Herring Networks, Inc.

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April 26, 2016

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 15-149, Submitting Party – Herring Networks, Inc., dba One America News Network and AWE

Ex parte filing regarding the Application of Charter Communications, Inc. ("Charter"), Time Warner Cable Inc. and Advance / Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations (The Charter - TWC Merger)

Dear Ms. Dortch:

This ex parte notice is filed on behalf of Herring Networks, Inc. On April 26, 2016, Charles Herring, President of Herring Networks, Inc. sent an email to Mr. J. David Grossman, Chief of Staff, Commissioner Clyburn's Office, see attachment. The email was copied to Commissioner Clyburn.

Respectfully submitted,

Charles P. Herring

Charles P. Herring
President
Herring Networks, Inc.

AWE
A WEALTH OF ENTERTAINMENT

OAN
One America News Network

April 26, 2016

The Honorable Mignon L. Clyburn, Commissioner
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: MB Docket No. 15-149, the Application of Charter Communications, Inc. ("Charter"), Time Warner Cable Inc. and Advance / Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations (The Charter - TWC Merger)

Submitting Party: Herring Networks, Inc., dba One America News Network and AWE.

Dear Commissioner Clyburn:

I applaud and thank you for your leadership in holding the second public workshop on the state of the video marketplace impacting independent and diverse sources of programming.

Yesterday, we witnessed a highly troubling and revealing fact, which for me, came to light for the first time. Another long standing and diverse independent programmer, namely ***The Africa Channel***, represented by Mr. Brian Newton, Vice President, Marketing and Digital, revealed that the network has been hindered by an anti-competitive alternative distribution method ("ADM") provision in its agreement with Time Warner Cable. Mr. Newton made several clear and unmistakably points in his opening remarks. The anticompetitive ADM provision forced upon ***The Africa Channel*** by Time Warner Cable has hindered the independent and diverse source of programming from entering into the digital over-the-top space, shutting out the network's ability to grow its distribution in the emerging digital OTT market and limiting its revenue opportunities.

Almost from the very beginning days of the proposed merger of Charter Communications and Time Warner Cable, Herring Networks, Inc. has been

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highlighting the anti-competitive practice by Charter Communications of forcing anti-competitive ADM clauses on independent networks, including AWE, formerly known as WealthTV. Herring Networks, Inc. has provided a simple merger condition proposal which will negate these anti-competitive provisions and prevent further harms to independent and diverse programmers that have been hindered, including ***The Africa Channel***.

Yesterday, shortly after the second public workshop had begun, media outlets reported that the Chairman Wheeler had circulated an order to conditionally approve the Charter Communications / Time Warner Cable merger. It is indisputably clear that both of the major parties to this merger, specifically Charter Communications and Time Warner Cable, have a history of engaging in the anti-competitive practice of forcing independent networks to accept irrefutably anti-competitive ADM provisions. To approve the merger without effectively addressing the on-going anticompetitive harms would be nothing short of a travesty of justice and a mockery of the merger approval process. The proper venue for addressing Charter's and Time Warner's abusive practices against independent and diverse programmers is the merger approval review.

Attached, please find the merger condition advocated to address and correct the harms to independent programmers and the public for Charter Communications' and Time Warner Cable's anti-competitive practices. I respectfully suggest that your approval of the merger should be contingent upon this condition being including in the merger approval.

Respectfully submitted,

Charles Herring

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President
Herring Networks, Inc.

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PROPOSED CONDITION: NEW CHARTER MUST CREATE ROOM ON ITS PLATFORM FOR INDEPENDENT NETWORKS FORCED TO ACCEPT ANTI-COMPETITIVE PROHIBITIVE EXHIBITION OVER-THE-TOP ("OTT") PROVISIONS

BACKGROUND

Charter's historic use of prohibitive exhibition clauses, commonly called prohibitive alternative distribution methods, or "ADMs" for short, is a clear anti-competitive practice. These clauses have hindered independent programmers, video competition in the marketplace, including small companies such as SkyAngel and large companies such as Intel and its former *On Cue* video product, and consumers. Several independent networks were carried by SkyAngel and were targeted to be distributed by *On Cue*. Further, such ADM provisions are inconsistent with the spirit, and arguably the clear language, of the carriage access rules, specifically Section 76.1301 *Prohibited Practices*, subsection (b) *Exclusive rights.*

Unfortunately, many independent networks are afraid to openly discuss this "little dirty secret" with regulatory and government officials for legitimate retaliatory concerns. Without the flourishment of OTT, the importance to the survival of an independent network in gaining carriage on the big cable networks has been well known. Former FCC Commissioner Michael Copps, while an active Commissioner stated:

> *"If an aspiring cable channel cannot win carriage on these big concentrated networks, its fate is sealed. It's doomed."* (Source: Seattle Times, Editorials/Opinions, Aug. 31, 2009)

To correct past harms and minimize the concerns of discriminatory, anticompetitive, and retaliatory behavior and to enhance the diversity of programming services in the interest of the public, the FCC should require "New Charter" to accept the following merger condition:

1. All alternative distribution method ("ADM") prohibition clauses in existing and future agreements with Charter Communications, Time Warner Cable, Advanced Newhouse (Bright House), and "New Charter" shall be deemed negated.

2. "New Charter" shall not retaliate against any programmer that: a.) offers its services via alternative distribution methods. b.) has raised alternative distribution method clauses with government agencies and elected officials. Such retaliation by "New Charter" shall be considered a violation of 76.1301 b and for such purposes only, an online video distributor shall be considered a multichannel video programming distributor.

§ 76.1301 Prohibited practices.

(a) ***Financial interest.*** No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.

(b) ***Exclusive rights.*** No cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(c) ***Discrimination.*** No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

3. This condition shall apply to any Independent Programmer that can demonstrate that its affiliation agreement with Charter Communications has had a "prohibitive exhibition clause". If the Independent Programmer meets the requirements of a through g, then New Charter shall extend carriage, as specified below, within 60 days of closing the proposed merger.

    a. The Network does not have <u>any</u> common ownership with any MVPD or broadcaster and is thus an "Independent Programmer".
    b. Network is currently not carried in more than 10 percent of Charter Communications video households.
    c. Network is a 24/7 US owned national cable network.
    d. The network has been launched 24/7 for at least two years upon closing of the merger.
    e. The network is launched and carried in the US across at least 5 million homes.
    f. The network is launched on at least two of the following larger MVPDs, "Launched MVPDs": AT&T U-Verse TV, DirecTV, Dish Network, Verizon FiOS TV.
    g. The Network can demonstrate to the FCC that at least within 24 months of the merger closure date Charter and Network have or had an affiliation agreement with a Prohibitive Exhibition provision limiting the network from providing its linear feed via the internet.

    If the above criteria is met, then "New Charter" shall extend carriage as follows:

    - Carriage term of 10 years for carriage in all markets and all Systems within 90 days of Merger close date.
    - All other terms and conditions per the largest Launched MVPD.