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

REPLY COMMENTS OF CHARTER COMMUNICATIONS

CHARTER COMMUNICATIONS

By: Christin McMeley
Vice President, Government Affairs
G. Patrick Webre
Senior Director and Senior Counsel
Government Affairs
Charter Communications
1919 Pennsylvania Avenue, NW, Suite 750
Washington, DC 20006
Direct: 202-973-4312 | Fax: 202-973-4499

January 11, 2012

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

REPLY COMMENTS OF CHARTER COMMUNICATIONS

In its initial comments in this proceeding, Charter Communications urged the Commission not to expand the scope of the antidiscrimination program carriage rule to apply to MVPDs that have contracts for the carriage of commonly-owned networks, but no common ownership or control.[1] Charter's position is that there have been no changes in the programming marketplace that warrant expanding the application of this rule, which instead 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, Charter explained that the definition Congress provided for "affiliates" in Section 616 of the Communications Act means common ownership or control, and does not provide the Commission authority to subject MVPDs to the rules where there is no such commonality.

[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.

A majority of the comments submitted agree with Charter, and demonstrate that the Commission should not expand the antidiscrimination program carriage rules to include pure play MVPDs like Charter.[2] Commenters explained that the potential problems Congress sought to address with the program carriage rules have been fully resolved by the vast expansion of the programming marketplace in the years since Congress adopted Section 616.[3] Cox lent support to Charter's concern over litigious networks, describing its experience "spending the last three years defending against a program carriage discrimination claim that the Commission found to be meritless."[4] Indeed, a number of program networks – each of which presumably would benefit if more MVPDs were subject to the antidiscrimination rule – do not even attempt to support the proposed expanded definition of "affiliated" MVPDs.[5] Together, these comments provide ample basis in fact and law for the Commission to consider *narrowing*, not expanding, the universe of program carriage complaints under Section 616.

Only one commenter explicitly supports a rule that would allow claims of discrimination against MVPDs who have no ownership or control of any programming, on grounds that a pure

---

[2] Comments of the American Cable Association at 4 -6; Comments of Cablevision Systems Corporation at 3 – 6; Comments of Comcast Corporation at 54 – 60; Comments of Cox Communications, Inc. at 6 – 8; Comments of DirecTV at 2 – 12; Comments of MSG Holdings and Music Choice at 4 – 13; Comments of National Cable & Telecommunications Ass'n at 8 – 10; Comments of Time Warner Cable, Inc. at 2 – 7.

[3] *See, e.g.*, Comments of Comcast Corporation at 58 – 59; Comments of National Cable & Telecommunications Ass'n at 8 – 10; Comments of Time Warner Cable, Inc. at 2 – 7. *See also* Comments of American Cable Association at 2-3 (explaining significant carriage of independent programmers by association members).

[4] Comments of Cox Communications, Inc. at 2.

[5] *See generally* Comments of Current TV LLC, Game Show Network, LLC; NFL Enterprises LLC, and The Tennis Channel, Inc.; Comments of TCR Sports Broadcasting Holding, L.L.P., d/b/a/ Mid-Atlantic Sports Network.

play MVPD "may be 'forced' to discriminate by [a] powerful content provider." [6] In other words, the premise is that the Commission should impose legal responsibility on an MVPD for program carriage decisions over which the MVPD allegedly had no meaningful control. It is absurd to propose that such theoretical involuntary conduct should trigger legal liability. In any event, Congress did not intend Section 616 to protect any MVPDs from programmers, and the Commission cannot stretch the statute to address carriage agreements between MVPDs and unaffiliated programmers.

Three other commenters similarly argue for a broader definition of MVPD affiliation, urging the Commission to prohibit a vertically integrated MVPD from discriminating against a program network that claims to be similarly situated to a network owned or controlled by a *different* MVPD.[7] These commenters speculate – also with no support of any kind -- that vertically integrated MVPDs will collude to favor each other's programming.[8] That notion of coordinated cable operator activity, however, was flatly rejected by this Commission and the D.C. Circuit.[9]

None of these comments articulates *any* incentive that an MVPD would have to discriminate in favor of programming in which it has no ownership, control, or other common interest. They offer not a single instance of purported discrimination by an MVPD in favor of

---

[6] Comments of HDNet Entertainment LLC at 4, 12 – 15.

[7] Comments of Bloomberg, L.P. at 17 – 19; Comments of Crown Media Holdings, Inc. at 8 – 9; Comments of Media Access Project and Public Knowledge at 11 – 13.

[8] *Id.*

[9] *Cable Horizontal and Vertical Ownership Limits*, Fourth Report and Order, 23 FCC Rcd 2134, ¶¶ 63 – 66 (2008) (establishing cable subscriber limits) (on remand) (subsequent history omitted); *Time Warner Ent. Co. v. FCC*, 240 F.3d 1126, 1132 (D.C. Cir. 2001)(vacating horizontal ownership rule) (finding no record that cable operators have incentives to buy each other's programming).

programming on the basis of a contract for the carriage of multiple channels. They provide no evidence to support an expansion of the rule that would deem virtually all MVPDs affiliated with all programmers with which they have contracts for the carriage of multiple channels.[10]

Nor do these four commenters provide any legal ground on which the Commission could define "affiliated" entities under Section 616 to mean entities that do not have any common ownership or control. They argue as if the word "affiliated" could be read without the context of Section 616. The language and legislative history of the statute, however, leave no room to doubt Congress' intent to limit the potential for an MVPD "to discriminate against an unaffiliated video programming vendor in which it does not hold a financial interest." [11] Conversely, nothing in the statute or its legislative history permits Section 616 to be applied to claims of discrimination that do not involve programming in which the MVPD at issue has an interest.

The record in this proceeding provides no basis for the Commission to adopt a new, expanded definition of "affiliated" entities subject to the antidiscrimination provision of Section 616. Instead, the comments provide substantial marketplace developments and legal justification for the Commission to reject the proposed expansion, and to consider ways to narrow the universe of program carriage complaints.

---

[10] HDNet reports a negotiation between Suddenlink (which has no ownership or control over any program network) and Viacom that offers no conceivable support for the notion that an operator like Suddenlink would discriminate in favor of unaffiliated programming, like Viacom's. HDNet Comments at 14.

[11] H.R. Rep. No. 92-628, 102d Cong., 2d Sess. 110 (1992) (emphasis added). *See also* Comments of the American Cable Association at 4 – 6; Comments of Comcast Corporation at 54 – 58; Comments of DirecTV at 3 – 4.

Respectfully submitted,

CHARTER COMMUNICATIONS

By: /s/

Christin McMeley
Vice President, Government Affairs
G. Patrick Webre
Senior Director and Senior Counsel
Government Affairs
Charter Communications
1919 Pennsylvania Avenue, NW, Suite 750
Washington, DC 20006
Direct: 202-973-4312 | Fax: 202-973-4499

January 11, 2012