May 12, 2016

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

Re: Written *Ex Parte* Communication, MB Docket Nos. 15-216, 10-71

Dear Ms. Dortch:

As NAB has shown throughout these proceedings, the Commission should not alter its retransmission consent rules so as to increase the already significant negotiating leverage possessed by the heavily consolidated pay TV industry.[1] It is undisputed that the ten largest pay TV providers control 94 percent of the multichannel video programming distribution (MVPD) market, the four largest control 79 percent of the market and three alone "control two-thirds of the video delivery universe."[2] This week in court filings related to the merger of Charter, Time Warner Cable (TWC) and Bright House, the Department of Justice (DOJ) concurred with NAB's analysis of the marketplace dynamics that give large MVPDs very substantial bargaining power vis-à-vis video programmers including broadcasters.

In various submissions to the FCC, NAB has explained that large pay TV providers have significant bargaining leverage in retransmission consent negotiations due to the high and increasing levels of consolidation in the MVPD industry and the highly competitive nature of

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[1] *See, e.g.*, Comments of the National Association of Broadcasters, MB Docket No. 15-216, at 15-22 (Dec. 1, 2015) (NAB Comments); Reply Comments of NAB, MB Docket No. 15-216, at 1-6 (Jan. 14, 2016); NAB Written *Ex Parte* Communication, MB Docket Nos. 15-216, 10-71, at 9-10 (Apr. 5, 2016).

[2] Tony Lenoir, *AT&T, Comcast pro forma Charter control 66% of the US video market based on MediaCensus Q2 '15 data*, SNL Kagan (Sept. 1, 2015); SNL Kagan, Media Census estimates, Q2 2015 (taking account of the Charter/Time Warner Cable/Bright House merger but not the later-proposed merger of Cablevision and Suddenlink/Altice); NAB Comments at 17-18. NAB also has shown that consolidated MVPDs have dominant positions in many local markets. *See, e.g.*, NAB Comments at 16 (noting that, upon approval of the Charter merger, a single MVPD would control 40% or more of the *total* MVPD market in 112 (or 53%) of all DMAs).

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today's video programming market.[3] A report by Economists Incorporated (EI) confirmed that broadcasters today must compete for viewers and advertising dollars against an unprecedented and rapidly growing number of video programming providers and options, including hundreds of cable networks and OTT video services that now produce record amounts of original, scripted programming.[4] This intense competition makes reaching all potential viewers – and thus being carried on all MVPDs – more important than ever for broadcast stations and other programming providers.[5] At the same time, the MVPD market is "highly concentrated, with little scope for competitive entry," potentially making a broadcaster's "failure to secure carriage with even a single MVPD" the "difference between profit and loss."[6] An MVPD distribution agreement, according to EI, is therefore "a 'must have' input from the broadcaster's point of view."[7]

In its competitive impact statement on the Charter/TWC/Bright House merger, DOJ agreed that these video marketplace dynamics give consolidated MVPDs substantial negotiating leverage over programmers. Observing that video programmers rely on distributors to reach consumers, DOJ explained that unless a video programmer obtains carriage on MVPDs

> reach[ing] a sufficient number of consumers, the programmers will be unable to earn enough revenue in licensing or to attract enough advertising revenue to generate a return on their investments in content. For this reason, video programmers prefer to have as many video programming distributors as possible carry their networks, and particularly seek out the largest MVPDs that reach the most customers. If the programmer is unable to agree on acceptable terms with a particular distributor, the programmer's content will not be available to that distributor's customers. This potential consequence gives the largest MVPDs *significant bargaining leverage in their negotiations with programmers*.[8]

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[3] *See, e.g.*, NAB Comments at 8-22; NAB Written *Ex Parte* Communication, MB Docket Nos. 15-216, 10-71 at 3 (Feb. 16, 2016), attaching Kevin W. Caves and Bruce M. Owen, *Bundling in Retransmission Consent Negotiations: A Reply to Riordan*, at 12-22 (Feb. 2016) (EI Study).

[4] *See* EI Study at 13-19 (discussing in detail the unconcentrated and "increasingly fragmented" nature of the upstream content market, broadcast television's significant and declining loss of viewership to cable/satellite and OTT options, and the relative ease of entry into the content market). Because "[c]ontent is so fragmented," media analysts now believe that "distribution at this point trumps content." Shalini Ramachandran, *Big Media's Fortunes Wane as Cable Operators Prosper*, Wall Street Journal (Feb. 16, 2016) (quoting Wells Fargo analyst Marci Ryvicker, noting the variety of viewing options, the "few suppliers" of distribution pipes and the recent consolidation in the cable industry). Even DISH CEO Charlie Ergen has stated that the balance of power in negotiations with programmers "has shifted to the distribution people having more leverage than they had in the past." David Lieberman, *Dish Network CEO Hints At Hard Line In Viacom Renewal Talks, Calls Extension A 'Positive,'* deadline.com (Feb. 18, 2016).

[5] As the EI Study pointed out, a broadcaster failing to secure wide MVPD distribution of its programming risks sacrificing both advertising revenue and retransmission fees. EI Study at 19.

[6] EI Study at 19-21.

[7] EI Study at 19.

[8] U.S. Department of Justice, Competitive Impact Statement at 5, *U.S.A. v. Charter Communications, Inc., Time Warner Cable Inc., Advance/Newhouse Partnership, and Bright House Networks, LLC*, Civil Action No. 1:16-cv-00759 (RCL) (D.D.C. May 10, 2016) (emphasis added). *See also id*. at 7 (finding that "incumbent cable

Last fall, the head of DOJ's Antitrust Division similarly stated that MVPDs "are essential gatekeepers to what customers watch and how they watch it" because established programming networks and newer OTT programming providers depend on MVPDS to both "deliver their content" and to "enable them to sell ads or obtain subscribers."[9]

In light of the DOJ analysis, the Commission should summarily reject repeated claims by large pay TV providers that they lack bargaining leverage and need the government to adopt their proposals changing the negotiating rules of the game in their favor.[10] It beggars belief that AT&T/DirecTV, Verizon, DISH, the combined Charter/TWC/Bright House and others – entities with market capitalizations up to 200 times greater than some of the biggest local TV station groups – need FCC assistance in negotiating their retransmission consent agreements.[11] Commission action tilting the competitive playing field for the benefit of consolidated pay TV providers that already dominate the market and are involved in the vast majority of service disruptions would not serve consumers,[12] would harm local broadcast stations, especially mid-sized and small ones, and is not supported by the record including DOJ's recent competitive analysis.

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companies are often the largest video distribution provider in their respective local territories" and observing that Charter's, TWC's and Bright House's market shares "exceed 50 percent in many local markets in which they operate"); at 12 (noting that large MVPDs, such as TWC, with millions of subscribers have sufficient leverage over video programmers to obtain their agreement to contract terms that restrict programmers' ability to provide their programming to and earn revenue from other video programming distributors); at 13 (explaining that programmers "will be less likely to risk losing access" to the combined Charter/TWC/Bright House's "considerable subscriber base" and "will be more likely to accept" restrictive demands from the combined entity); at 14 (observing that "additional entry into wireline or DBS distribution is not likely to be significant for the next several years" due to the "enormous upfront investment" to create a video distribution infrastructure).

[9] Assistant Attorney General William Baer, Keynote Address at the Future of Video Competition and Regulation Conference, Duke Law School (Oct. 9, 2015).

[10] *See, e.g.*, Comments of Charter Communications, Inc., MB Docket No. 15-216, at 4 (Dec. 1, 2015) (contending that broadcasters enjoy a "gross imbalance in bargaining power" in their favor); Reply Comments of Verizon, MB Docket No. 15-216, at 4 (Jan. 14, 2016) (asserting that "[b]roadcasters' leverage has substantially increased" and that "MVPDs are at an unfair disadvantage in negotiating retransmission consent agreements"); Reply Comments of the American Television Alliance, MB Docket No. 15-216, at 12 (Jan. 14, 2016) ("the balance of leverage in retransmission consent negotiations remains squarely in favor of broadcasters"); Reply Comments of AT&T, MB Docket No. 15-216, at 3 (Jan. 14, 2016) (arguing that retransmission negotiations no longer involve MVPDs and broadcasters "with roughly equivalent bargaining power" and that broadcasters have "significant leverage").

[11] *See* NAB Comments at 19 (showing that the market capitalizations of AT&T/DirecTV, Verizon, Comcast, Charter/TWC/Bright House and DISH to be, respectively, 201, 182, 142, 72 and 27 times greater than the market caps of Nexstar, Scripps or Media General each).

[12] SNL Kagan's list of 2015 retransmission consent disputes shows that DISH alone was involved in half of them, with DirecTV and then the combined AT&T/DirecTV being involved in a quarter of them. Of the 28 disputes identified by SNL Kagan, only one involved a small MVPD. Moreover, about three quarters of all 2015 disputes involved large MVPDs with small-to-mid-sized TV broadcasters possessing much less bargaining leverage and financial resources. *See* Atif Zubair, *2015 retrans roundup: Industry consolidation leads to larger renewals, high-profile disputes*, SNL Kagan (Jan. 22, 2016).

Respectfully submitted,

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