BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
	)	
Revision of the Commission's Program Carriage Rules	)	MB Docket No. 11-131
	)	
Leased Commercial Access; Development of Competition and Diversity in Video Programming Distribution and Carriage	)	MB Docket No. 07-52

COMMENTS OF CHARTER COMMUNICATIONS

CHARTER COMMUNICATIONS

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EXECUTIVE SUMMARY

The Commission should not expand the definition of "affiliated" video programming vendors for purposes of the program carriage rules to include MVPDs and program vendors that "have entered into a contractual relationship that requires carriage of commonly owned channels" but otherwise have no common ownership or management.[1]

Through retransmission consent agreements, virtually *all* of Charter's cable systems carry multiple channels of programming controlled by a broadcaster. Likewise, major independent program vendors often negotiate for MVPD carriage of multiple channels. The proposed change to the definition of affiliated entities wrongly presumes that a "pure play" cable distributor like Charter has a proprietary interest in carrying these channels and discriminating against other unaffiliated channels.

The complaint process under the program carriage regime would impose tremendous burdens on Charter's staff not justified by any existing or even potential problem. Every one of Charter's routine discussions with independent programmers could trigger that process, and distort the market in favor of litigious channels not otherwise desired by consumers.

The Commission does not have the legal authority to define "affiliate" under program carriage where nothing more than a contractual relationship exists. Section 616, added as part of the Cable Television Consumer Protection and Competition Act of 1992, reflects Congress' concern that a cable operator might coerce an unaffiliated program supplier to give it ownership or exclusive rights as a condition of carriage and discriminate against those that did not. Those concerns do not apply when a "pure play" cable distributor tries to navigate retransmission

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[1] *In the Matter of Revision of the Commission's Program Carriage Rules,* Second Report and Order in MB Docket No. 07-42 and Notice of Proposed Rulemaking in MB Docket No. 11-131, 26 FCCR (rel. Aug. 1, 2011) ("NPRM") at ¶ 78.

consent, negotiate for carriage of other program networks, and provide channels of the greatest interest to its subscribers.

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I. INTRODUCTION

The Commission is seeking "comment on whether to broaden the definition of 'affiliated' and 'attributable interest' in Section 76.1300 of the Commission's rules to reflect changes in the marketplace."[2] Charter Communications ("Charter") Charter is the nation's fourth largest cable company, serving 5.2 million customers.[3] Charter is recognized as a "pure play" cable distributor. It is not integrated with video programs networks, but revising the definition of "affiliated" entities would subject Charter to the full effect of the program carriage rules.

In Section 616(a)(3) of the Communications Act, Congress directed the Commission to adopt rules that prohibit MVPD conduct that "unreasonably restrains" an unaffiliated video program vendor's ability "to compete fairly by discriminating in video programming distribution

[2] NPRM at 50 ¶ 78.

[3] Charter Communications, Inc. SEC 10-Q filed November 1, 2011 at 24.

on the basis of affiliation or non-affiliation of vendors. . .".[4] The Commission notes that the current "discrimination" rule is triggered by common ownership or management, and asks:

> Are there other kinds of relationships between a programming vendor and an MVPD, other than those involving common ownership or management, that should nonetheless be considered "affiliation" under our rules? For example, to the extent that a programming vendor and an MVPD have entered into a contractual relationship that requires carriage of commonly owned channels and adversely affects the ability of other programming vendors to obtain carriage, should this relationship be considered "affiliation" under the program carriage rules?[5]

Charter submits that no market development warrants such a sweeping rule change. Instead, the proposed inclusion of mere contractual relationships for the carriage of multiple channels would distort the market by giving program vendors new leverage in negotiations that are now driven by Charter's independent evaluation of customer value. Moreover, Congress defined "affiliate" to mean common ownership or control, and has not granted the Commission authority to apply the rules where there is no such commonality.

II. THE COMMISSION SHOULD NOT EXPAND THE DEFINITION OF "AFFILIATED" ENTITIES IN ITS PROGRAM CARRIAGE RULES TO INCLUDE CONTRACTUAL RELATIONSHIPS.

A. Through Retransmission Consent and the Negotiating Practices of Independent Program Owners, Virtually All Cable Systems Carry Networks Under Common Ownership Through Contract.

Charter is a cable distributor which does not own or control a slate of video program networks. Yet virtually *all* of Charter's cable systems carry multiple channels of programming from program vendors that control commonly owned broadcast and cable channels, a well-

[4] 47 U.S.C. § 56(a)(3); *see also* 47 C.F.R. § 76.1301(c).

[5] NPRM at ¶ 78.

recognized feature of the retransmission consent process.[6] News Corp owns Fox Broadcasting, Fox News, FX, National Geographic, Fox Business, and many others. Disney owns ABC Broadcasting, ESPN, Disney Channel, Disney XD, ABC Family, and others.[7] Charter carries these and other broadcast-affiliated channels on its cable systems, but not because of an equity or financial interest in these vendors.

In addition to networks owned by broadcasters, many other program channels are commonly owned by independent vendors. For example, Scripps Interactive owns HGTV, Travel Channel, and Food Network.[8] Univision owns Univision and Galavision.[9] These vendors often require Charter to negotiate for carriage of multiple channels under one carriage agreement. Yet Charter has no common ownership or management with the vendor, nor any incentive to disfavor any other independent program vendor "on the basis of affiliation or nonaffiliation," the concerns Congress sought to address through Section 616(a)(3). The fact is, Charter evaluates each program service for carriage or renewal of carriage on its own merit as a value proposition for Charter customers. Although it may not carry every channel under

[6] *See, e.g., In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 06-189, 24 FCC Rcd 542, 633, Table 12 ("*Thirteenth Report*"). The record for the *Thirteenth Report* includes a study finding that "the big four broadcast networks generally have chosen to tie retransmission consent to the carriage of relatively new affiliated video programming networks and that, as a result, networks that are not affiliated with the big four broadcast networks have difficulty gaining carriage on cable systems. The paper also finds that broadcasters have used the threat of withdrawing retransmission consent. . to force cable operators to pay higher prices for cable programming than they otherwise would be willing to pay and/or to purchase programming that they otherwise would be unwilling to purchase, creating significant social costs." *Id.* at 641 ¶ 208.

[7] *Thirteenth Report*, at 633, Table 12.

[8] *Thirteenth Report*, at 634, Table 12.

[9] *Thirteenth Report*, at 633, Table 12.

common ownership of a single vendor, Charter is routinely required to negotiate for carriage of multiple channels.

B. There Is No Real World Basis to Expand the Definition of "Affiliated" MVPDs In the Program Carriage Rules to Include Simple Carriage Contracts.

The Commission's suggested expansion of the definition of "affiliate" for purposes of program carriage would assume, incorrectly, that Charter has structural incentives to favor one vendor's service over another's. Charter has no economic, proprietary, or other reason to disfavor any competing video services.

Moreover, no events in the marketplace suggest a need to change the rules to treat Charter like those MVPDs Congress feared would favor the program networks they controlled. In its most recent report to Congress, the Commission identified 565 national nonbroadcast video programming networks.[10] These cable networks are constantly in negotiation with cable operators and other MVPDs to both expand and maintain (through contract renewal) carriage. And in its efforts to maximize customer satisfaction, Charter routinely has discussions and negotiations with program vendors seeking to renew or obtain carriage on Charter systems. Charter estimates that over the course of the next five years, it will have well over 200 networks up for renewal. Other MVPDs similarly experience ongoing discussions with program vendors over potential new and renewed carriage agreements.

Despite the constant stream of negotiations and discussions between program suppliers and MVPDs, there is no problem in the programming marketplace that the proposed expansion of "affiliates" under the program carriage rules would address. No program supplier has complained that Charter has discriminated against an independent program supplier in a manner

[10] *Thirteenth Report*, at 550 ¶ 20, 629-630 ¶ 184 and App. C, Table C-1 and C-2.

that should be covered by Section 616. The *NPRM* itself mentions no problem that an expanded definition of "affiliated entities" would rectify. It is a regulatory "solution" looking for a problem, contrary to the regulatory reform initiative of the Administration and this Commission.[11]

C. Expanding the Definition of Affiliated MVPDs Imposes Substantial and Unwarranted Burdens on Charter and Distorts the Programming Market.

Allowing complaints against Charter would impose particularly unjustified burdens and interfere with a functioning marketplace in the process. Under the Commission's proposed new definition of an "affiliated" MVPD for program carriage purposes, every negotiation or discussion Charter has could become the basis for an FCC complaint. A dissatisfied vendor might file a complaint alleging that Charter somehow discriminates in favor of any number of the broadcast-affiliated or other program channels, and that these other contracts have "the effect of unreasonably restraining" its ability "to compete fairly." [12] If the Media Bureau decides that a complaint meets the low standards for a *prima facie* complaint, the minimum obligations of the proposed discovery procedures will require Charter to automatically produce "all documents" in five broad categories within 10 days of the order.[13] Under the proposed rules, the complaining

[11] *See* FCC's Preliminary Plan for Retrospective Analysis of Existing Rules (November 7, 2011); FCC News Release, *FCC Chairman Genachowski Continues Regulatory Reform to Ease Burden on Businesses; Announces Elimination of 83 Outdated Rules* (Aug. 22, 2011); *see also* FCC News Release, *Statement from FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies* (July 11, 2011).

[12] Proposed Section 76.1302(d)(3)(iii)(elements of a *prima facie* complaint for program carriage discrimination in favor of affiliated programmer).

[13] Proposed Section 76.1303(b)(3).

vendor may then serve its own discovery requests, [14] triggering a tight set of deadlines leading to the close of discovery 75 days after the initial order allowing the complaint to proceed.[15] In this compressed discovery period, Charter will be forced to supervise litigation holds, review voluminous paper and electronic records, prepare those records for production, designate employees for deposition, all the while losing the productive time of staff who respond to the discovery.

The proposed discovery process for proceedings decided by the Media Bureau may only be the beginning of the regulatory burden. The Commission believes that "most program carriage complaints will require an administrative hearing to evaluate contested facts related to the parties' specific negotiations."[16] And as the Commission observed, complaints designated for hearing "raise[ ] additional complexities not applicable to cases handled by the Media Bureau."[17] Efforts to litigate discriminatory intent often involve depositions and live testimony to determine witness credibility and state of mind: one recent program carriage complaint proceeding had twenty-one live witnesses.[18]

Subjecting Charter to program carriage complaints and the burdens of discovery and hearing would severely distort the functioning market. A disgruntled program vendor would

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[14] Proposed Section 76.1303(c). *See also NPRM*, 26 FCCR 11494, 11524-11526 at ¶¶ 41-44 (discussing proposed expanded discovery procedures).

[15] Proposed Section 76.1303(c)(6).

[16] *Id.* at ¶ 21 n. 78 (quoting *1993 Program Carriage Order*, 9 FCC Rcd at 2652 ¶ 24).

[17] *NPRM*, 26 FCC Rcd at 11529 ¶ 49.

[18] *See Herring Broadcasting, Inc. d/b/a/ Wealth TV*, Recommended Decision of Chief Administrative Law Judge Richard J. Sippel in MB Docket No. 08-214, 24 FCC Rcd 12967, 12970 ¶ 5 & nn. 18 -19 (rel. Oct. 14, 2009) (consolidated hearing on program access complaints filed by Wealth TV against four MVPDs).

have significant opportunity to create unfair leverage against Charter by threatening or filing a complaint, because concern over discovery and other costs of litigation often causes parties to settle cases that otherwise would not settle on the merits.[19] In this context, the Commission's suggested rule change would impose extraneous regulatory pressure to carry channels that are otherwise not attractive in the market. This frustrates, rather than promotes, the efficient functioning of the programming marketplace.

D. The Commission May Not Lawfully Define "Affiliated Entities" as Those With Nothing More Than an Arms-Length Contractual Relationship.

Apart from the lack of any real world basis for the Commission to declare Charter "affiliated" with program vendors by virtue of arms-length program carriage contracts, the Commission has no legal authority to do so. Congress defined an "affiliate" for purposes of Title VI as an entity "who owns or controls, is owned or controlled by, or is under common ownership or control by" another entity.[20] This definition tracks the definition generally applicable to the Communications Act and the Commission's long-standing rulings on various forms of affiliation.[21] The Commission has never suggested that the statutory term "affiliate" in Title VI could include a simple carriage agreement, and in fact recognized that Congress

[19] According to 80% of counsel recently surveyed by the ABA Section on Litigation, the burden of litigation, especially discovery, forces cases to settle that should not otherwise settle on the merits. *ABA Section of Litigation Member Survey on Civil Practice: Detailed Report* (December 11, 2009) at 68 (Table demonstrating that "counsel use discovery as a tool to force settlement"), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/ABA%20Section%20of%20Litigation,%20Survey%20on%20Civil%20Practice.pdf .

[20] 47 USC § 522(2).

[21] 47 USC § 153(1); *see also*, *e.g.*, 47 CFR § 73.3555 notes 1 – 3 (defining "cognizable interest" and standards for attributing ownership interests for the Commission's media ownership rules).

intended to preserve the ability of MVPDs and program suppliers to enter into routine contracts without triggering the program carriage rule.[22]

Expanding the scope of the program carriage rules to cover cable distributors by virtue of their contracts with vendors is contrary to Congressional intent. Program carriage and vertical channel occupancy limits were companion provisions (Sections 11 and 12) in the Cable Television Consumer Protection and Competition Act of 1992 Act. They reflect Congressional concern at the time "that increased horizontal concentration and vertical integration in the cable industry [had] created an imbalance of power between cable operators and program vendors."[23] With vertical channel occupancy limits, Congress intended to limit the number of affiliated channels on any cable system. With program carriage rules, Congress addressed concerns that a cable operator might coerce an unaffiliated program supplier to give it ownership or exclusive rights as a condition of carriage and discriminate against the carriage of those that did not. Those concerns do not apply in today's programming marketplace when a cable distributor tries to balance the demands of retransmission consent and powerful independent program vendors and still provide channels of the greatest interest to its subscribers. In fact, trying to retrofit Section 616 into one that treats a carriage agreement as an affiliate interest would render meaningless the

[22] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programing Distribution and Carriage*, MM Docket No. 92-265, Second Report and Order, 9 FCC Rcd 2642, 2648 ¶ 14 (1993) (regulations implementing Section 616 "must strike a balance that not only prescribes behavior prohibited by the specific language of the statute, but also preserves the ability of affected parties to engage in legitimate, aggressive negotiations.").

[23] *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programing Distribution and Carriage*, MM Docket No. 92-265, Second Report and Order, 9 FCC Rcd 2642, 2643 ¶ 2 (1993).

companion vertical ownership limits in Section 613, because a vast array of channels would become "affiliated" solely through carriage. This was clearly not Congress' intent.

III. CONCLUSION

The Commission should not amend the definition of "affiliate" for purposes of the program carriage rules to include contractual relationships that govern the carriage of multiple channels of programming. Charter has no reason to skew its price-value calculations of each program network in a way that reflects anything but its customers' and shareholders' interests. Charter is a cable distributor, and should not be saddled with the burdens of regulations intended for MVPDs that Congress feared would favor programming they controlled. In any event, the Commission has no authority to ignore the statutory definition of "affiliate," which requires some form of common ownership or control that is not satisfied by a simple contract for carriage of multiple channels.

Respectfully submitted,

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