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BY HAND

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: ***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**

Dear Ms. Dortch:

AT&T does not oppose the Charter/Time Warner Cable/Bright House merger. The Commission should, however, review the transaction carefully and consider the impact of cable consolidation and coordination on emerging competition.

The cable industry, as the merging parties concede, is marked by a lack of head-to-head competition.[1] Cable companies have chosen not to compete and instead coordinate to gain shared advantages over rivals, which further industry consolidation will only facilitate. The reason is simple: as Charter CEO Tom Rutledge put it, following the proposed merger "[t]here will be less people to coordinate [with]."[2] Other cable executives have likewise signaled increased cable cooperation. Liberty Media Chairman John Malone noted "huge opportunities for inter-company cooperation to create ubiquity of offerings, ubiquity of branding, scale," which he expects to be "a very important future of the industry."[3] Statements like these have

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[1] Public Interest Statement at 42 (filed June 25, 2015) ("Because Charter, Time Warner Cable, and Bright House Networks serve distinct geographic areas, a combination of the companies does not reduce competition."); *Applications of Comcast Corp., Time Warner Cable Inc., Charter Communications, Inc., and SpinCo for Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Dkt No. 14-57, Public Interest Statement at 127 (filed Apr. 8, 2014) ("[T]he transaction presents no 'horizontal' competitive concerns because . . . Comcast's and TWC's service areas are distinct and the companies do not compete in any relevant market.").

[2] Cynthia Littleton, *Charter CEO: TW Cable Acquisition Will Lead to 'Better Industry' Overall*, Variety (May 26, 2015), http://variety.com/2015/tv/news/charter-time-warner-cable-acquisition-2-1201504796/.

[3] Liberty Media Corporation, Q3 2014 Earnings Call (Nov. 4, 2014).

spurred AT&T to submit this letter to underscore the need for critical scrutiny of cable coordination, both in this merger proceeding and more broadly.

Careful scrutiny is especially warranted because this increased consolidation and coordination comes just as new competitive threats are emerging. Over-the-top video providers are disrupting the traditional cable pay TV model by revolutionizing the way consumers access and view video. AT&T/DIRECTV – which the Commission described as "a bet on competition"[4] – is investing billions to go toe-to-toe with cable incumbents and foster online video distribution ("OVD").

This emerging competition is vulnerable to coordinated exclusionary actions by cable. The Commission's Staff and the Department of Justice concluded that allowing Comcast and Time Warner Cable to merge would create a dominant national platform that could "block the adoption of innovative products, including 'over-the-top' video services that threaten the traditional cable business model."[5] The instant merger may be different, but the Commission must ensure that the cable industry cannot use coordination to replicate the same mega-cable threat to competition.

Cable companies share common, national rivals in broadband, video, and telecommunications services. These geographically segregated cable companies therefore have incentives to coordinate their activities to fend off these common rivals and have demonstrated the ability to do so. The cable industry has formed a variety of exclusive associations, organizations, and other ventures to advance the competitive interests of cable companies. These joint initiatives, although opaque to outsiders, are transparent to cable-company members who may use them to coordinate strategies against rivals. The proposed merger could make that easier. The transaction would reduce by two the number of major cable operators, and create a second cable giant – alongside Comcast – that together would be able to dictate strategy for the entire cable industry.

Against this backdrop, the Commission should focus its scrutiny on several key areas. First, the Commission should look into cable's affiliated programming, which it has long recognized as an area with potential for anticompetitive conduct.[6] The largest cable

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[4] *Applications of AT&T Inc. and DIRECTV for Consent To Assign or Transfer Control of Licenses and Authorizations*, MB Dkt No. 14-90, Memorandum Opinion and Order, FCC 15-94, ¶ 4 (rel. July 28, 2015).

[5] Remarks of Jon Sallet, Federal Communications Commission General Counsel, Before the Telecommunications Policy Research Conference, *The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews* at 14 (Sept. 25, 2015), https://www.fcc.gov/document/speech-general-counsel-jon-sallet-lessons-recent-merger-reviews ("Sallet Speech") (quotations omitted).

[6] *See Applications of Comcast Corporation, General Electric Company and NBCU Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4252 ¶ 34 (2011).

companies still control or significantly influence numerous networks and OVD platforms.[7] For example, John Malone, whose Liberty Broadband will be the single largest shareholder in New Charter, has significant interests in Discovery Communications' family of channels, Starz, QVC, and HSN.[8] Time Warner Cable and Comcast both have interests in SportsNet New York[9]; iN DEMAND is a partnership among Comcast, Cox, Time Warner Cable, and Bright House that provides pay-per-view and other types of video on-demand[10]; and Comcast controls NBCUniversal and its broad suite of broadcast networks and cable channels.[11] Because cable companies have chosen not to compete against one another but face common competitors, they have an incentive to share programming with each other at reasonable rates, while using that same programming to raise their rivals' costs. AT&T has firsthand experience of this kind of exclusion.[12] A national online distribution platform created through cable coordination could likewise pose a threat to OVD development.[13]

Second, the Commission should ensure that the cable industry cannot impede the development of a consumer-friendly mobile video experience. Because video consumes enormous bandwidth, a robust mobile video experience increasingly requires offloading video from scarce licensed spectrum to unlicensed frequencies. Five major cable operators (Bright House Networks, Cox, Cablevision, Time Warner Cable, and Comcast) recently formed the Cable WiFi® consortium to give their high-speed Internet customers exclusive access to each other's WiFi hotspots.[14] The consortium's over 400,000 hotspots[15] give it unrivaled reach. Cable is not only excluding rivals from the consortium's network, but also is trying to restrict

[7] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd. 3253, App. B (2015) ("Sixteenth Report").

[8] *See* Discovery Communications, SEC Form 10-K for 2014 at 23; Starz, , SEC Form 14A at 4 (Apr. 23, 2015); Liberty Interactive Corporation, SEC Form 10-K for 2014 at I-15.

[9] *See* Sixteenth Report at App. B.

[10] *See* iN Demand, Who We Are, http://www.indemand.com/who-we-are/ (last visited Oct. 1, 2015).

[11] *See* Sixteenth Report at App. B.

[12] *See, e.g., AT&T Services, Inc. and Southern New England Telephone Company d/b/a AT&T Connecticut, Complainants, v. Madison Square Garden, L.P. and Cablevision Systems Corp., Defendants*, Order, 26 FCC Rcd 13206 (MB 2011) (subsequent history omitted); *AT&T Services, Inc. and Pacific Bell Telephone Company d/b/a SBC California d/b/a AT&T California v. CoxCom, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 2859 (MB 2009).

[13] *See* Sallet Speech at 13.

[14] *See* Cable WiFi, http://www.cablewifi.com/ (last visited Oct. 12, 2015); Kevin Fitchard, *Why the Charter-TWC Merger Could Be a Big Deal for Wireless and Mobile, Too*, Fortune (May 26, 2015), http://fortune.com/2015/05/26/charter-twc-merger-wireless-mobile/.

[15] *See* Cable WiFi, http://www.cablewifi.com/ (last visited Oct. 12, 2015).

competitors from serving mobile video customers using LTE-Unlicensed technologies in frequencies reserved for unlicensed use.[16]

Third, the Commission should consider the role of CableLabs. For many years, cable companies have coordinated technology standards and R&D through CableLabs, a consortium formed explicitly to benefit the cable industry.[17] Membership is restricted to cable system operators, as defined by the 1984 Cable Act,[18] its board is comprised of member cable operators, and participation from non-cable MVPDs is limited.[19] With closed membership and a process opaque to outsiders, the major cable companies could use their control over CableLabs to promote technical features and intellectual property that favor cable and its technologies over other MVPDs or OVDs.

Finally, the Commission should resist calls by the cable industry and others for asymmetrical regulation of Ethernet and other enterprise services. Even without the merger, Time Warner Cable and Comcast are the fifth and sixth largest providers of Ethernet services in the United States.[20] These companies compete vigorously with AT&T and other providers of Ethernet services, not one of which has a port share exceeding one fifth of the market, and eight of which (mostly non-ILECs) have shares over five percent.[21] Cable providers are making

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[16] *See, e.g.*, *Office of Engineering and Technology and Wireless Telecommunications Bureau Seek Information on Current Trends in LTE-U and LAA Technology*, ET Dkt No. 15-105, Comments of the National Cable & Telecommunications Association (filed June 11, 2015).

[17] CableLabs, About CableLabs, http://www.cablelabs.com/about-cablelabs (last visited Oct. 12, 2015) (describing CableLabs as "dedicated to creating innovative ideas that significantly impact our cable operator members' business.").

[18] *See, e.g.*, CableLabs, Become a Member, http://www.cablelabs.com/become-a-member (last visited Oct. 12, 2015); CableLabs, Member Companies, http://www.cablelabs.com/about-cablelabs/member-companies/ (last visited Oct. 12, 2015).

[19] In contrast, the Alliance for Telecommunications Industry Solutions and the 3rd Generation Project Partnership are far more open. *See* Alliance for Telecommunications Industry Solutions, Become an ATIS Member, http://www.atis.org/membership/become.asp (last visited Oct. 12, 2015) ("Full Membership is open to service providers, manufacturers, distributors, and developers of communications, entertainment and information technology products and services."); 3rd Generation Project Partnership, 3GPP Working Procedures § B, http://www.3gpp.org/ftp/Information/Working_Procedures/3GPP_WP.htm#SECTION_B (last visited Oct. 12, 2015) (describing the low barriers to 3GPP membership and participation); 3rd Generation Project Partnership, 3GPP Membership, http://webapp.etsi.org/3gppmembership/QueryForm.asp (last visited Oct. 12, 2015) (searchable membership list indicating that CableLabs, for example, is a member).

[20] Vertical Systems Group, *Mid-Year 2015 U.S. Carrier Ethernet LEADERBOARD* (Aug. 24, 2015), http://www.verticalsystems.com/vsglb/mid-year-2015-u-s-carrier-ethernet-leaderboard/.

[21] Vertical Systems Group, ENS Research Program (2015).

particularly fast inroads in this space,[22] and, just last month, Comcast announced a major interconnection deal with other cable companies across the country that will allow it to provide nationwide business-class services.[23] Under these circumstances, regardless of whether this merger is approved, there is no cause for the Commission to saddle incumbent LECs with new regulatory obligations that do not apply to other providers of Ethernet services. But if the merger is approved, the combined company will be an even larger and stronger Ethernet provider, and there would accordingly be even less cause to heed cable's call for unwarranted regulatory advantages.

The question underlying all these issues is whether the combined entity will, along with the other major cable companies that have chosen not to compete with each other, effectively act as a single national cable company capable of "put[ting] sand in the gears of competition through the totality of its efforts," [24] impairing broadband service, video distribution, and program access. The comprehensive information requests to the Applicants indicate the Commission understands that it must investigate these issues closely. AT&T looks forward to participating in the review of this significant transaction.

Respectfully submitted,

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[22] Sean Buckley, *Cable Operators Taking Greater Share of Large Businesses, Says Analyst Firm*, Fierce Telecom (Sept. 21, 2015), http://www.fiercetelecom.com/story/cable-operators-taking-greater-share-large-businesses-says-analyst-firm/2015-09-21 (among "businesses with over 100 employees during the past two years, . . . business spending on voice and data services from cable operators rose 38 percent, climbing from 12.2 percent to 16.9 percent").

[23] Shalini Ramachandran, *Comcast To Sell Data Services to Big Firms Nationwide*, Wall St. J. (Sept. 16, 2015), http://www.wsj.com/articles/comcast-to-sell-data-services-to-big-firms-nationwide-1442376240; Press Release, Comcast, Comcast Business Announces New Unit Targeting Fortune 1000 Enterprises (Sept. 16, 2015), http://corporate.comcast.com/news-information/news-feed/comcast-business-announces-new-unit-targeting-fortune-1000-enterprises.

[24] Sallet Speech at 14.