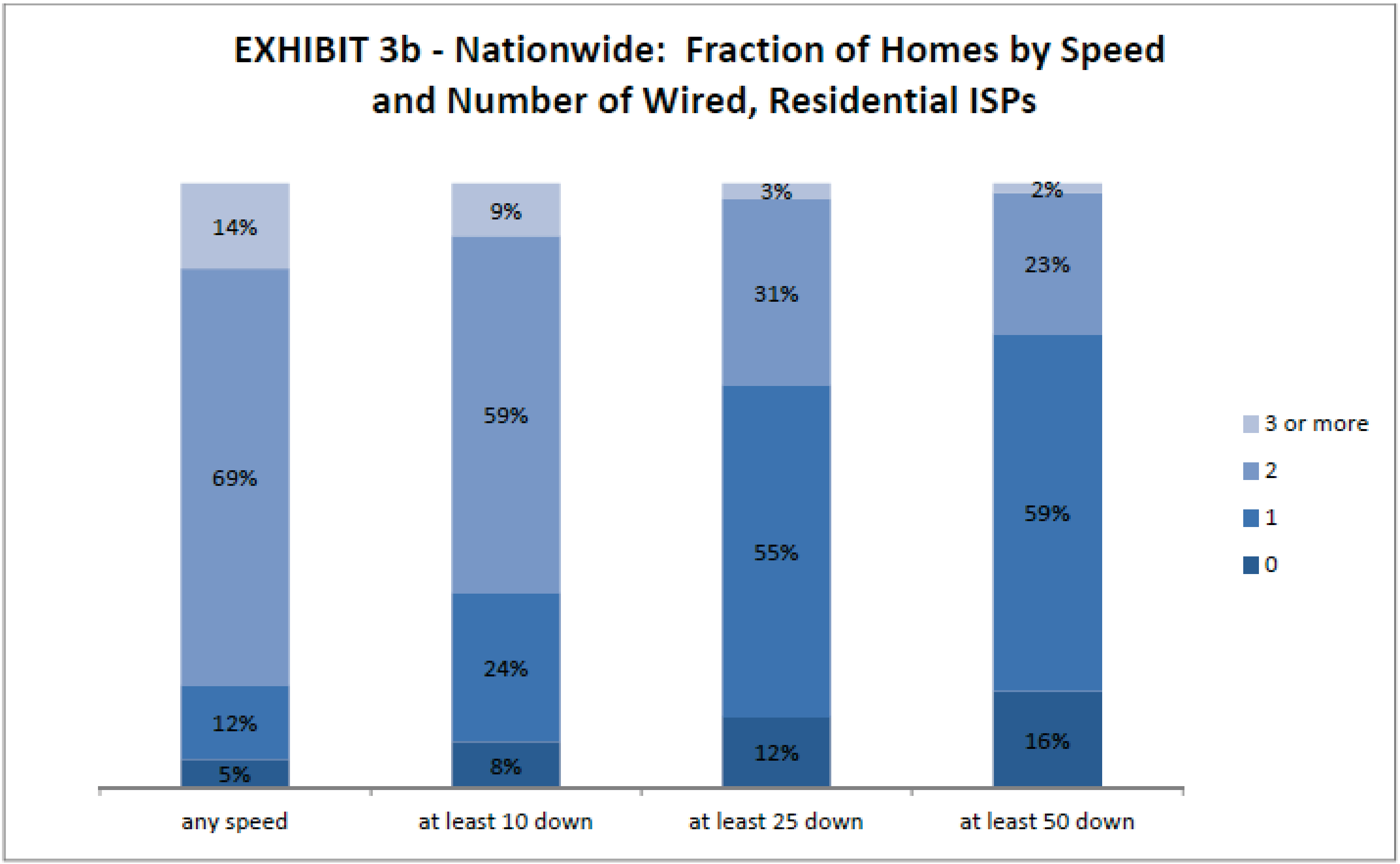
Summary

- The market for local broadband competition is broken and non-competitive.
- Potential broadband entrants must offer linear video programming. The Department and the FCC agree.
- The four largest MVPDs account for 74 percent of all MVPD subscribers.
- The lower prices paid by the largest MVPDs effectively set the market price for the purchase of video programming.
- Small MVPDs are unable to obtain programming at market prices. The latest FCC video competition report affirms this point.
- The cost delta between small and large MVPDs perpetuates the lack of broadband competition.
- The proposed Cooperative will enable small MVPD/ISPs to bridge the cost delta and compete against larger, incumbent broadband providers in the residential marketplace.

Local Broadband Markets Are Broken

- Residential customers lack meaningful choices for high-speed broadband
  - A majority of consumers have access to only one broadband provider offering speeds of 25 Mbps
  - For consumers with slower speeds of 10 Mbps, a majority of subscribers have access to only one alternative provider
- The lack of competition removes the incentive for incumbent broadband providers to deliver high-speed, high-quality services
- Incumbent providers have the incentive and ability to keep potential competitive providers out of the market to maintain their market power

The FCC Has Consistently Found that Consumers Lack Meaningful Choices for High-speed Broadband Services



Source: FCC Media Bureau Memorandum, MB Docket 15-149 (November 13, 2015)

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Consumer Demand for Broadband Is Growing

- "Consumer demand [for increasingly higher capacity broadband] is growing; today over 60% of peak-time downloads are streaming audio and video. While today that video may be for entertainment, other applications are right behind. For instance, if we are to tackle healthcare costs, high-speed broadband video for remote examination, diagnosis and even surgery is important. If our students are to get a 21st Century education, high-speed broadband to the classroom is essential. And, increasingly, that high-speed will be in both directions."
- "High-speed connections are crucial not only for the kind of innovation that will educate our children and deliver quality health care, but also improve energy efficiency, fill the employment ranks, and maintain the United States as the world's innovation leader for the 21st Century."

- Tom Wheeler, Chairman, FCC, Remarks at 1776 Headquarters, Washington, D.C.: The Facts and Future of Broadband Competition (Sept. 4, 2014).

The FCC Has Made Broadband Deployment and Competition a Priority

- **Chairman Wheeler has made broadband deployment a Commission priority:**
  - "It's pedal to the metal on broadband policy—for both consumers and competitors. Expanding broadband requires better network technology. It requires more competition. It requires that companies continue to invest to satisfy consumer demands for bigger, better, and more broadband. It requires that broadband providers not be able to limit competition in broadband-dependent markets."

Transcript: Maximizing the Benefits of Broadband: Keynote Address by Federal Communications Commission Chairman Tom Wheeler, Brookings Institution (June 26, 2015)

- **The Commission has recognized the importance of "removing barriers to investment and lowering the costs of broadband build-out."**

Hearing on Oversight of the Federal Communications Commission: Before the Subcomm. on Comm'cns and Tech. Comm. on Energy and Commerce, 114 Cong. 4 (2014)

Consumers Demand a Broadband and Linear Video Programming Bundle

- Broadband entrants must offer subscribers access to multichannel linear video programming
- Consumers overwhelmingly demand that broadband providers offer multichannel linear video programming
- Cord-cutters represent a small segment of the video viewing population
  - Only 7.3% of households have cut the cord. Tim Mullaney, *Cord-cutters: Why It's Apple's New Key Demographic*, CNBC (Mar. 17, 2015)

A Principal Barrier to Investment Is the High Cost of Video Programming

- "Broadband investments are less attractive, at least at present, if you can't also get access to low cost video programming and put together a cable-like package (MVPD) to offer customers. And that's in part because it's a way that many consumers are buying a bundle of cable and broadband from their provider. And so it might even be that by discouraging online video, you're also discouraging broadband buildout and competition in that market down the road."

- Nancy Rose, Deputy AAG for Economic Analysis, Antitrust Division, DOJ, Remarks at ABA Economics Committee Brown Bag on Bargaining Leverage and Competitive Effects (June 25, 2015).

The FCC Has Long-Recognized that Broadband Providers Must Offer Multichannel Video Programming to Successfully Enter the Market

- "The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated."
  - *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, *Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 5101 ¶¶ 51, 62 (2006).
- "Broadband deployment and entry into the MVPD business are 'inextricably linked.'"
  - *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, Report and Order, Notice of Proposed Rulemaking*, 22 FCC Rcd. 20235 ¶ 20 (2007).
- "[A] wireline firm's decision to deploy broadband is linked to its ability to offer video."
  - *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements, First Report and Order*, 25 FCC Rcd. 746 ¶ 36 (2010).

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New Entrants Face a Significant Cost Disadvantage

- The four largest MVPDs account for 74 percent of all MVPD subscribers
- The lower prices paid by the largest MVPDs effectively set the market price for the purchase of video programming
- While the largest MVPDs can purchase programming at the market price, INCOMPAS members lack the bargaining power to secure similar prices
- Small providers are unable "to obtain programming on favorable terms, [and] secure unique and exclusive programming." *Sixteenth Video Competition Report,* 30 FCC Rcd. At 3281-82 ¶ 61
- Small providers cannot compete because they lack scale and resources to offer competitive bids for programming as compared to larger MVPDs *Id.* At 3279-82 ¶ ¶ 55-62.

Proposed Video Programming Purchasing Cooperative

- The Cooperative will be formed as a nonprofit corporation
- New Charter's participation in the cooperative would give smaller purchasers the ability to purchase programming at prevailing market prices
  - For the Cooperative to achieve necessary scale to purchase video programming at prevailing market prices, it will need participation of a larger MVPD to serve as an anchor member
- The total number of subscribers represented by the Cooperative will be capped to 24% of households that subscribe to MVPDs, or that of AT&T-DIRECTV, whichever is lower

Cooperative Details – Programming

- The Cooperative will negotiate and enter into Master Programming Agreements with various programmers for the purchase of national programming rights
  - Each Master Agreement will be made available to the members for the purchase of national programming pursuant to the terms of that particular Master Agreement
- Members will be required to purchase all of their national video programming through the Cooperative pursuant to the terms of the Master Agreements
  - To protect the integrity and scale of the Cooperative, members will not be permitted to negotiate for or purchase national programming outside of the Master Agreements
  - Each member will be permitted to choose which national programming it purchases through the Cooperative based on its individual preferences and business needs

Cooperative Details – Member Agreements

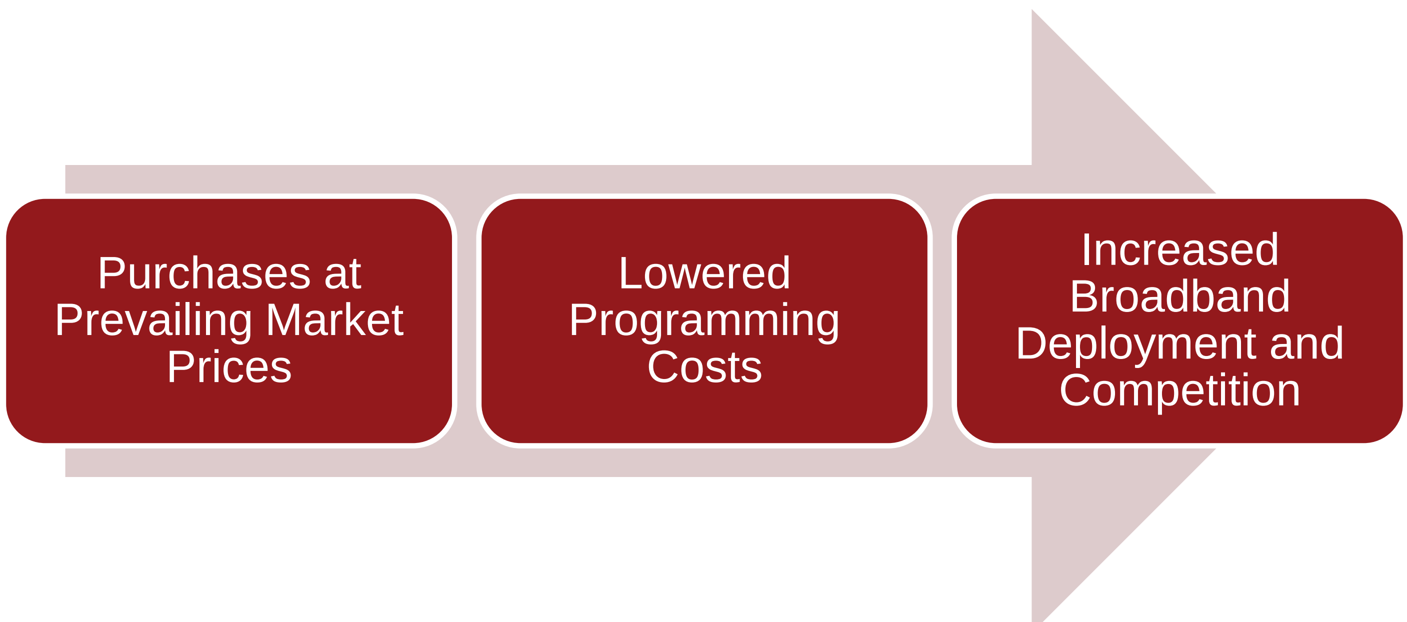
- As a condition of joining the Cooperative, each member will be required to sign a Commitment Agreement that:
  - commits the member to purchase all of its national programming through the Cooperative pursuant to the Master Agreements
  - provides the minimum terms (e.g., price, scope of rights) under which the member would agree to purchase and carry programming under each Master Agreement
  - commits the member to purchase the specified programming under each Master Agreement so long as the Master Agreement has terms at least as favorable as the member's minimum terms

Cooperative Details – Negotiations

- The largest member of the Cooperative will act as the Negotiating Member as it will be in the best position to negotiate for the best available market prices and to secure the broadest scope of distribution rights due to its experience negotiating for a large number of subscribers
  - The Negotiating Member will designate its own business personnel to negotiate Master Agreements with various national video programmers on behalf of the Cooperative
- An independent employee or agent will act as the Cooperative Negotiator
  - Will not also be an employee of a member of the Cooperative
  - Will participate in negotiations to ensure that the Cooperative's interests are represented
  - Will be permitted to share with the Negotiating Member aggregate, non-identifiable information regarding the other members' minimum terms and to negotiate directly with the programmers if the Negotiating Member cannot reach a Master Agreement with a particular programmer or where it is not interested in purchasing certain programming

Pro-Competitive Benefits of the Cooperative

- ***The Cooperative Will Increase MVPD Competition***
- The Cooperative will enable all its members to purchase video programming at the prevailing market prices currently available only to large MVPDs
  - This will enhance Members' abilities to obtain programming on favorable terms and compete more effectively in the market.



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Pro-Competitive Benefits of the Cooperative

- ***The Cooperative Will Increase Residential Broadband Competition***
- The Cooperative will promote residential broadband competition by promoting access to programming for broadband providers entering new markets
  - Much like small providers, new entrants in the broadband market lack sufficient scale to obtain favorable rates from programmers so they cannot offer competitively-priced bundled services
  - Broadband providers also must offer multichannel video services in order to compete effectively
- The Cooperative will enable new broadband entrants to offer bundled services, gain subscribers, and thus enable them to build-out when these companies otherwise would not have a business case to expand

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Proposed Condition – Programming Cooperative – Charter/TWC Merger

I. VIDEO PROGRAMMING PURCHASING COOPERATIVE

A. Introduction

1. The Transaction will result in new barriers to competition for local broadband Internet access services. Specifically, New Charter's increase in bargaining power over video programmers will enable New Charter to increase the cost disparity for purchase of video programming between New Charter and small, competitive entities that also provide a bundle of linear video programming and broadband Internet access.

2. Broadband entrants generally need to offer video programming services to compete in the market. The lower price paid for video programming per subscriber by New Charter would increase New Charter's operating margin for video programming. This would enable New Charter to more aggressively deter entry and expansion by smaller, competitive broadband providers. Therefore, the transaction as proposed would harm broadband competition as a result of New Charter's increased market power over video programmers.

3. By increasing the video programming cost advantage of New Charter, the Transaction as proposed would reduce the incentives for smaller broadband providers to compete in local areas served by New Charter, by investing in competitive network alternatives.

4. By suppressing competition from small, competitive entrants, the Transaction would result in areas served by New Charter having higher priced and lower quality broadband service than otherwise would be the case, and having no alternative provider to New Charter.

5. A Video Programming Purchasing Cooperative would promote broadband infrastructure investment and deployment both within and outside the New Charter's footprint by using a market mechanism to lessen disparities between the video programming purchasing costs of New Charter and those of small, competitive entities that provide a bundle of linear video programming and broadband Internet access. As such, this Condition addresses the Transaction's harm to local broadband competition.

B. Condition

1. Within three months of the closing of the Transaction, New Charter shall enter into a memorandum of understanding to join the video programming purchasing cooperative ("Cooperative") as proposed by INCOMPAS in this docket, and it shall join such Cooperative within sixth months of the closing of the Transaction.

2. New Charter will work with INCOMPAS in good faith to ensure that such Cooperative does not raise competitive concerns, as determined by the Department of Justice through its business review process under 28 C.F.R. § 50.6.

3. New Charter shall participate in good faith as a member of the Cooperative for no less than seven years from the time the Cooperative receives a business review letter confirming that the Department of Justice has no present intention of bringing an enforcement action against the proposed business conduct of the Cooperative.

4. In addition to any other remedies available under Commission regulations or contract, a violation of this Condition is subject to an enforcement action by the Commission, in which New Charter may be required to specifically perform its obligations under this Condition. Any remedy for substantial failure to comply with this Condition will include time added to the length of this Condition in proportion to time lost by Charter's failure to comply.