

**Before the
Federal Communications Commission
Washington, DC 20554**

In the matter of

Applications of Charter Communications,
Inc., Time Warner Cable, Inc., and
Advance/Newhouse Partnership For
Consent to Transfer Control of Licenses
and Authorizations

MB Docket No. 15-149

**PETITION TO DENY OF PUBLIC KNOWLEDGE, COMMON CAUSE, CONSUMERS
UNION, AND OPEN MIC**

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13 October 2015

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I. Introduction and Summary

The cable and broadband markets are already highly concentrated, yet mergers, attempts at mergers, and rumors of mergers keep coming. The smart money seems to suggest that more consolidation is good for profits, good for some investors, and good for fending off competition. But there's little reason to think it's good for consumers, or even for the industry and economy as a whole. An arms race where consolidation begets consolidation, where constant dealmaking increases the industry's debt-load, and where cost-cutting takes the place of innovation, is not likely to lead to lower prices, increased diversity of content, or new services for consumers.

Combined, Charter, Time Warner Cable, and Bright House would serve “approximately 19.4 million broadband customers, 17.3 million video customers, and 9.4 million voice customers across 41 states.”¹ Nationally, the firms would control approximately 18% of pay TV market share (including 35% of cable pay TV), and more than 21% of broadband market share (including 36% of cable broadband).² (For these purposes, petitioners are using a data source that defines “broadband” at a low-speed threshold. Using the Commission’s recently-adopted 25 Mbps standard, the relevant broadband market shares would be substantially higher.)³ By

¹ In the Matter of Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149, *Application*, p. 16 (Jun. 25, 2015) (“*Charter-TWC-Bright House Application*”).

² Leichtman Research Group, *Major Pay-TV Providers Lost About 470,000 Subscribers in 2Q 2015*, at 2 (Aug. 17, 2015), <http://www.leichtmanresearch.com/press/081715release.pdf>; Leichtman Research Group, *About 360,000 Added Broadband in 2Q 2015*, at 2 (Aug. 18, 2015), <http://www.leichtmanresearch.com/press/081815release.pdf>.

³ Public data reflecting connections meeting the FCC’s newer, 25/3 Mbps broadband definition, is not widely available. As of the most recent report, however, 99% of connections meeting the 25 Mbit threshold, were cable connections. Non-cable broadband, which only accounts for approximately 39% of all broadband nationwide, provided less than 1% of connections meeting the 25 Mbps threshold. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN

comparison, Comcast already controls 23% of pay TV nationwide, and 25% of the broadband market.⁴ Within the cable industry, Comcast controls 45% and 42%, respectively, of those two markets.⁵ All told, New Charter and Comcast would control approximately 41% of the pay TV market, and 46% of broadband. Within the cable space, they would account for 80% of the national cable TV market, and 78% of the national cable broadband market.⁶ In many ways, the two companies would be very similar, facing similar challenges in an evolving marketplace. Intentionally or not, the two companies may respond to their similar incentives in similar ways. From the perspective of programmers and Internet content companies, and ultimately consumers, two large national cable companies that behave in parallel ways may be little better than one large cable company.

Charter has asserted that it has different business plans and incentives than Comcast. It argues that, unlike Comcast, it is not a vertically integrated content and distribution business. It has preemptively made a number of commitments with respect to its broadband practices that are intended to reduce its ability to harm incipient online video competition. A proper analysis of this merger must take note both of the similarities between Comcast and a post-merger Charter, particularly in terms of their scale and incentives as a bundled cable/broadband provider, and the differences, both in terms of meaningful and enforceable commitments and differing business incentives. Ultimately, the Commission cannot grant this merger unless it can be assured that a post-merger Charter cannot detrimentally affect the programming market, or use its clout as a

Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, ¶ 3 (rel. Feb. 4, 2015); *see also* Petition to Deny of Public Knowledge and Open Technology Institute, Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign and Transfer Control of FCC Licenses and Other Authorizations, MB Docket No. 14-57 (Aug. 25, 2014).

⁴ *Id.*

⁵ *Id.*

⁶ *See* Leichtman Research Group data, *supra* note 2.

video distributor to impose contractual prohibitions that would inhibit online video's access to programming in ways that are less visible than the blunt instrument of data caps, Open Internet violations, and congested interconnection points. The Commission's analysis must be driven by its mission to promote the public interest, in a marketplace that is consolidating in response to challenges posed by incipient online competition and changes in consumer behavior.

II. The Commission Has the Legal Authority to Block This Merger if It Finds It Is Not in the Public Interest

Charter must prove that its purchase of Time Warner Cable serves “the public interest, convenience, and necessity.”⁷ The Commission's public interest analysis embodies a “deeply rooted preference for preserving and enhancing competition in relevant markets... and ensuring a diversity of information sources and services to the public.”⁸ Although “[t]he FCC's actions should be informed by competition principles,” its “‘public interest’ standard is not limited to purely economic outcomes.”⁹ Charter must show that its transaction would not harm the public, frustrate the goals of the Communications Act, harm competition, or otherwise break the law, and Charter must also demonstrate that its transaction would result in positive public interest benefits. Charter can not merely attempt to rebut claims of harms to the public interest without addressing these concerns.

Based on its initial application and preliminary commitments, Charter has not met this burden. As proposed, this merger would harm consumers and competition, providing grounds for the Commission to block it on both competition law and public interest grounds.

⁷ 47 U.S.C. § 310(d).

⁸ Applications of Comcast Corporation, General Electric Company and NBC Universal for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion & Order*, 26 FCC Rcd 4238, ¶ 23 (2011).

⁹ Jon Sallet, *FCC Transaction Review: Competition and the Public Interest*, FCC Blog, Aug. 12, 2014, <http://www.fcc.gov/blog/fcc-transaction-review-competition-and-public-interest>.

Under the Clayton Act, transactions that substantially lessen competition, or tend to create a monopoly in any line of commerce, are illegal.¹⁰ As this Petition will show, among other harms, this merger could substantially lessen competition in the online video marketplace. But “[i]n order to find that a merger is in the public interest,” the Commission must “be convinced that it will enhance competition.”¹¹ Charter has addressed a number of significant competitive concerns but not fully addressed all competitive or public interest concerns and therefore have not made this showing.

The Commission must also determine whether this merger “could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.”¹² But Charter’s burden is not merely to show a lack of public interest harms. It must demonstrate specific public interest benefits that would directly flow from this transaction. Its attempts to do so have fallen short.

The Commission is charged with providing access to advanced telecommunications and information services across the country and encouraging deployment to all Americans;¹³ ensuring quality services available at just, reasonable, and affordable rates;¹⁴ promoting the development of the Internet and preserving the competitive free market for its provision;¹⁵ encouraging the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet;¹⁶ and

¹⁰ 15 U.S.C. § 18.

¹¹ Applications of NYNEX and Bell Atlantic for Consent to Transfer Control, *Memorandum Opinion & Order*, 12 FCC Rcd 19985, ¶ 2 (1997).

¹² XM Satellite Radio Holdings, *Memorandum Opinion & Order & Report & Order*, 23 FCC Rcd 12348, ¶ 30 (2008).

¹³ 47 U.S.C. §§ 254(b)(2), 1302(a).

¹⁴ 47 U.S.C. §§ 254(b)(1), 201(b), 151.

¹⁵ 47 U.S.C. §§ 230(b)(1), 230(b)(2).

¹⁶ 47 U.S.C. § 230(b)(3).

preventing unjust or unreasonable discrimination by carriers.¹⁷ The Commission cannot grant this merger unless it is assured that it will not frustrate these goals.

The Commission is also directed by Congress to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.¹⁸

This provision grants the FCC “broad and sweeping”¹⁹ powers to promote video competition. Unless the Commission blocks this merger or addresses the harms it would cause, its ability to carry out this provision would be frustrated.

The Commission is also required to maintain “standards by which cable operators may fulfill their customer service requirements,” which include, at a minimum, requirements governing:

- (1) cable system office hours and telephone availability;
- (2) installations, outages, and service calls; and
- (3) communications between the cable operator and the subscriber (including standards governing bills and refunds).²⁰

Therefore, as part of its public interest review, the Commission must consider the extent to which this merger between two companies with poor customer service records would make the experience even worse.

The Commission’s ample legal authority gives it all the tools it needs to ensure that this merger does not harm consumers. It must not grant this merger unless it can ensure that.

¹⁷ 47 U.S.C. § 202(a).

¹⁸ 47 U.S.C. § 548.

¹⁹ *Nat. Cable & Telecommunications Assoc. v. FCC*, 567 F. 3d 659, 664 (DC Cir. 2009).

²⁰ 47 U.S.C. § 552.

III. Charter's Broadband-Related Commitments Do Not Go Far Enough to Protect the Public Interest

The Commission must consider the effects this merger would have on the consumer broadband market. As a large cable TV provider and a broadband provider, post-merger Charter would have the incentive to discriminate against online video services that compete with its video offerings. It would also have the leverage to require payments of Internet content companies that must interconnect with it and deliver their traffic over its last-mile connections. As Assistant Attorney General Bill Baer recently explained,

So many consumers' only option for high-speed internet service is the cable company – the same cable company that also derives significant revenues from its cable television business. This means that as online video distribution increases the cable companies have both the incentives and means to use their gatekeeper power to slow innovation to protect their video profits. In this way, the high-speed internet market and the video distribution market are inextricably intertwined.²¹

These incentives are common to all cable companies, but this merger would likely increase not only Charter's expected returns from anticompetitive activities, but its increased scale would give it more ability to discriminate against online video while increasing the potential public interest harm.

The Commission must review this merger against the backdrop both of the Commission's Open Internet rules and Charter's voluntary broadband commitments.²² If they were to be fully implemented and enforced, Charter's commitments begin to address some of the competitive concerns that can occur in broadband markets, but they fall short in other respects, while not at all addressing other areas of potential competitive harm.

²¹ Remarks of Assistant Attorney General Bill Baer at the Future of Video Competition and Regulation Conference, *Video Competition: Opportunities and Challenges* (Oct. 9, 2015), <http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-keynote-address-future-video-competition>.

²² See Charter-TWC-Bright House Application, *supra* note 1, at pp. 17-20.

For example, while the Open Internet rules are likely to be upheld by the DC Circuit, Charter has agreed to abide by some of their terms regardless of the outcome of any litigation or other legal developments. However, the Commission should require that a post-merger Charter agrees to be subject to the entirety of the rules, not just a subset. This includes the “general conduct” rule²³ which Charter has not agreed to follow.²⁴ Although Charter’s commitment to avoid data caps should be a baseline for mergers of this kind, it does not capture the entirety of behaviors the general conduct rule is intended to prevent. Because the general conduct rule is designed to give the Commission flexibility to deal with new, potentially anticompetitive practices as they arise, attempts to limit it to specific prohibitions are counterproductive. Additionally, as much of the Open Internet Order’s effectiveness depends not just on its actual rules, but on the broad legal authority of Title II of the Communications Act, Charter should agree to operate consistently with Title II with respect to its broadband practices.

Charter has also undertaken certain broadband interconnection commitments. Although some large Internet companies have indicated that they are satisfied with the terms of these commitments,²⁵ the Commission must ensure they are fair to all Internet content companies, not just those large enough to negotiate legal and policy documents with Charter.

More fundamentally, behavioral commitments that require companies to act against their own economic self-interest can fall short. In general, structural merger commitments that

²³ See Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, FCC 15-24, at ¶ 21 (rel. Mar. 12, 2015).

²⁴ Marvin Ammori, *Here’s How Charter Will Commit to an Open Internet*, Wired.com (Jun. 25, 2015), <http://www.wired.com/2015/06/heres-charter-will-commit-open-internet>.

²⁵ See Letter from Netflix, *Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to the Transfer of Control of Licenses and Authorizations*, MB Docket No. 15-149 (Jul. 15, 2015).

actually address these underlying economic incentives are more effective.²⁶ A post-merger Charter could have an increased incentive to protect its video business from online competition, extract more revenue from consumers, and squeeze suppliers. Behavioral conditions may address only the most visible and egregious manifestations of this. Indeed, just the financial terms of this deal could exacerbate Charter's potential incentives to maximize revenue at all costs: As the Wall Street Journal explained, the deal would leave Charter with twice the debt-to-earnings ratio of Comcast.²⁷ At the very least, if the Commission does decide to adopt some set of behavioral conditions, it should appoint an independent monitor to ensure compliance. Additionally, no matter how effective a particular set of commitments may be, it is difficult to see how three-year commitments could be sufficient to offset permanent changes to an industry. Any anticompetitive incentives that this merger creates will still be in place three years from now. Thus, if the Commission were to adopt behavioral conditions, they should be in place for at least seven to ten years.

It is also relevant to note that even if Charter's broadband commitments are entirely enforceable and effective, they could be undermined by actions it would still be free to take in its video distribution business. To give true effect to any pro-competitive intent behind Charter's broadband commitments, the Commission must therefore carefully examine how this merger would increase its ability to impose anti-competitive conditions on video programmers which would limit consumer choice, or otherwise harm the video programming market.

²⁶ See Department of Justice, Antitrust Division Policy Guide to Merger Remedies 8 (2004).

²⁷ Gillian Tan, *Time Warner Cable Deal Stirs Debt Concerns*, Wall Street Journal (May 26, 2015), <http://www.wsj.com/articles/time-warner-cable-deal-stirs-debt-concerns-1432682489>.

IV. This Merger Could Worsen an Already-High Risk of Consumer Harms in the Video Programming Industry

Post-merger Charter would control around 18% of the nationwide MVPD market. In some large designated market areas (DMAs), they would control upwards of 47% of all pay-tv subscribers.²⁸ But this understates what its true market power would be. Most customers prefer to buy a pay TV/broadband bundle, which limits the competitive effect of direct broadcast satellite (DBS). Cable is the dominant platform that offers such bundles, and Charter would have 36% of cable TV subscriptions nationwide, with around 25% of cable/telco TV subscriptions.²⁹

As the parties note in their application, the merger would lead to increased clustering in a number of markets, including large DMAs. For example, post-merger Charter would control 86.7% of cable subscribers, and 34.1% of all MVPD subscriptions, in the Los Angeles DMA - the second-largest DMA in the nation, by hits.³⁰ In the Dallas-Ft. Worth, Texas, DMA (#5 nationally, by hits) they would control 84.6% of cable subscriptions, and 20.1% of the MVPD market.³¹ In Charlotte and Raleigh-Durham, NC (both top-25 DMAs) they would control 88.1% and 94.3%, respectively, of cable subscriptions, and 47.4% and 49.2%, respectively, of all MVPD subscriptions.³² This level of control would give it a disproportionate ability to control the development of the video marketplace—in particular, the online video market. Because carriage on its systems would likely be important for most video programmers, it would have the ability to extract anticompetitive carriage terms. If a small MVPD or online video distributor demands unreasonable terms from a programmer, the programmer can usually just say no. But post-merger Charter would be of such a size that no programmer could afford to simply walk

²⁸ See Charter-TWC-Bright House Application, Exhibit D, Table 2, p. 7

²⁹ Leichtman Research Group, *Major Pay-TV Providers Lost About 470,000 Subscribers in 2Q 2015*, at 2 (Aug. 17, 2015), <http://www.leichtmanresearch.com/press/081715release.pdf>.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

away from it. No single distributor should have that much power. Of course, the video distribution market is already highly concentrated and many distributors already do have excessive leverage in negotiations, and merger-specific remedies must be complementary to, not replacements for, any necessary industry-wide reform. But that does not mean that the Commission should wave through a merger that could make a bad situation even worse.

A. This Merger Would Primarily Create Harms by Giving Charter Anticompetitive Leverage as a Video Programming Distributor

The Commission's analysis of the relevant market in this merger should be guided by its internal analysis of the proposed Comcast/Time Warner Cable merger.³³ In that proceeding, Comcast strenuously argued that because it did not overlap geographically with Time Warner Cable, that the merger could not, by definition, reduce competition. However, as Public Knowledge and many others explained, and as the FCC apparently agreed, the proper lens by which to analyze a large cable merger like that in Comcast/Time Warner Cable, and now in Charter/Time Warner Cable, is not as a retail merger, but as a merger of distributors of programming. A larger distributor has an increased ability to extract terms from its programming suppliers that could harm consumers and competition, and its actions are more consequential. For example, larger video distributors are better positioned to extract contractual terms that restrict the delivery of programming online, and their carriage decisions are more likely to harm the nationwide programming marketplace.

³³ See Speech by FCC General Counsel Jonathan Sallet, *Lessons of Recent Merger Reviews* (Sep. 25, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0925/DOC-335494A1.pdf; Petition to Deny of Public Knowledge and Open Technology Institute, *Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign and Transfer Control of FCC Licenses and Other Authorizations*, MB Docket No. 14-57, at 7 (Aug. 25, 2014).

This is exacerbated by a few features of the cable market that the FCC must consider. First, while all cable companies act as distributors for video programming, they do not generally compete with each other. Programmers prefer to be carried not just by most cable companies (as they serve distinct geographic areas), but by all MVPDs, even when they do overlap. Although, during carriage disputes, a high-value programmer may pull its content from a distributor as a temporary negotiating tactic, in general, a programmer would prefer to be carried by a cable company, as well as DISH, DirecTV, and any telco video provider, instead of being carried by just one. Because programmers do not choose between competing distributors but instead typically do business with many of them at once, large distributors do not compete with each other for access to programming. This increases the incentive for large distributors to behave in parallel ways—for example, by offering similarly unfavorable terms. Thus, the increased ability of a post-merger Charter to impose onerous conditions on video programmers would not be offset by competition between distributors.

Additionally, while the video marketplace is not generally a model of competition, cable providers have particular advantages their video-only rivals cannot match. Many customers have a strong preference for video/broadband bundles, an offering that online-only or DBS providers cannot match. Apart from rare instances of cable overbuilding, the only rivals to cable companies in offering fixed, wireline-based bundles of this kind are telecommunications companies that have upgraded their facilities with fiber. But they overlap with only a small percentage of cable's footprint. For this reason, a cable company with a large customer base has significant leverage in programming negotiations—particularly with smaller or independent programmers.

1. Charter Would Have the Ability to Restrict Online Video Competition in Ways that Would Be Unlawful if Done Against Other MVPDs

In addition to dangers that Charter could harm online video competition via broadband or interconnection practices, as a large video distributor, it would also have the ability to achieve the same result by imposing terms on video programmers that restrict their ability to make programming available online. To the extent that Charter continues to benefit from the video/broadband bundle, it has the incentive to, as well.

Section 628 of the Communications Act³⁴ has been very successful. Passed as part of the Cable Television Consumer Protection and Competition Act of 1992,³⁵ this section states that an MVPD may not “engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.” This statute (and the FCC’s implementation of it via the “program access” rules) allowed the development of MVPD competition in the United States. Without these protections, DBS providers, telco MVPDs, and other new entrants would not have been able to access the programming they needed to start competing with incumbent cable providers.

Unfortunately, the anticompetitive practices that this legal regime prevents (for example, contracts that prohibit a programmer from selling its programming to rival MVPDs) do not extend to online video. Although program carriage contracts are generally confidential, there is enough in the public record to demonstrate that MVPDs are free to, and do, either require that programmers not distribute their programming online (or distribute it online only subject to restrictive conditions), or refuse to carry programming networks that do distribute their

³⁴ Codified at 47 U.S.C. § 548.

³⁵ PL 102-385, 106 Stat. 1460.

programming online.³⁶ Larger video distributors, such as post-merger Charter, are in an even stronger position to demand terms of this kind.

The use of “alternative distribution method” (ADM) provisions with respect to online video is an area of obvious concern—it is unclear why, if certain behaviors are unlawful with respect to MVPD carriage, they are not unlawful with respect to online carriage.³⁷ But even practices that also exist within the MVPD marketplace can cause concern. The use of “most favored nation” (MFN) clauses in programming contracts can harm consumers. These clauses state that an MVPD who is able to demand such a provision automatically benefits from terms another distributor is able to secure—terms that might not only relate to programming costs, but kinds of access. MVPDs that secure MFNs not only benefit from any contractual terms or rates that other MVPDs might secure, but would gain the same kind of access to programming that an online distributor might secure.

Because of these kinds of terms, a programmer might not be able to give a special break to a new entrant in order to promote competition, or to grant an online provider on-demand access to programs, without also granting these rights to an incumbent cable company. Thus, MFNs can restrict competition and prevent the market from evolving toward new methods of video distribution and new business models. The Department of Justice has noted the anticompetitive problems that MFNs can cause. For example, then-Deputy Assistant Attorney General, Antitrust Division Fiona Scott-Morton noted that when an “MFN is in place, the incumbent is contractually entitled to the low price of the entrant. Thus the entrant can never

³⁶ See Letter from TheBlaze, Inc., *Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent to Assign or Transfer Control of License and Authorizations*, MB Docket No. 14-57 (Feb. 13, 2015).

³⁷ See Comments of Public Knowledge, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, MB Docket No. 14-261, at 19 (Mar. 3, 2015).

create an advantage vis-a-vis the incumbent, and entry is blocked.”³⁸ Additionally, as the Second Circuit recently explained, “though surely proper in many contexts, [MFNs] can be ‘misused to anticompetitive ends in some cases.’”³⁹

In the video marketplace, MFNs and ADMs can harm consumers and restrict video competition. By merging, Charter and Time Warner Cable would be in a better position to demand these kinds of contractual provisions from programmers. This problem is made worse by the already-concentrated state of the video marketplace.⁴⁰ Therefore, the Commission must not approve this merger unless it can be assured that the post-merger company would not be able to harm consumers in this way.

2. Charter Would Have the Ability to Harm Access to Programming and Raise Costs on Other Video Distributors

Volume discounts are common in business. This is not surprising, as in many cases, volume brings with it economies of scale, and discounts associated with real savings are not anticompetitive. However, the Department of Justice has noted that volume discounts can be anticompetitive on the part of the seller,⁴¹ or on the part of the buyer.⁴² Before it approves a

³⁸ Presentation by Fiona Scott-Morton, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Contracts that Reference Rivals*, at 13 (Apr. 5, 2012), <http://www.justice.gov/atr/file/518971/download>. Additionally, the presentation argues that in some market conditions, smaller buyers who obtain MFNs can actually be harmed by the practice. *Id.* at 11-12.

³⁹ *United States v. Apple*, 791 F.3d 290, 319 (2nd Cir. 2015) (citing *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir.1995)).

⁴⁰ That said, the fact that the same effect can result from restrictive contracts imposed by other distributors should not deter the Commission from addressing the specific anticompetitive incentives presented by this merger. The Commission can both impose merger-specific remedies in this context while acting separately to examine industry-wide practices.

⁴¹ Competitive Impact Statement at 18, *United States v. Microsoft Corp.*, 56 F.3d 1448 (D.C. Cir. 1995) (Nos. 95-5037, 95-5039), <http://www.usdoj.gov/atr/cases/f0000/0045.pdf>

⁴² See Business Review Letter from Joel I. Klein, Assistant Attorney General, to Counsel for Containers America LLC (Mar. 8, 2000), <http://www.justice.gov/sites/default/files/atr/legacy/2006/09/20/4287.pdf> (recognizing possibility of “oligopsonistic” buying power); *see also* Statement of Peter C. Carstensen, *Buyer Power and*

merger between Time Warner Cable and Charter, the FCC must assure itself that any volume discounts that the merged company is able to enjoy are not anticompetitive, and that any such discounts would not raise costs on smaller rivals.

One indicator that any new volume discounts that arise after a merger on the buyer side are anticompetitive is when the merging firms are already so large they are already “enjoying most or all of the economies of scale,” meaning that there are

unlikely to be any appreciable real production cost savings resulting from the combination of such firms. It is equally hard to imagine that combining such buyers would significantly reduce transaction costs of buying inputs. Hence, any significant reduction in costs from such a merger is likely to arise only from driving down the price of inputs. But absent evidence of seller cartelization or other market power on the selling side, there is no reason to believe that seller prices are excessive. Therefore, the most likely explanation for the putative “efficiency” gains is that they represent the potential for exploitation of monopsony power. It bears emphasis that a monopsonist has no incentive to share any of those gains with downstream customers unless, ... downstream buyer power drives the upstream market exploitation.⁴³

To the extent that Charter and Time Warner Cable plan to pay lower costs for video programming after the transaction, the FCC must be assured that these lower costs result from real efficiencies and not anticompetitive leverage—bearing in mind, of course, that the answer may be different when it comes to savings that come from large programming companies that themselves possess significant leverage, versus independent programmers.

There is reason to suspect that large cable companies already do enjoy economies of scale, and that any additional savings from merging would come from anticompetitive leverage,

Merger Analysis – The Need for Different Metrics at 1 (Feb. 17, 2004), <http://www.justice.gov/sites/default/files/atr/legacy/2007/08/30/202606.pdf> (“the structure of buying markets plays a very significant role in both creating incentives for and the opportunity to exploit buyer power. Mergers that increase such power... present significant threats to both the short run and long run efficiency of those markets in static as well as dynamic terms.”)

⁴³ See *Carstensen, id.* at 19 (discussing this issue in an agricultural context).

and not efficiencies. As Justice Department official Nancy Rose put it (when reflecting on the failed Comcast/Time Warner Cable deal):

What we found was there was very strong evidence of substantial bargaining leverage in this industry by larger cable firms. Not only did the larger firms get better deals in both of these distribution channels, but the implication of putting together these two was that they'd have more bargaining leverage and be able to raise prices significantly as a result of that.⁴⁴

The harmful effects of anticompetitive volume discounts that result from this kind of leverage are at least threefold. First, a programmer that must grant such discounts may have to reduce the quality of its programming. Second, a programmer that must grant such discounts may be forced to charge more to smaller video distributors, raising costs to consumers, and harming MVPD and online video competition.

Third, and most broadly: Independent programmers, particularly those catering to diverse or niche interests, may struggle to come to terms with the merged entity. This may undermine their business or keep them off the cable dial entirely. Other independent programmers may be tempted to sell to larger conglomerates in a tit-for-tat of consolidation. Such an outcome would be contrary to the Commission's established goal of ensuring that "no single operator can, by simply refusing to carry a programming network, cause it to fail."⁴⁵ Fostering diverse ownership and content is an important public interest goal, and because the public relies on multiple, conflicting accounts to cast informed ballots, ensuring independent and diverse voices can get carriage on reasonable terms has civic benefits.

⁴⁴ Spoken comments of Nancy Rose at ABA Event, Bargaining Leverage and Competitive Effects, Jun. 25, 2015.

⁴⁵ See, e.g., Cable Horizontal and Vertical Ownership Limits, *Fourth Report & Order and Further Notice of Proposed Rulemaking*, 23 FCC Rcd. 2134, ¶ 40 (2008).

3. This Merger Would Increase Charter's Ability to Subsidize Its Video Business with Other Revenue in Ways Unavailable to Many Competitors

Large MVPDs have a number of advantages over smaller MVPDs, and over online video distributors. Many of these derive from their more favorable programming cost structure, as well as from economies of scale, so granting petitioners increased economies of scale risks foreclosing future competition from competitive overbuilders. Incumbents also have a greater ability to subsidize their video business with broadband revenue, an option which is not available to many of their competitors.

Broadband is a higher-margin business than video, because broadband providers do not have to pay online content companies like Facebook, Netflix and Amazon for the content that makes their networks valuable. Thus, video distributors that are also broadband providers have the opportunity to use revenues from broadband to cross-subsidize their video businesses—for example, by offering broadband/video bundles that are cheaper than standalone MVPD service paired with standalone broadband. This is an anticompetitive advantage that broadband/MVPD providers have that standalone video distributors, such as DBS and online video, cannot match, and it is one that this merger would amplify.

4. A Post-Merger Charter Would Have Greater Control Over Set-Top Boxes, Which Could Raise Costs for Consumers While Restricting Competition

Cable companies have been able to use their control of the cable set-top box to their advantage. The FCC had limited success with CableCARD, and although some companies and consumers have found it to be a valuable technology, for the most part CableCARD has not enabled the Commission to achieve its statutory goal of promoting retail navigation device competition. See 47 U.S.C. § 548. This merger threatens to make these problems worse. The merged company would have greater scale, and thus a greater ability to leverage its control over customers' TV screens to restrict what online video choices they can access. Also, if the merged

company does not support the existing CableCARD system properly, a greater consumer harm would result. The Commission should not grant this merger—even if other concerns can be satisfactorily resolved—unless the merged company agrees to work with the Commission in a cooperative way to help implement a new, nationwide standard that would help achieve a competitive market for navigation devices, and also agrees to follow industry best practices with respect to CableCARD customer and technical support.

5. This Merger Could Result in Worse Customer Service

Even in an industry notorious for poor customer service across the board, Charter and Time Warner Cable fare poorly. Both Charter and Time Warner Cable “are among the bottom dwellers in overall customer satisfaction for TV service.”⁴⁶ Even worse, according to a recent survey, Time Warner Cable is not just the cable company with the worst customer service record, but the worst customer service record of *any company*⁴⁷—with Charter not faring much better. There are a number of explanations as to why cable customer service tends to be so bad. The lack of competition in the industry is generally cited as a major cause.⁴⁸ That said, larger cable companies tend to do even more poorly than smaller cable companies when it comes to customer service, even though they don’t necessarily face less retail-level competition. Larger companies face management challenges and internal incentives that are not necessarily present

⁴⁶ Cable-TV and Internet Subscribers Remain Unhappy Customers, New Consumer Reports Survey Says, Consumer Reports (May 29, 2015), <http://www.consumerreports.org/cro/news/2015/05/cable-tv-customer-dissatisfaction/index.htm>.

⁴⁷ Chris Morran, *Time Warner Cable has Lowest Customer Satisfaction Score of All U.S. Companies, Not Just Cable Providers*, Consumerist (Jun. 2, 2015), <http://consumerist.com/2015/06/02/time-warner-cable-has-lowest-customer-satisfaction-score-of-all-u-s-companies-not-just-cable-providers>.

⁴⁸ Timothy B. Lee, *This is what a monopoly looks like*, Vox (Sep. 17, 2014), <http://www.vox.com/2014/9/17/6225869/comcast-this-is-what-a-monopoly-looks-like>.

for smaller providers.⁴⁹ Additionally, companies under financial pressure—such as the debt-laden post-merger Charter—may face incentives to cut costs, which could result in customer service cuts, or fewer customer service investments than are needed. The Commission cannot find that this merger is in the public interest unless it determines that it would not worsen the already-bad customer service experience of Charter and Time Warner Cable subscribers.

6. This Merger Could Threaten Access to PEG Programming

There is a record of Charter not supporting community agreements with local franchising authorities, harming the local community information services provided by Public, Educational and Government (PEG) Access channels and organizations. For example, Charter has unilaterally moved channels without community consent or notification in a number of states, and has reduced the ability of elderly and low-income consumers from receiving essential civic information. Additionally, the corporation has aggressively sought to undercut its agreements to support PEG in states such as California, taking controversial legal stands to walk away from their public interest obligations—stands not taken by other cable operators. PEG is an important source of local, diverse, and community-centric content, so Charter’s track record is particularly worrisome. It would violate the public interest if Charter’s management continued these practices and expanded them to the Time Warner Cable footprint.

B. Potential Vertical Integration Concerns

Finally, the Commission must determine the extent to which Charter shareholder John Malone’s various business interests create the same kinds of anticompetitive incentives that more traditional vertical business arrangements create. For example, Charter professes that, unlike Comcast/NBCU, it does not face the same incentives to discriminate in favor of affiliated

⁴⁹ See Adrienne Jenkins, *The Worst Company in America: What happens when the most unpopular company in the US merges with the runner-up?*, The Verge (Aug. 19, 2014), <http://www.theverge.com/2014/8/19/6004131/comcast-the-worst-company-in-america>.

programming. But John Malone sits on the board of Lionsgate and is the largest shareholder in Starz,⁵⁰ and controls 29% of the voting rights of Discovery Communications.⁵¹ The different Liberty companies have investments in many areas of entertainment and content, including online services. Part of this analysis must include the extent to which Mr. Malone exercises excessive influence on some of the companies he invests in, for example, through voting rights that exceed his ownership stake, and the extent to which the same may be true with respect to a post-merger Charter. These business realities and governance structures could create incentives for a post-merger Charter to offer more favorable terms to Malone-affiliated companies. The Commission must ensure that this merger would not create such incentives.

V. Conclusion

For the foregoing reasons, the Commission must reject this transaction as proposed.

Respectfully submitted,
/s John Bergmayer
Senior Staff Attorney
Public Knowledge

13 October 2015

⁵⁰ Jon Erlichman, *Lionsgate Considered Starz Acquisition Before Stock Swap with John Malone*, *The Wrap* (Apr. 29, 2015), <http://www.thewrap.com/lionsgate-considered-starz-acquisition-before-stock-swap-with-john-malone/>.

⁵¹ Discovery Communications 2014 Annual Report 22-23, <http://eproxy.materials.com/interactive/disca2014/> (also noting the potential conflicts of interest that arise from Discovery having directors in common with Liberty companies.)

PARTIES

Public Knowledge is a nonprofit public interest organization that promotes freedom of expression, an open Internet, and access to affordable communications tools and creative works. Working to shape policy on behalf of the public interest, Public Knowledge frequently advocates for pro-competitive media policies before the FCC.

Common Cause is a nonpartisan, nationwide grassroots network of more than 400,000 members and supporters that has advocated open, honest, and accountable government for over 45 years. Because a vibrant informational ecosystem is critical to self-governance, Common Cause public interest communications policies that connect all Americans to the news and information they need to cast informed ballots.

Consumers Union is the public policy and advocacy division of Consumer Reports. Consumer Reports is the world's largest independent product-testing organization with a mission to work for a fair, just, and safe marketplace in the areas of telecommunications, health care, food and product safety, energy, financial services, and other issues. The nonprofit organization tests and rates thousands of products and services in its 50-plus labs, state-of-the-art auto test center and consumer research center. With more than eight million subscribers to its flagship magazine, website and other publications, Consumer Reports accepts no advertising, payment or other support from the companies whose products it evaluates.

The Open Media and Information Companies Initiative (Open MIC) is a non-profit organization which works to foster more open and democratic media through market-based solutions. Open MIC works with a coalition of investors, investment advisory and mutual fund companies, foundations, and pension funds with fiduciary interests in a broad range of industries and publicly-held companies. The guiding principle of Open MIC is that the media values we

promote as citizens are the same as those we seek as investors: diversity and competition, creativity and innovation, openness and transparency. We believe that a dynamic, open and critical media sector is good for both the business of media and the health of democratic society; it is critical to economic growth, innovation and democratic engagement. Members of the Open MIC coalition have current combined assets under management of more than \$170 billion.

DECLARATION

I, John Bergmayer, declare under penalty of perjury that:

1. I have read the foregoing Petition to Deny.
2. I am a Senior Staff Attorney at Public Knowledge (PK), an advocacy organization with members, including Charter and Time Warner Cable subscribers, who, in my best knowledge and belief, will be adversely affected if the Commission approves the merger.
3. PK members subscribe to Charter and Time Warner Cable broadband, cable TV, and telephone services. PK is a Comcast subscriber. They use these services to access online video and other edge services. PK and some of its members are also video content creators.
4. In my best knowledge and belief, PK and its members will be directly and adversely affected if the Commission allows the proposed merger of Charter and Time Warner Cable to proceed.
5. The allegations of fact contained in the Petition are true to the best of my personal knowledge and belief.

/s John Bergmayer
Senior Staff Attorney
Public Knowledge

13 October 2015

CERTIFICATE OF SERVICE

I, John Bergmayer, certify that today, October 13, 2015, I have served copies of this Petition to Deny on the following parties and staff via email:

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