Lines, Inv. No. 337–TA–360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005. 70 FR 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

Written Submissions: The parties to the investigation are requested to file written submissions on the issues identified in this notice. Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Such submissions should address the recommended determination by the ALJ on remedy and bonding. Complainants and the IA are requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the date that the patents expire and the HTSUS numbers under which the accused products are imported. Complainants are further requested to supply the names of known importers of the Umicore products at issue in this investigation. The written submissions and proposed remedial orders must be filed no later than close of business on May 23, 2016. Reply submissions must be filed no later than the close of business on June 2, 2016. Opening submissions are limited to 50 pages. Reply submissions are limited to 25 pages. Such submissions should address the ALJ's recommended determinations on remedy and bonding. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document electronically on or before the deadlines stated above and submit eight true paper copies to the Office of the Secretary by noon the next day pursuant to section 210.4(f) of the Commission's Rules of Practice and Procedure (19 CFR 210.4(f)). Submissions should refer to the investigation number (''Inv. No. 337–TA–951'') in a prominent place on the cover page and/or the first page. (*See* Handbook for Electronic Filing Procedures, *http://www.usitc.gov/secretary/fed_reg_notices/rules/handbook_on_electronic_filing.pdf*). Persons with questions regarding filing should contact the Secretary (202–205–2000).

Any person desiring to submit a document to the Commission in confidence must request confidential treatment. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19 CFR 201.6. Documents for which confidential treatment by the Commission is properly sought will be treated accordingly. A redacted non-confidential version of the document must also be filed simultaneously with any confidential filing. All non-confidential written submissions will be available for public inspection at the Office of the Secretary and on EDIS.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in part 210 of the Commission's Rules of Practice and Procedure (19 CFR part 210).

By order of the Commission.

Issued: May 11, 2016.

Lisa R. Barton,

Secretary to the Commission.

[FR Doc. 2016–11563 Filed 5–16–16; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Antitrust Division

United States v. Charter Communications, Inc., et al.; Proposed Final Judgment and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America* v. *Charter Communications, Inc., et al.,* Civil Action No. 16–cv–00759. On April 25, 2016, the United States filed a Complaint alleging that Charter Communications, Inc.'s proposed acquisitions of Time Warner Cable Inc. and Bright House Networks, LLC would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, forbids the merged company from engaging in certain conduct that could make it more difficult for competing online video distributors (OVDs) to obtain programming content.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's Web site at *http://www.justice.gov/atr* and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's Web site, filed with the Court, and, under certain circumstances, published in the **Federal Register**. Comments should be directed to Scott A. Scheele, Chief, Telecommunications and Media Enforcement Section, Antitrust Division, Department of Justice, 450 Fifth Street NW., Suite 7000, Washington, DC 20530 (telephone: 202–616–5924).

Patricia A. Brink,

Director of Civil Enforcement.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States of America, Department of Justice, Antitrust Division, 450 5th Street N.W., Suite 7000, Washington, DC, 20530, Plaintiff, v., *Charter Communications, Inc., 400 Atlantic Street, Stamford, CT 06901, Time Warner Cable Inc., 60 Columbus Circle, New York, NY 10023, Advance/Newhouse Partnership, 5823 Widewaters Parkway, East Syracuse, NY 13057,* and, *Bright House Networks, LLC, 5823 Widewaters Parkway, East Syracuse, NY 13057,* Defendants.

Case No.: 1:16–cv–00759

Judge: Royce C. Lamberth

Filed: 04/25/2016

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil antitrust action to enjoin the proposed combination of Charter Communications, Inc. (''Charter''), Time Warner Cable Inc. (''TWC''), and Advance/Newhouse Partnership's (''Advance/Newhouse'') subsidiary, Bright House Networks, LLC (''BHN'') (collectively referred to herein as ''New Charter''), which would create the second-largest cable company and the third-largest multi-channel video distributor in the United States.

I. INTRODUCTION

1. Online video programming distributors (''OVDs'') are beginning to revolutionize the way Americans receive and experience video content. With access to an adequate Internet connection, consumers can now choose among a number of OVDs to access collections of movies and television shows, including original content, at any time and on a device of their choosing. The early OVDs, such as Netflix, Hulu, and Amazon, focused on offering on-demand video to their customers and have developed video services that have already proven popular. Several newer OVDs, including DISH Network's Sling TV and Sony's Playstation Vue, have introduced services that offer live television channels in addition to on-demand content. And several television networks, including CBS, HBO, and Showtime, have launched OVD services to distribute their own programming over the Internet directly to subscribers. Continued growth of OVDs promises to deliver more competitive choices and a greater ability for consumers to customize their consumption of video content to their individual viewing preferences and budgets.

2. The emergence of OVDs threatens to upend the competitive landscape. For years, incumbent cable companies such as Comcast, TWC, and Charter have served the majority of American video households. Although these companies now face competition from the two direct broadcast satellite (''DBS'') providers, DirecTV and DISH Network, and, in some areas, from telephone companies (''telcos'') like AT&T and Verizon that also offer video services, all of these distributors—collectively referred to as multichannel video programming distributors (''MVPDs'')—offer fairly similar products and pricing. Most notably, all of these MVPDs sell content to consumers primarily through large and costly video bundles that include hundreds of channels of programming that many customers neither desire nor watch.

3. In order for an OVD to successfully compete with the traditional MVPDs, it needs both the ability to reach consumers over the Internet and the ability to obtain programming from content providers that consumers will want to watch. Importantly, incumbent cable companies often can exert significant influence over one or both of these essential ingredients to an OVD's success, because they provide broadband connectivity that OVDs need to reach consumers and are also a critical distribution channel for the same video programmers that supply OVDs with video content. To the extent a transaction, such as the one at issue here, enhances an MVPD's ability or incentive to restrain OVDs' access to either of these critical inputs, and thus to prevent OVDs from becoming a meaningful new competitive option, consumers lose.

4. MVPDs have responded to the emergence of OVDs in various ways. Many MVPDs have sought to keep their customers from migrating some or all of their viewing to OVDs by taking steps to make their services more attractive to consumers, for example, by allowing their subscribers to receive programming over the Internet through Web sites or apps and providing expanded video-on-demand offerings. But some MVPDs have sought to restrain nascent OVD competition directly by exercising their leverage over video programmers to restrict the programmers' ability to license content to OVDs. To this end, some MVPDs have sought so-called Alternative Distribution Means (''ADM'') clauses in their programming contracts that prohibit programmers from distributing content online, or have placed significant restrictions on online distribution. No MVPD has sought and obtained these restrictive ADMs as frequently, or as successfully, as TWC.

5. The combination of TWC with Charter and BHN will result in a larger MVPD with a greater ability and incentive to secure restrictions on programmers that limit or foreclose OVD access to important content. The Defendants, along with other MVPDs and OVDs, compete with one another as buyers of video content and serve as alternative distribution channels for national video programmers to build viewership scale. Since New Charter would have nearly 60 percent more subscribers than TWC standing alone, the merger will make New Charter a more vital distribution channel for these video programmers than each of the Defendants individually. Hence, as a result of the merger, New Charter will have greater bargaining leverage to insist that video programmers limit their distribution to OVDs.

6. In addition, with its much larger subscriber base, New Charter would gain significant additional benefits from impeding OVD competition. Today, Charter, TWC, and BHN each only act to protect its own MVPD profits. After the merger, however, New Charter would act to protect the much larger combined video revenues of all three Defendants. That is, while prior to the merger TWC has an incentive to obtain restrictive contract clauses to protect its $10.4 billion in video revenues, New Charter would have a much larger incentive to protect the Defendants' over $16 billion in aggregated video revenues.

7. With more to gain from imposing ADMs and other contractual restrictions and with greater bargaining leverage with programmers to insist on such provisions, New Charter will be well-positioned to restrain continued OVD growth by limiting or foreclosing OVD access to the video content that is vital to their competitiveness. Accordingly, the proposed combination of Charter, TWC, and BHN is likely to substantially lessen competition in the provision of video programming distribution in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and should be enjoined.

II. JURISDICTION AND VENUE

8. The United States brings this action under Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, to prevent and restrain Charter, TWC, and BHN from violating Section 7 of the Clayton Act, 15 U.S.C. 18.

9. Defendants Charter, TWC, and BHN all provide video distribution services to programmers in the flow of interstate commerce, distributing video programming to millions of consumers in numerous states within the United States. Accordingly, Defendants' activities substantially affect interstate commerce. The Court has subject matter jurisdiction over this action and these Defendants pursuant to Section 15 of the Clayton Act, as amended, 15 U.S.C. 25, and 28 U.S.C. 1331, 1337(a), and 1345.

10. Defendants have consented to personal jurisdiction and venue in the District of Columbia for the purposes of this action.

III. THE PARTIES AND THE PROPOSED TRANSACTION

11. Defendant Charter is a Delaware corporation with headquarters in

Stamford, Connecticut. With over 4.2 million video subscribers across 28 states, Charter is the third-largest cable company in the United States (behind Comcast and TWC) and the sixth-largest MVPD in the nation. In 2014, Charter reported total revenues of around $9.1 billion. Nearly 49% of those revenues, around $4.4 billion, were derived from Charter's video business.

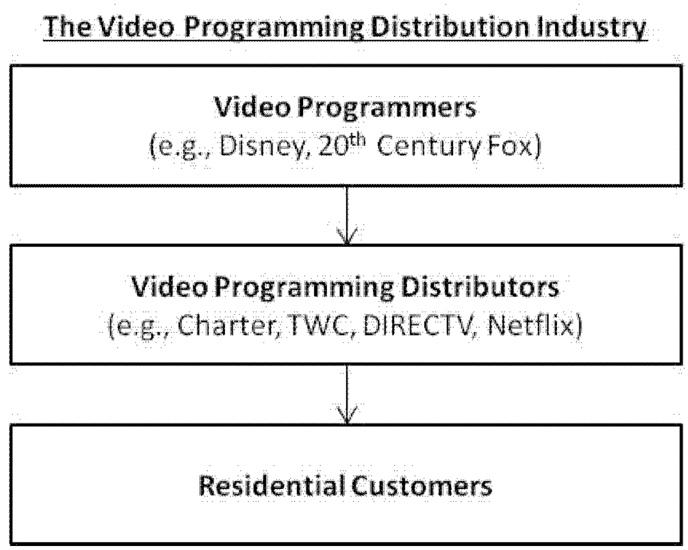
12. Defendant TWC is a New York corporation with headquarters in New York, New York. With over 10.8 million video subscribers across 30 states, TWC is the second-largest cable company in the United States (behind only Comcast), and the fourth-largest MVPD in the country. In 2014, TWC reported total revenues of approximately $22.8 billion. Around 45% of those revenues, or about $10.4 billion, were derived from TWC's video business.

13. Defendant Advance/Newhouse is a New York partnership with headquarters in East Syracuse, New York, and the sole owner of Defendant BHN, a Delaware limited liability company headquartered in East Syracuse, New York. BHN is the sixth-largest cable company in the United States and the ninth-largest MVPD. BHN owns cable systems serving around 2 million video customers across six states. In 2014, BHN generated total revenues of around $3.7 billion, approximately $1.5 billion of which were derived from its video business.

14. On May 23, 2015, Charter, TWC, and Advance/Newhouse entered into a series of agreements that would combine Charter, TWC, and BHN into a single company, New Charter. Pursuant to these agreements, (1) Charter and TWC would merge in a transaction valued at over $78 billion; and (2) Charter would acquire BHN from Advance/Newhouse in a transaction valued at $10.4 billion. The combined entity would have nearly 17.4 million video subscribers across 41 states, making it the second-largest cable company and third-largest MVPD, accounting for nearly 18% of all MVPD subscribers in the United States.

IV. THE VIDEO PROGRAMMING DISTRIBUTION INDUSTRY

15. There are two distinct levels to the video programming distribution industry. At the "upstream" level, video programmers license their content to video programming distributors—both OVDs and traditional MVPDs including Charter, TWC, and BHN. At the "downstream" level, the video programming distributors then sell subscriptions to various packages of that content and deliver the content to residential customers.



16. Video programmers produce themselves, or acquire from other copyright holders, a collection of professional, full-length programs and movies. These video programmers then typically aggregate this content into branded networks (*e.g.,* NBC, ESPN, or The History Channel) to create a 24-hour-per-day television service that is attractive to consumers. Many of the largest video programmers control the rights to multiple networks. Except for networks of purely local or regional interest, the video programmers will contract with video programming distributors across the country to distribute the content to consumers.

17. In order to acquire the rights to distribute each network, video programming distributors pay the video programmer a license fee. Generally, MVPDs and OVDs pay the video programmer a monthly per-subscriber fee. These license fees are an important revenue stream for video programmers. Most of the remainder of their revenues comes from fees for advertisements placed on their networks.

18. Video programmers rely on video programming distributors to reach consumers. Unless a video programmer obtains carriage in the packages of video programming distributors that reach 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.

V. RELEVANT MARKET

19. The timely distribution of professional, full-length video programming to residential customers ("video programming distribution") constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. 18. Both

MVPDs and OVDs are participants in this market.

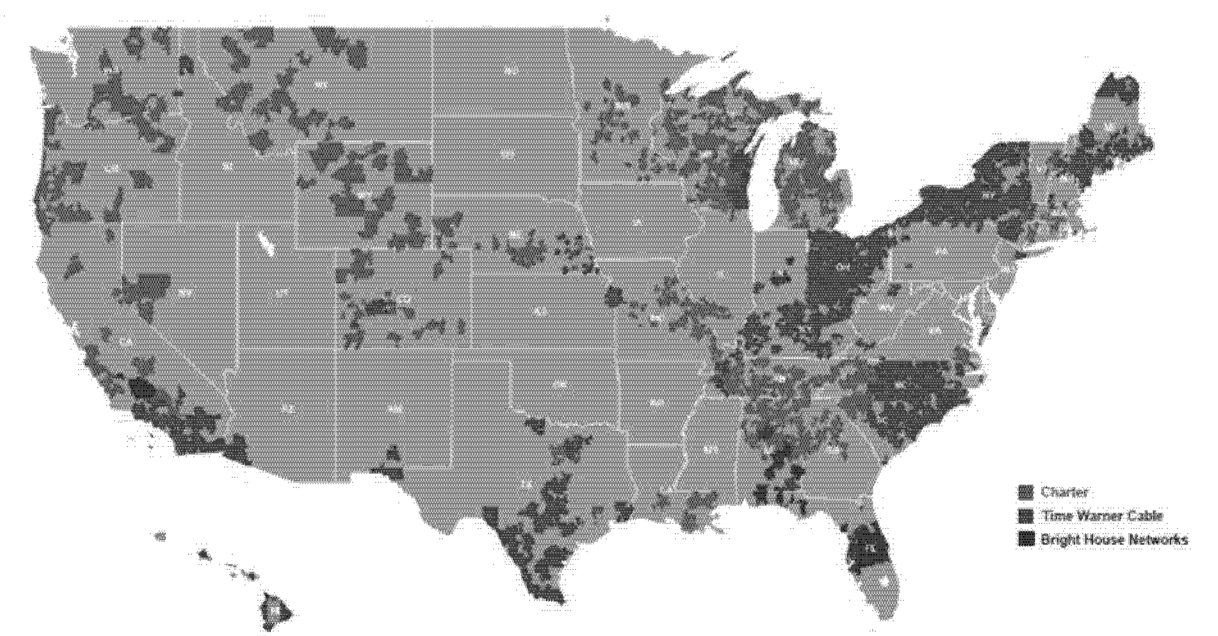
20. Video programming distribution is characterized by the aggregation and delivery of professionally produced content. This content includes scripted and unscripted television shows, live programming, sports, news, and movies licensed from a mixture of broadcast and cable networks, as well as from movie studios. Video programming can be viewed immediately by consumers, whether on demand or as scheduled.

21. Consumers purchase video programming distribution services from among those distributors that can offer such services directly to their home. The DBS operators, DirecTV and DISH, can reach almost any customer in the continental United States who has an unobstructed line of sight to their satellites. OVDs are available to any consumer with Internet service sufficient to deliver video of an acceptable quality. In contrast, wireline-based distributors such as cable companies and telcos generally must obtain a franchise from local, municipal, or state authorities in order to construct and operate a wireline network in a specific area, and then build lines to homes in that area. A consumer cannot purchase video programming distribution services from a wireline distributor operating outside its franchise area because the distributor does not have the facilities to reach the consumer's home. Thus, although the set of video programming distributors able to offer service to individual consumers' residences is generally the same within each local community, the set can differ from one local community to another.

22. Each local community whose residents face the same competitive choices in video programming distribution comprises a local geographic market and section of the country under Section 7 of the Clayton Act, 15 U.S.C. 18. A hypothetical monopolist of video programming distribution in any of these geographic areas could profitably raise prices by a small but significant, non-transitory amount.

23. The specific geographic markets relevant to this action are the numerous local markets throughout the United States shown in the map below where either Charter, TWC, or BHN is the incumbent cable operator.

Figure 1: Service Areas of Charter, TWC, and BHN



In order to protect its profits in these geographic markets, which cover around 48 million U.S. television households across 41 states, New Charter will have an incentive to prevent rival OVDs from obtaining, or to raise the costs of those rivals obtaining, programming for their services. Because these OVD competitors also serve homes outside New Charter's service areas, however, other local markets may be affected, with the anticompetitive effects of the transaction likely extending to the whole nation.

VI. MARKET CONCENTRATION

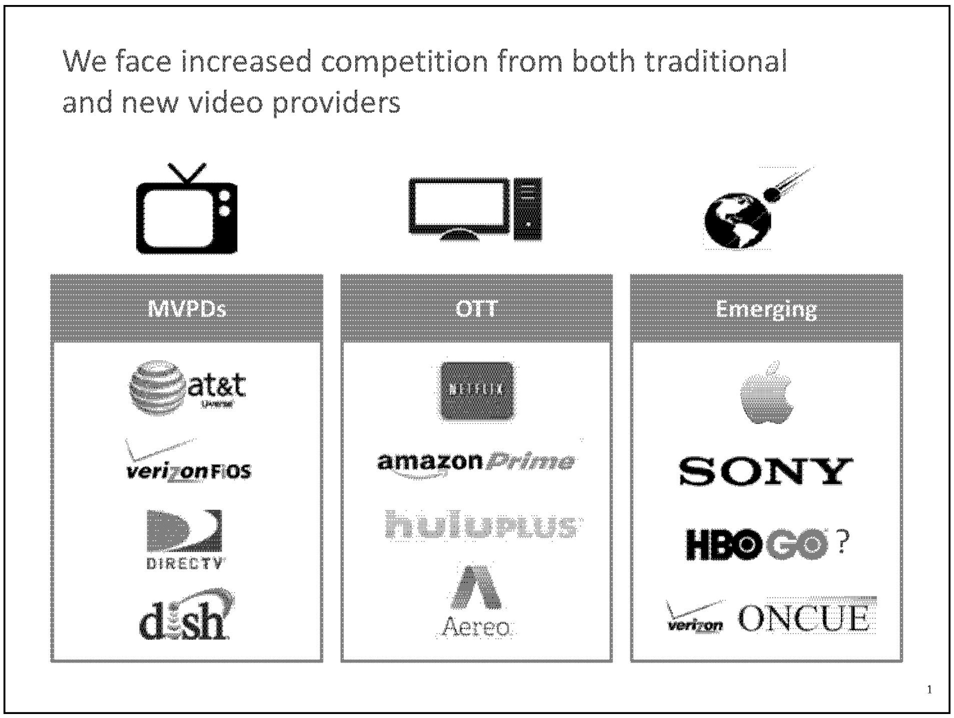
24. The incumbent cable companies typically have the highest share of subscribers within their respective service areas, often above 50 percent. The DBS providers, DirecTV and DISH, account for approximately one-third of the video programming distribution subscribers nationwide, although their shares vary by local market. The telcos, AT&T and Verizon, account for over 10 percent of video programming distribution nationwide and have successfully achieved penetration of up to 40 percent in some areas, but their video services remain limited to certain local markets and are unavailable to most American homes. In a handful of areas, other providers called ''overbuilders'' have constructed an additional wireline network to residential consumers, offering another competitive option for video and broadband service. But these overbuilders, including companies like RCN and Google Fiber, are available in very few communities, serving less than two percent of U.S. television households nationwide.

25. Although OVDs have acquired a significant number of customers over the last several years, they account for only five percent of total video programming distribution revenues. Nevertheless, established distributors such as Charter, TWC, and BHN view OVDs as a growing competitive threat and have taken steps to respond to OVD entry.

VII. ANTICOMPETITIVE EFFECTS

26. Charter, TWC, and BHN compete with DBS, overbuilder, and telco providers by upgrading their existing services, offering promotions and other price discounts, and introducing new product offerings. Consumers benefit from this competition by receiving better quality services, lower prices, and more programming choices. Competition between the incumbent cable companies and these alternative video providers has also fostered innovation, including the development of digital transmission, HD, and 4K programming, and the introduction of DVRs, video-on-demand, and ways to view content on other devices or away from home.

27. The continued development and expansion of OVDs could unlock additional competitive benefits. Today, many consumers purchase OVD services as a supplement to a traditional MVPD subscription. But in light of expanding OVD options, some consumers are switching from larger, more expensive MVPD bundles to slimmer and cheaper bundles. A small number of consumers are even ''cutting the cord''—cancelling their MVPD subscription altogether and relying solely on one or more OVDs to receive content. And many younger consumers are emerging as ''cord nevers'' that do not seek out an MVPD subscription in the first place. Large cable companies such as Charter and TWC, which rely on their video businesses to deliver significant profit margins, have observed these developments with growing concern. In numerous internal documents, Defendants show a keen awareness of the competitive threat that OVDs pose. In fact, a TWC board presentation from February 2014 illustrated the threat posed by such emerging online competitors as a meteor speeding toward earth:



28. Because of the threat OVDs pose to their video business, some MVPDs have an incentive to engage in tactics that would diminish OVDs' ability to compete. TWC, in particular, has recognized that it can use its contracts with video programmers to try and foreclose OVD competitors from access to valuable content. TWC has been the most aggressive MVPD in the industry in seeking and obtaining restrictive contract provisions in its agreements with programmers that limit the programmer's ability to license programming to OVDs. Specifically, TWC has used the leverage that comes from its status as an important distribution channel for many video programmers to secure ADM provisions that either prevent the programmer from distributing its content online, or place certain restrictions on such online distribution. For example, some of TWC's ADMs prohibit any online distribution for a certain period of time; others prevent the programmers from distributing their content through OVDs that do not meet specific criteria that can be difficult for OVDs to satisfy (*e.g.,* requiring the OVD to include a minimum number of programming networks in its service).

29. Although they offer service to residential customers in different local areas, each of the Defendants serves as an alternative distribution channel for nationwide video programmers to deliver their content to consumers and to build national viewership scale. Video programmers rely on traditional MVPDs to provide licensing fees and to build a large viewership base that is attractive to advertisers. Post-merger, New Charter will become one of the largest MVPDs in the country and will serve as a critical distributor for video programmers, offering access to over 17 million customers spread across 41 states. As a result, New Charter will have more leverage to demand that video programmers agree to forego or limit the licensing of programming to OVDs.

30. In addition, New Charter will have greater incentive to engage in conduct designed to make OVDs less competitive because the merged firm will be significantly larger than any of the Defendants individually. Because New Charter will have far more subscribers, it will also stand to lose more profits as OVDs continue to take business from traditional video distributors. Today,

any conduct that Charter engages in to harm OVDs would only benefit Charter within its own service territory. After the merger, New Charter will internalize the combined benefits to Charter, TWC, and BHN of harming OVDs and therefore will have a greater incentive to do so, and will be willing to offer more consideration to video programmers to obtain licensing restrictions.

31. Restrictions imposed on video programmers by New Charter will likely make it more difficult for OVDs to obtain important content from programmers in the future. In order to comply with New Charter's restrictions, video programmers may have to effectively cease providing certain programming to an OVD altogether, or may be obligated to impose burdensome conditions on an OVD (such as the requirement to include a minimum number of programming networks in the service). Such actions could negatively affect OVDs' business models and undermine their ability to provide robust video offerings that compete with the offerings of traditional MVPDs. By limiting OVDs' access to content that is important to their customers, the competitiveness of OVDs will likely be diminished and consumers will likely receive lower-quality services and fewer choices.

VIII. ENTRY

32. Entry or expansion of traditional video programming distributors will not be timely, likely, or sufficient to reverse the competitive harm that would likely result from the proposed merger of Charter, TWC, and BHN. Entry and expansion in the traditional video programming distribution business is difficult and time-consuming because it requires an enormous upfront investment to create distribution infrastructure such as building out wireline facilities or launching satellites. Entry or expansion into a new geographic area also typically requires approval from one or more regulatory bodies.

33. OVDs are less likely to enter or expand to develop into significant competitors if denied access to popular content as a result of the proposed transaction.

IX. VIOLATION ALLEGED

34. The United States hereby incorporates paragraphs 1 through 33.

35. Defendants' proposed combination of Charter, TWC, and BHN would likely substantially lessen competition in the numerous geographic markets for video programming distribution identified above in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

36. Unless enjoined, the proposed transactions between Charter, TWC, and Advance/Newhouse would likely have the following anticompetitive effects, among others:

a. competition in the development, provision, and sale of video programming distribution services in each of the relevant geographic markets will likely be substantially lessened;

b. prices for video programming distribution services will likely increase to levels above those that would prevail absent the proposed transactions; and

c. innovation and quality of video programming distribution services will likely decrease to levels below those that would prevail absent the proposed transactions.

X. REQUESTED RELIEF

37. Plaintiff United States requests that this Court:

a. adjudge and decree that the proposed transactions violate Section 7 of the Clayton Act, 15 U.S.C. 18;

b. preliminarily and permanently enjoin the Defendants from carrying out the proposed transactions, or from entering into or carrying out any other agreement, understanding, or plan that would have the effect of bringing the video distribution businesses of Charter, TWC, and BHN under common ownership or control;

c. award the United States its costs in this action; and

d. award the United States such other and further relief as may be just and proper.

Dated: April 25, 2016.

Respectfully submitted,

For Plaintiff United States of America:

/s/ __________

Renata B. Hesse (D.C. Bar #466107).

Principal Deputy Assistant Attorney General.

/s/ __________

Patricia A. Brink,

Director of Civil Enforcement.

/s/ __________

Scott A. Scheele (D.C. Bar #429061),

Chief, Telecommunications & Media Enforcement Section.

/s/ __________

Lawrence M. Frankel (D.C. Bar #441532),

Assistant Chief, Telecommunications & Media Enforcement Section.

/s/ __________

Robert A. Lepore*,

Ruediger R. Schuett (D.C. Bar #501174),

Maureen Casey (D.C. Bar #415893),

*Trial Attorneys, U.S. Department of Justice, Antitrust Division, Telecommunications & Media Enforcement Section, 450 Fifth Street NW., Suite 7000, Washington, DC 20530, Telephone: (202) 532–4928, Facsimile: (202) 514–6381, Email: Robert.Lepore@usdoj.gov, *Attorney of Record*

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States of America, Plaintiff, v. *Charter Communications, Inc., Time Warner Cable Inc, Advance/Newhouse Partnership,* and *Bright House Networks, LLC,* Defendants.

Case No.: 1:16–cv–00759

Judge: Royce C. Lamberth

Filed: 05/10/2016

COMPETITIVE IMPACT STATEMENT

The United States of America (''United States''), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (''APPA'' or ''Tunney Act''), 15 U.S.C. 16(b)–(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On May 23, 2015, Charter Communications, Inc. (''Charter'') and Time Warner Cable, Inc. (''TWC''), two of the largest cable companies in the United States, agreed to merge in a deal valued at over $78 billion. In addition, Charter and Advance/Newhouse Partnership, which owns Bright House Networks, LLC (''BHN''), announced that Charter would acquire BHN for $10.4 billion, conditional on the sale of TWC to Charter. As a result of these transactions, the combined company, referred to as ''New Charter,'' will become one of the largest providers of pay television service in the United States.

The United States filed a civil antitrust Complaint on April 25, 2016, seeking to enjoin the proposed transactions because their likely effect would be to lessen competition substantially in numerous local markets for the timely distribution of professional, full-length video programming to residential customers (''video programming distribution'') throughout the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. 18. Specifically, the Complaint alleges that the proposed merger would increase the ability and incentive of New Charter to use its leverage with video programmers to limit the access of online video distributors (''OVDs'') to important content. These OVDs are increasingly offering meaningful competition to cable companies like Charter, and the loss of competition caused by the proposed merger likely would result in lower-quality services, fewer choices, and higher prices for consumers, as well as reduced investment and less innovation in this dynamic industry.

At the same time the Complaint was filed, the United States also filed a Stipulation and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the proposed merger. Under the proposed Final Judgment, which is explained more fully below, the Defendants will be prohibited from using their bargaining leverage with video programmers to inhibit the flow of video content to OVDs. The proposed Final Judgment will provide a prompt, certain, and effective remedy for consumers by preventing New Charter from using its leverage over programmers to harm competition. The United States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment, and to punish and remedy violations thereof.

The proposed merger was also subject to review and approval by the Federal Communications Commission (''FCC'').[1] On May 5, 2016, the FCC adopted an order approving the transactions subject to certain conditions discussed below, and that order was released publicly on May 10, 2016. The Department and the FCC coordinated closely in their reviews of the proposed merger. The FCC's remedy is independent of the proposed Final Judgment and not subject to review in this proceeding.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Merger

Charter is the third-largest cable company in the United States, and the sixth-largest multichannel video programming distributor (''MVPD'') overall. Charter owns cable systems across 28 states, serving approximately 4.8 million residential broadband customers and 4.2 million residential video customers. Charter reported total revenues of around $9.1 billion in 2014, approximately $4.4 billion of which were derived from Charter's video business.

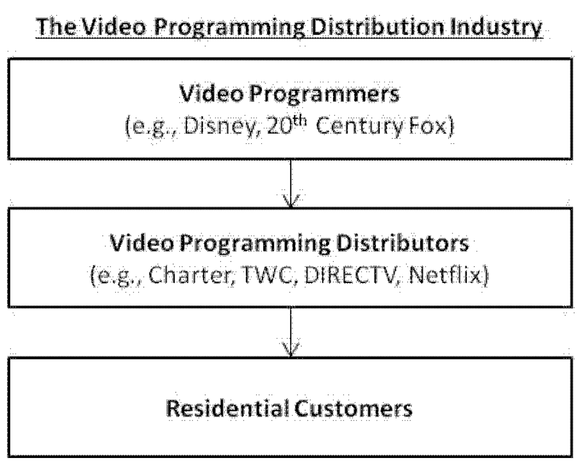
TWC is the second-largest cable company in the United States (behind only Comcast Corp.), and the fourth-largest MVPD in the country. TWC's cable systems serve approximately 11.7 million residential broadband and 10.8 million residential video customers in 30 states. TWC reported total revenues of approximately $22.8 billion in 2014, around $10.4 billion of which were derived from TWC's video business.

BHN is the sixth-largest incumbent cable company in the United States and the ninth-largest MVPD overall. It owns cable systems serving approximately 2 million video customers across six states, the majority of whom are located in the Orlando and Tampa-St. Petersburg, Florida areas. BHN is a wholly-owned subsidiary of Advance/Newhouse Partnership. Although the Advance/Newhouse Partnership retains the authority to manage BHN, it has entered into agreements by which TWC performs certain functions for BHN, including the procurement of cable programming. In 2014, BHN generated total revenues of around $3.7 billion, approximately $1.5 billion of which were derived from its video business.

The proposed transactions combining Charter, TWC, and BHN into New Charter, as initially agreed to by the Defendants on May 23, 2015, would lessen competition substantially in numerous local markets for video programming distribution. These transactions are the subject of the Complaint and proposed Final Judgment filed by the United States on April 25, 2016.

B. The Structure of the Video Programming Distribution Industry

The video programming distribution industry operates at two distinct levels. At the ''upstream'' level, video programmers license their content to video programming distributors—both OVDs and traditional MVPDs including Charter, TWC, and BHN. At the ''downstream'' level, the video programming distributors then sell subscriptions to various packages of that content and deliver the content to residential customers.



1. Video Programmers

Video programmers produce themselves, or acquire from other copyright holders, a collection of professional, full-length programs and movies. These video programmers then typically aggregate this content into branded networks (*e.g.,* NBC or The History Channel) that provide a 24-hour schedule that is attractive to consumers. Large video programmers often own multiple individual networks. For instance, The Walt Disney Company owns the ABC broadcast network as

[1] Under the Communications Act, the FCC has jurisdiction to determine whether mergers involving the transfer of a telecommunications license are in the ''public interest, convenience, and necessity.'' 47 U.S.C. 310(d).

well as many cable networks such as ESPN and The Disney Channel.

In order to acquire the rights to distribute each network, video programming distributors pay the video programmer a license fee, generally on a per-subscriber basis. These license fees are an important revenue stream for video programmers. Most of the remainder of their revenues comes from fees for advertisements placed on their networks.

Video programmers rely on video programming distributors—both MVPDs and OVDs—to reach consumers. Unless a video programmer obtains carriage in the packages of video programming distributors that reach 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.

2. Multichannel Video Programming Distributors

Traditional video programming distributors include incumbent cable companies such as Charter and TWC; direct broadcast satellite (''DBS'') providers such as DirecTV and DISH Network; telephone companies (''telcos'') that offer video services such as Verizon and AT&T; and overbuilders such as Google Fiber and RCN.[2] These distributors are referred to collectively as MVPDs. MVPDs typically offer hundreds of channels of professional video programming to residential customers for a monthly subscription fee.

3. Online Video Programming Distributors

OVDs are relatively recent entrants into the video programming distribution market. They deliver a variety of live and/or on-demand video programming over the Internet, whether streamed to Internet-connected televisions or other devices, or downloaded for later viewing. OVDs today include services like Netflix, Hulu, Amazon Prime Instant Video, and Sling TV, although, as discussed in more detail below, their content selection and business models vary greatly. Unlike MVPDs, OVDs do not own distribution facilities and are dependent upon broadband Internet access service providers, including incumbent cable companies such as Charter and TWC, for the delivery of their content to viewers.

C. The Relevant Market and Market Concentration

The Complaint alleges that video programming distribution constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. 18. The market for video programming distribution includes both traditional MVPDs and their newer OVD rivals.

Consumers purchase video programming distribution services from among those distributors that can offer such services directly to their home. The DBS operators, DirecTV and DISH, can reach almost any customer in the continental United States who has an unobstructed line of sight to their satellites. OVDs are available to any consumer with an Internet service sufficient to deliver video of an acceptable quality. In contrast, wireline-based distributors such as cable companies and telcos generally must obtain a franchise from local, municipal, or state authorities in order to construct and operate a wireline network in a specific area, and then build lines to homes in that area. A consumer cannot purchase video programming distribution services from a wireline distributor operating outside its franchise area because the distributor does not have the facilities to reach the consumer's home. Thus, although the set of video programming distributors able to offer service to individual consumers' residences is generally the same within each local community, the set can differ from one local community to another.

According to the Complaint, each local community whose residents face the same competitive choices in video programming distribution comprises a geographic market and section of the country under Section 7 of the Clayton Act, 15 U.S.C. 18. The geographic markets relevant to this action are the numerous local markets throughout the United States where either Charter, TWC, or BHN is the incumbent cable operator—an area encompassing 48 million U.S. television households located across 41 states. However, because OVDs typically offer services nationwide, the Complaint alleges that anticompetitive effects of the proposed merger likely extend to the entire United States.

The incumbent cable companies are often the largest video distribution provider in their respective local territories; the Defendants' market shares, for example, exceed 50 percent in many local markets in which they operate. The DBS providers, DirecTV and DISH Network, account for an average of about one third of video programming subscribers combined in any given local market. The telcos, including AT&T and Verizon, have market shares as high as 40 percent in the communities they have entered, but they are only available in limited areas and account for about 10 percent of video programming customers nationwide. Overbuilders such as Google Fiber can also have moderately high shares in particular local markets, but their services are only available in a small number of areas and they account for fewer than two percent of nationwide video programming distribution subscribers.

Although OVDs have acquired a significant number of customers over the last several years, most of these customers also purchase traditional MVPD subscriptions. As a result, OVDs currently have a small share of video programming distribution market revenues—likely around 5%.

D. Emerging Competition From OVDs in the Relevant Market

1. OVD Business Models and Participants

OVDs have developed a number of different business models for delivering content to consumers. Several OVDs, including Netflix, Amazon Prime Instant Video, and Hulu Plus, offer ''subscription video on demand'' (''SVOD'') services where consumers typically obtain access to a wide library of movies, past-season television shows, and original content for a subscription fee.[3] In addition, some individual cable programmers, such as CBS and HBO, have begun offering their content directly to consumers on an SVOD basis. For example, HBO's service, branded HBO NOW, provides subscribers who pay a monthly fee with access to the same HBO content over the Internet that they would receive through a subscription to HBO as part of an MVPD package.

In contrast to these SVOD providers, a few OVDs have recently begun

[2] Overbuilders are providers who have constructed an additional wired network to residential consumers for offering video and broadband service (*i.e.,* they have ''built over'' the cable and phone company networks).

[3] Hulu also offers current-season content from various television networks on an ad-supported basis for no subscription fee.

offering MVPD-like bundles of live, scheduled content to consumers over the Internet. In early 2015, DISH launched Sling TV, a monthly subscription service that provides customers access to many of the same cable networks that are available through traditional MVPDs. Sony has launched a similar service called PlayStation Vue. Unlike SVODs, these ''virtual'' MVPDs (''vMVPDs'') provide customers the ability to watch live sports and news programming, as well as other scheduled entertainment programming, at the same time it is available on traditional MVPDs.

2. The Effects of OVD Development on Traditional MVPDs

As OVDs have developed new business models and obtained a wider array of attractive video content, they have started to become closer substitutes for traditional MVPD services. Although many consumers treat OVD services as a complement to traditional MVPD service—for example, purchasing services from an SVOD like Netflix to access past season content and Netflix's original content but subscribing to an MVPD for live and current-season content—some are already using OVDs as substitutes for at least a portion of their video consumption. These consumers buy smaller content packages from traditional MVPDs, decline to take certain premium channels, or purchase fewer VOD offerings, and instead substitute content from OVDs, a practice known as ''cord-shaving.'' In addition, a small, but growing number of MVPD customers are ''cutting the cable cord'' completely, using one or more OVDs as a replacement for their MVPD service. Finally, some younger consumers are emerging as ''cord nevers'' who do not seek out an MVPD subscription in the first place.

Absent interference from the established MVPDs, OVDs are likely to continue to grow, and to become stronger competitors to MVPDs. Moreover, to the extent that OVDs continue to develop services that more closely resemble those offered by traditional MVPDs, such as the live programming offered by vMVPDs or the current season content offered by certain SVODs, traditional MVPDs will likely face greater substitution to OVD services. To this end, the Defendants' internal documents show that they have typically been comparatively less concerned about competition from certain SVOD providers, like Netflix, that do not offer live or current-season programming, and more concerned by the threat posed by vMVPDs like Sling TV and SVODs like HBO NOW that offer current season content.

3. Traditional MVPDs' Responses to the Growth of OVDs

The Defendants and many other MVPDs recognize the threat that the growth of OVDs pose to their video distribution businesses. Numerous internal documents reflect the Defendants' assessment that OVDs are growing quickly and pose a competitive threat to traditional forms of video programming distribution. MVPDs have responded to this growth in various ways. To keep their customers from migrating some or all of their viewing to OVDs, many MVPDs, including the Defendants, have introduced new and less expensive packages with smaller numbers of channels, increased the amount of content available on an on-demand basis, and made content available to subscribers on devices other than traditional cable set-top boxes. At the same time, however, some MVPDs have sought to restrain nascent OVD competition directly by exercising their leverage over video programmers to restrict video programmers' ability to license content to OVDs. As alleged in the Complaint, and explained in more detail below, TWC has been an industry leader in seeking such restrictions, and the formation of New Charter will create an entity with an increased ability and incentive to do so.

E. The Anticompetitive Effects of the Proposed Merger

Although Defendants do not compete to provide video distribution services to consumers in the same local geographic markets, the Clayton Act is also concerned with mergers that threaten to reduce the number or quality of choices available to consumers by increasing the merging parties' incentive or ability to engage in conduct that would foreclose competition.[4] For example, a merger may create, or substantially enhance, the ability or incentive of the merged firm to protect its market power by denying or raising the price of an input to the firm's rivals.

As alleged in the Complaint, New Charter will be significantly larger than each of the Defendants individually, and thus will have a greater incentive and ability to use its bargaining power with video programmers to protect its market power in the local markets for video programming distribution. Specifically, following the merger, New Charter will be the one of the largest MVPDs in the country, with over 17 million subscribers in 41 states, and will therefore be a critical distribution channel for video programmers. The Complaint alleges that this greater scale will give New Charter more leverage to demand that programmers agree to limit their distribution to OVDs, enabling the merged firm to increase barriers to entry for OVDs or otherwise make OVDs less competitive.

The Complaint also alleges that New Charter will have increased incentive to engage in such behavior because it will stand to lose substantially more profits than Charter, TWC, and BHN individually if OVDs take business from traditional MVPDs, and it will internalize more of the benefits of harming OVDs. The Defendants' specific means for foreclosing OVDs—ADM clauses and other restrictive contracting provisions—are discussed in more detail below.

1. TWC Is the Industry Leader in Imposing ADMs and Other Restrictive Programming Clauses that Limit Video Programmers' Rights to License to OVDs

Video programmers sign lengthy licensing agreements with distributors that establish the terms on which the distributors will carry the programmers' networks. Sometimes, these licensing agreements include restrictions on the other distributors to whom the programmer may license content, or on other ways the programmer may make the content available to consumers. One type of restriction is often referred to in the industry as an ''alternative distribution means'' (''ADM'') clause. ADM clauses take many forms, and in some cases can have significant consequences for programmers' ability to license to OVDs. For example, some ADMs prohibit a video programmer from licensing content to OVDs for an extended period of time after the content is first aired on traditional MVPDs—permanently blocking OVDs from being able to offer current-season content from those programmers. Other ADMs prohibit the programmer from licensing content to OVDs unless the OVDs meet a number of strict (and sometimes elaborate) criteria that can be difficult to satisfy.[5]

[4] *See Brown Shoe Co.* v. *United States,* 370 U.S. 294, 317 (1962) (noting that the Clayton Act intended to make illegal ''not only [] mergers between actual competitors, but also [] vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country.''); *FTC* v. *Procter & Gamble Co.,* 386 U.S. 568, 577 (1967) (''All mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate.'').

[5] For instance, an ADM in one MVPD's contract with a video programmer prohibited the programmer from licensing to any OVD unless that

TWC has been the most aggressive MVPD at seeking and obtaining restrictive ADM clauses in recent years. The Department's review of hundreds of programming contracts and ordinary course business documents revealed that TWC has obtained numerous ADMs that limit distribution to paid OVDs. Other distributors, by contrast, have rarely, if ever, sought or obtained such clauses, or have only obtained ADMs that are much less restrictive. TWC's success in seeking and obtaining ADMs is likely attributable in part to its bargaining leverage over video programmers; although such programmers might disfavor such restrictions because they require the programmer to forsake opportunities to earn revenues from OVDs, they are more likely to agree to a large MVPD such as TWC's demand to include them because they do not want to lose access to TWC's millions of cable subscribers.

The Department's investigation further suggested that TWC may be the most aggressive at obtaining such clauses because, other than Comcast, TWC has more to lose from the expansion of OVDs than any other traditional MVPD. Although Comcast also has substantial video profits at risk, it is prohibited from entering into or enforcing any provisions that restrict distribution to OVDs under the terms of a consent decree entered in *United States* v. *Comcast Corp.*[6] By contrast, distributors with fewer subscribers than TWC have less to lose from the expansion of OVDs, and, in some cases, may actually support OVD expansion because they make little or no profit margin on their video distribution businesses and would prefer to improve the attractiveness of their broadband Internet access services. Meanwhile, the two DBS providers, DISH and DirecTV, have historically been comparable to TWC in size, but because of their different distribution technology and their customer demographics, may perceive a lower threat from OVDs. In fact, DISH is offering an OVD service of its own—Sling TV—and DirecTV recently announced plans to offer a similar OVD service.

OVD offered a package that included thirty-five channels, including at least two channels each from three out of a list of six large video programmers.

[6] *See* Final Judgment, *United States et al.* v. *Comcast et al.,* Civil Action No. 1:11cv–00106, 2011–2 Trade Cas. (CCH) ¶77,585, 2011 WL 5402137 (D.D.C. Sept. 1, 2011), *available at https://www.justice.gov/atr/case-document/file/492196/download.*

2. The Proposed Transaction Increases New Charter's Ability and Incentive To Obtain ADMs and Other Restrictive Programming Clauses

The number and scope of the ADMs that TWC obtained prior to the merger suggests that TWC believes that these ADM clauses are worth whatever consideration it must provide video programmers in return. After the merger, New Charter, with over 17 million video subscribers in 41 states, will have even more leverage than TWC to demand that programmers agree to ADMs. Given the importance of New Charter as a distribution channel, programmers will be less likely to risk losing access to New Charter's considerable subscriber base—which is almost 60 percent larger than TWC alone—and will be more likely to accept to New Charter's demands. Moreover, since New Charter will have far more profits at risk from increased OVD competition than Charter, TWC, or BHN standing alone, it will be willing to provide greater consideration to programmers to obtain such clauses. As a result, New Charter can be expected to seek and obtain ADMs with more programmers than TWC has to date, and the ADMs are likely to be more restrictive than TWC's current ADM provisions. As alleged in the Complaint, such ADMs could negatively affect OVDs' business models and undermine their ability to provide robust video offerings that compete with the offerings of traditional MVPDs. The weakening of OVD competition will result in lower-quality services, fewer consumer choices, and higher prices.

4. Entry Is Unlikely To Reverse the Anticompetitive Effects of the Proposed Merger

Successful entry into the traditional video programming distribution business is difficult and requires an enormous upfront investment to create a distribution infrastructure. As alleged in the Complaint, additional entry into wireline or DBS distribution is not likely to be significant for the next several years. Telcos have been willing to incur some of the enormous costs to modify their existing telephone infrastructure to distribute video, and will continue to do so, but only in certain areas. Other new providers, such as Google Fiber, are also expanding services, but the time and expense required to build to each new area makes expansion slow. Therefore, traditional MVPDs' market shares are likely to be fairly stable over the next several years.

OVDs represent the most likely prospect for successful and significant competitive entry into the existing video programming distribution market. However, in addition to the other barriers they face, OVDs must obtain access to a sufficient amount of content to become viable distribution businesses, and the proposed merger will likely increase that barrier to entry even further.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment ensures that New Charter will not impede competition by using programming contracts to prevent the flow of content to OVDs. The proposed Final Judgment thereby protects consumers by eliminating the likely anticompetitive effects of the proposed merger alleged in the Complaint.

A. The Proposed Final Judgment Prohibits Defendants From Limiting Distribution to OVDs Through Restrictive Licensing Practices

As discussed above, certain types of contract provisions, such as ADMs, can have the purpose and effect of limiting distribution to OVDs. However, not all provisions that limit distribution are anticompetitive. Reflecting this reality, Sections IV.A and IV.B of the proposed Final Judgment set forth broad prohibitions on restrictive contracting practices, while Section IV.C delineates a narrowly tailored set of exceptions. Taken together, these provisions ensure that New Charter cannot use restrictive contract terms to harm the development of OVDs, but preserve programmers' incentives to produce quality programming and New Charter's ability to compete with other distributors to obtain marquee content.

Section IV.A of the proposed Final Judgment prohibits New Charter from entering into or enforcing agreements that forbid, limit, or create incentives to limit the provision of video programming to OVDs. This language prevents New Charter from enforcing the ADM provisions in current TWC contracts, or from entering into new provisions.

Section IV.B provides additional detail as to the types of terms that could create ''incentives to limit'' distribution to OVDs. The Department's investigation revealed that TWC has obtained ADM provisions for the purpose of attempting to limit distribution to OVDs. However, once those agreements are prohibited, New Charter could substitute ADMs with more subtle types of contract provisions that do not directly limit distribution to

OVDs, but make it financially unattractive for video programmers to license content to OVDs. For instance, absent relief, New Charter could enter into an agreement that permits a video programmer to license content to an OVD, but specifies that so licensing will entitle New Charter to a massive license fee discount. To prevent evasion of the ban on ADMs, Section IV.B.1 clarifies that such ''penalty'' provisions that create incentives to limit distribution to OVDs are not permitted.

Alternatively, New Charter could enter into certain kinds of ''most favored nation'' (''MFN'') provisions that are designed to create incentives to limit distribution to OVDs. Although MFN provisions are ubiquitous in the industry—for example, many MVPDs use MFN provisions entitling the MVPD to the lowest license fee that the programmer offers to any other MVPD—the Department's investigation revealed that some MVPDs were utilizing certain provisions that, while referred to as ''MFNs,'' actually require much more than equal treatment. Specifically, some provisions, commonly referred to as ''unconditional MFNs'' or ''cherry-picking MFNs,'' require that a programmer provide an MVPD the most favorable term the programmer has offered to any other distributor, even if that other distributor agreed to additional payment or other conditions in exchange for receiving that term.[7] As a result of an unconditional MFN, the programmer may be reluctant to license the additional content to the other distributor in the first place.

Although unconditional MFNs are uncommon today, and the Defendants have only a few such provisions in their current contracts, the Department was concerned that New Charter could replace ADMs with unconditional MFNs in an effort to circumvent the proposed Final Judgment. For example, New Charter might obtain an unconditional MFN from a programmer that would entitle New Charter to receive at no additional cost any content a programmer makes available to an OVD, regardless of payments or other conditions with which the OVD must comply. In such case, by providing programming to an OVD, the programmer might face significant economic disadvantages in the form of losing the opportunity to monetize the content through distribution by New Charter. As a result, unconditional MFNs could create significant disincentives for programmers to license content to OVDs. For these reasons, Section IV.B.2 of the proposed Final Judgment prohibits New Charter from entering into or enforcing unconditional MFNs against programmers for distributing their content to OVDs.[8]

Section IV.C of the proposed Final Judgment establishes three narrow exceptions to the broad prohibitions in Sections IV.A and IV.B. First, New Charter may prohibit the programmer from making content available on the Internet for free for 30 days after its initial airing, if New Charter has paid a fee for the video programming. The Department's investigation revealed that such limitations on free distribution are ubiquitous in the industry, and the Department has discovered no evidence that such provisions are harmful to competition.

Second, New Charter may enter into an agreement in which the programmer provides content exclusively to New Charter, and to no other MVPD or OVD. Although uncommon, a few programmers wish to make some of their content available to only one distributor. This relationship then incentivizes the distributor to vigorously market the content, and thus can be procompetitive in some circumstances. The proposed Final Judgment ensures that New Charter can continue to compete with other distributors to obtain these kinds of exclusives. As long as the exclusivity applies to *all* other video programming distributors, and does not narrowly prohibit distribution only to OVDs, the Department has no basis to believe such provisions will always or usually be harmful.[9]

Third, New Charter may condition carriage of programming on its cable system on terms which require it to receive as favorable material terms as other MVPDs or OVDs, except to the extent such terms would be inconsistent with the purpose of the proposed Final Judgment. That is, New Charter may enter into the kinds of ordinary conditional MFNs that are ubiquitous in the industry, such as a provision which entitles New Charter to the lowest license fee paid by any other distributor. This provision explicitly does not override Section IV.B.2's ban on the application of unconditional MFNs to OVD distribution. Importantly, New Charter may not use MFNs as a back door to obtain provisions which are otherwise ''inconsistent with the purpose of Sections A and B.'' For instance, even if another distributor obtains a provision which ''create[s] incentives to limit'' a programmer's provision of programming to an OVD, New Charter cannot use an MFN to add that other distributor's provision to New Charter's own contract.

2. The Proposed Final Judgment Prohibits Defendants From Discriminating Against, Retaliating Against, or Punishing Video Programmers

Section IV.D of the proposed Final Judgment prohibits Defendants from discriminating against, retaliating against, or punishing any Video Programmer for providing programming to any OVD. This provision ensures that even though Defendants are no longer permitted to contractually prohibit or deter video programmers from licensing content to OVDs, the Defendants are not able to instead deter such licensing through threats or punishment. Section IV.D also prohibits Defendants from discriminating against, retaliating against, or punishing any video programmer for invoking any provisions of the proposed Final Judgment or any FCC rule or order, or for furnishing information to the Department concerning Defendants' compliance with the proposed Final Judgment.

Negotiations between video programmers and MVPDs are often contentious, high-stakes affairs, and it is common for one or both sides to the negotiation to threaten to walk away, or even to temporarily terminate the relationship (sometimes called a ''blackout'' or ''going dark'') in order to secure a better deal. The proposed Final Judgment is not concerned with such negotiating tactics and therefore clarifies that ''[p]ursuing a more advantageous deal with a Video Programmer does not constitute discrimination, retaliation, or

[7] For example, a programmer may enter into an agreement with Distributor A that provides Distributor A with extra content (for instance, additional video-on-demand rights) in exchange for an extra payment. If the programmer has an unconditional MFN with Distributor B, the programmer may then be required to provide the additional video-on-demand rights to Distributor B *without Distributor B having to make the extra payment.* By contrast, a more typical—and less problematic—MFN would entitle Distributor B to the additional content only if Distributor B agreed to pay the same additional fee paid by Distributor A.

[8] Specifically, Section IV.B.2.i provides that New Charter may not require a programmer to provide New Charter the same terms offered to an OVD unless New Charter also accepts any conditions that are integrally related, logically linked, or directly tied to those terms. The language chosen for this provision mirrors language that is common in conditional MFN provisions throughout the industry. Also consistent with other conditional MFNs in the industry, Section IV.B.2.ii states that Charter need not comply with related terms and conditions if it is unable to do so for technological or regulatory reasons.

[9] The Department retains the authority to challenge under Sections 1 or 2 of the Sherman Act any exclusive agreement in the future that the evidence demonstrates unreasonably restrains trade or creates or enhances monopoly power. *See* Proposed Final Judgment at § VII (No Limitation of Government Rights).

punishment.'' Rather, Section IV.D is designed to prevent situations where New Charter intentionally decides to forgo an agreement with a programmer that would otherwise be economical for New Charter in order to obtain the long-term benefits of deterring video programmers from licensing content to OVDs or cooperating with the Department or the FCC.

3. Provision of Defendants' FCC Interconnection Reports

Although the Department's Complaint focuses on the likely competitive harm resulting from New Charter's imposition of ADMs and other contractual restrictions on video programmers, the Department also investigated the potential for the proposed merger to increase the price New Charter will charge Internet content companies, including OVDs, for access to its broadband subscribers. OVDs rely on broadband connections provided by other companies to reach their customers, and the Defendants are also major providers of Internet access service. Therefore, the Department examined whether the merger could increase both the incentive and ability of New Charter to use its control over the interconnection to New Charter's broadband Internet service provider network to try and disadvantage online video competitors.

The FCC's order approving the merger imposes an obligation on New Charter to make interconnection available on a non-discriminatory, settlement-free basis to any Internet content provider, transit provider, or content delivery network (''CDN'') who meets certain basic criteria. Although this policy only directly protects those sending large volumes of traffic, even smaller sources who do not qualify for direct interconnection ought to find ample bandwidth available at competitive prices because large transit and CDN providers will be guaranteed access, and could resell that capacity. Thus, the Department expects that the FCC's order will prevent any merger-related harm to Internet content companies, including OVDs. In light of the FCC's remedy, the Department did not target interconnection in its Complaint and elected not to pursue duplicative relief with respect to interconnection in the proposed Final Judgment. However, in order to assist the Department in monitoring future developments with regard to interconnection and in taking whatever action might be appropriate to prevent anticompetitive conduct, Section IV.E requires New Charter to provide the Department with copies of the regular reports that New Charter furnishes to the FCC pursuant to the FCC's order.

D. Term of the Proposed Final Judgment

Section VIII of the proposed Final Judgment provides that the Final Judgment will expire seven years from the date of entry. The Department believes this time period is long enough to ensure that New Charter cannot harm OVD competitors at a crucial point in their development while accounting for the rapidly evolving nature of the video distribution market. After five years, Section VIII permits Charter to request that the Department reevaluate whether the Final Judgment remains necessary to protect competition. If at such time the Department concludes that the market has evolved such that the protections of the decree are no longer necessary, it will recommend to the Court that the Final Judgment be terminated.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the **Federal Register**, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet Web site and, under certain circumstances, published in the **Federal Register**. Written comments should be submitted to:

Scott A. Scheele
Chief, Telecommunications and Media Enforcement Section
Antitrust Division
United States Department of Justice
450 Fifth Street NW., Suite 7000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, seeking preliminary and permanent injunctions against Defendants' transactions and proceeding to a full trial on the merits. The United States is satisfied, however, that the relief in the proposed Final Judgment will preserve competition for the provision of video programming distribution services in the United States. Thus, the proposed Final Judgment would protect competition as effectively as would any remedy available through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment ''is in the public interest.'' 15 U.S.C. 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to ''broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.,* 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States* v. *SBC Commc'ns, Inc.,* 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.,* 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the ''court's inquiry is limited'' in Tunney Act settlements); *United States* v. *InBev N.V./S.A.,* No. 08–1965 (JR), 2009–2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires ''into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.'').[10]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft,* 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the decree, a court may not ''engage in an unrestricted evaluation of what relief would best serve the public.'' *United States* v. *BNS, Inc.,* 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States* v. *Bechtel Corp.,* 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft,* 56 F.3d at 1460–62; *United States* v. *Alcoa, Inc.,* 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is ''*within the reaches of the public interest.''* More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[11] In determining whether a proposed settlement is in the public interest, a district court ''must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft,* 56 F.3d at 1461 (noting the need for courts to be ''deferential to the government's predictions as to the effect of the proposed remedies''); *United States* v. *Archer-Daniels-Midland Co.,* 272 F. Supp. 2d 1, 6 (D.D.C. 2003) (noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. ''[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.''' *United States* v. *Am. Tel. & Tel. Co.,* 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland* v. *United States,* 460 U.S. 1001 (1983); *see also U.S. Airways,* 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft,* 56 F.3d at 1461); *United States* v. *Alcan Aluminum Ltd.,* 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States ''need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.'' *SBC Commc'ns,* 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to ''construct [its] own hypothetical case and then evaluate the decree against that case.'' *Microsoft,* 56 F.3d at 1459; *see also U.S. Airways,* 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev,* 2009 U.S. Dist. LEXIS 84787, at *20 (''the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged''). Because the ''court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place,'' it follows that ''the court is only authorized to review the decree itself,'' and not to ''effectively redraft the complaint'' to inquire into other matters that the United States did not pursue. *Microsoft,* 56 F.3d at 1459–60. As this Court confirmed in *SBC Communications,* courts ''cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power.'' *SBC Commc'ns,* 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that ''[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.'' 15 U.S.C. 16(e)(2); *see also U.S. Airways,* 38 F. Supp. 3d at 76

[10] The 2004 amendments substituted ''shall'' for ''may'' in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. 16(e) (2004), *with* 15 U.S.C. 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments ''effected minimal changes'' to Tunney Act review).

[11] *Cf. BNS,* 858 F.2d at 464 (holding that the court's ''ultimate authority under the [APPA] is limited to approving or disapproving the consent decree''); *United States* v. *Gillette Co.,* 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to ''look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass''). *See generally Microsoft,* 56 F.3d at 1461 (discussing whether ''the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest''').

(indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: ''[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process.'' 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's ''scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings.'' *SBC Commc'ns,* 489 F. Supp. 2d at 11.[12] A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways,* 38 F. Supp. 3d at 76.

VIII. DETERMINATIVE DOCUMENTS

Appendix B to the FCC's Memorandum Opinion and Order, *In re Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations,* FCC MB Docket No. 15–149 (adopted May 5, 2016; released May 10, 2016), was the only determinative document or material within the meaning of the APPA considered by the Department in formulating the proposed Final Judgment. This document is available on the FCC's Web site at *https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-59A1.pdf,* and will also be made available on the Antitrust Division's Web site at *https://www.justice.gov/atr/case/us-v-charter-communications-inc-et-al.*

Dated: May 10, 2016

Respectfully submitted,

/s/ __________________________

Robert A. Lepore,

Telecommunications & Media, Enforcement Section, Antitrust Division, U.S. Department of Justice, 450 Fifth Street NW., Suite 7000, Washington, DC 20530, Telephone: (202) 532–4928, Facsimile: (202) 514–6381, Email: Robert.Lepore@usdoj.gov

[12] *See United States* v. *Enova Corp.,* 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the ''Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone''); *United States* v. *Mid-Am. Dairymen, Inc.,* No. 73–CV–681–W–1, 1977–1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D. Mo. 1977) (''Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.''); S. Rep. No. 93–298, at 6 (1973) (''Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.'').

United States District Court for the District of Columbia

United States of America, Plaintiff, v. *Charter Communications, Inc., Time Warner Cable Inc, Advance/Newhouse Partnership, and Bright House Networks, LLC,* Defendants.

Case No.: 1:16–cv–00759

Judge: Royce C. Lamberth

Filed: 04/25/2016

[PROPOSED] FINAL JUDGMENT

WHEREAS, Plaintiff, the United States of America, filed its Complaint on April 25, 2016 alleging that Defendants propose to enter into transactions the likely effect of which would be to lessen competition substantially in the market for the timely distribution of professional, full-length video programming to residential customers (''video programming distribution'') across the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Plaintiff and Defendants, by their respective attorneys, have consented to the entry of this Final Judgment without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to be bound by the provisions of this Final Judgment pending its approval by the Court;

AND WHEREAS, Plaintiff requires Defendants to agree to undertake certain actions and refrain from certain conduct for the purpose of remedying the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants have represented to the United States that the actions and conduct restrictions can and will be undertaken and that Defendants will later raise no claim of hardship or difficulty as grounds for asking the Court to modify any of the provisions contained below;

NOW THEREFORE, before any testimony is taken, without trial or adjudication of any issue of fact or law, and upon consent of the parties, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

This Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

II. DEFINITIONS

As used in this Final Judgment:

A. ''Advance/Newhouse'' means defendant Advance/Newhouse Partnership, a New York partnership with headquarters in East Syracuse, New York, its successors and assigns, and its Subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees, in their capacity as directors, officers, managers, agents, and employees of the foregoing.

B. ''Bright House'' means defendant Bright House Networks, LLC, a Delaware limited liability company with headquarters in East Syracuse, New York, its successors and assigns, and its Subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees, in their capacity as directors, officers, managers, agents, and employees of the foregoing.

C. ''Charter'' means defendant Charter Communications, Inc., a Delaware corporation with headquarters in Stamford, Connecticut, its successors and assigns (including, without limitation, CCH I, LLC), and its Subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees, in their capacity as directors, officers, managers, agents, and employees of the foregoing.

D. ''Defendants'' means Charter, TWC, Bright House, and Advance/Newhouse, acting individually or collectively. Notwithstanding the foregoing, Advance/Newhouse is not a ''Defendant'' for purposes of Section IV.

E. ''Department of Justice'' means the United States Department of Justice Antitrust Division.

F. ''MVPD'' means a multichannel video programming distributor as that term is defined on the date of entry of this Final Judgment in 47 CFR 76.1200(b), in its capacity as an MVPD.

G. ''OVD'' means any service that (1) distributes Video Programming in the United States by means of the Internet; (2) is not a component of an MVPD subscription; and (3) is not solely available to customers of an Internet access service owned or operated by the Person providing the service or an affiliate of the Person providing the service. For avoidance of doubt, this definition (1) includes a service offered by a Video Programmer for the distribution of its own Video

Programming by means of the Internet to Persons other than subscribers of an MVPD service; (2) includes a service offered by an MVPD that offers Video Programming by means of the Internet outside its MVPD service territory as a service separate and independent of an MVPD subscription; and (3) excludes an MVPD that offers Video Programming by means of the Internet to homes inside its MVPD service territory as a component of an MVPD subscription.

H. ''Person'' means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office, or other business or legal entity, whether private or governmental.

I. ''Subsidiary'' refers to any Person in which there is partial (25 percent or more) or total ownership or control between the specified Person and any other Person. Notwithstanding the foregoing, Subsidiary shall not include any Person in which a Defendant does not have majority ownership or de facto control if that Person does not provide MVPD service.

J. ''TWC'' means defendant Time Warner Cable Inc, a New York corporation with headquarters in New York, New York, its successors and assigns, and its Subsidiaries, divisions, groups, affiliates, partnerships and joint ventures, and their directors, officers, managers, agents, and employees, in their capacity as directors, officers, managers, agents, and employees of the foregoing.

K. ''Video Programmer'' means any Person that provides Video Programming for distribution through MVPDs, in its capacity as a Video Programmer.

L. ''Video Programming'' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station or cable network, regardless of the medium or method used for distribution, and, without expanding the foregoing, includes programming prescheduled by the programming provider (also known as scheduled programming or a linear feed); programming offered to viewers on an on-demand, point-to-point basis (also known as video on demand); pay per view or transactional video on demand; short programming segments related to other full-length programming (also known as clips); programming that includes multiple video sources (also known as feeds, including camera angles); programming that includes video in different qualities or formats (including high-definition and 3D); and films for which a year or more has elapsed since their theatrical release.

III. APPLICABILITY

This Final Judgment applies to Defendants and all other Persons in active concert or participation with any of them who receive actual notice of this Final Judgment by personal service or otherwise.

IV. PROHIBITED CONDUCT AND REPORTING

A. Defendants shall not enter into or enforce any agreement with a Video Programmer under which Defendants forbid, limit, or create incentives to limit the Video Programmer's provision of its Video Programming to one or more OVDs.

B. Agreements that ''create incentives to limit'' a Video Programmer's provision of its Video Programming to one or more OVDs within the meaning of Section IV.A shall include, but are not limited to, the following:

1. agreements that provide for any pecuniary or non-pecuniary penalty on the Video Programmer for the provision of its Video Programming to an OVD, such as rate reductions, re-tiering or re-positioning penalties, termination rights for Defendants, or loss or waiver of any rights or benefits otherwise available to the Video Programmer; or

2. agreements that entitle Defendants to receive any benefits such as favorable rates, contract terms, or content rights offered or granted to an OVD by a Video Programmer without requiring Defendants to also accept any obligations, limitations, or conditions:

i. that are integrally related, logically linked, or directly tied to the offering or grant of such rights or benefits, and

ii. with which Defendants can reasonably comply technologically and legally. For avoidance of doubt, Defendants will be deemed able to ''reasonably comply technologically'' if they are able to implement an obligation, limitation, or condition in a technologically equivalent manner.

C. Notwithstanding the foregoing, nothing in this Final Judgment shall prohibit Defendants from:

1. entering into and enforcing an agreement under which Defendants discourage or prohibit a Video Programmer from making Video Programming for which Defendants pay available to consumers for free over the Internet within the first 30 days after Defendants first distribute the Video Programming to consumers;

2. entering into and enforcing an agreement under which the Video Programmer provides Video Programming exclusively to Defendants, and to no other MVPD or OVD; or

3. entering into and enforcing an agreement which requires that Defendants receive as favorable material terms as other MVPDs or OVDs, except to the extent application of other MVPDs' or OVDs' terms would be inconsistent with the purpose of Sections A and B of this Section IV.

D. Defendants shall not discriminate against, retaliate against, or punish any Video Programmer (i) for providing Video Programming to any MVPD or OVD, (ii) for invoking any provisions of this Final Judgment, (iii) for invoking the provisions of any rules or orders concerning Video Programming adopted by the Federal Communications Commission, or (iv) for furnishing information to the United States concerning Defendants' compliance or noncompliance with this Final Judgment. Pursuing a more advantageous deal with a Video Programmer does not constitute discrimination, retaliation, or punishment.

E. Defendants shall submit to the Department of Justice all reports and data relating to interconnection with the Defendants' broadband Internet access network that are required to be submitted to the Federal Communications Commission (''the Commission'') pursuant to any rule or order of the Commission, at the same time such reports or data are required to be submitted to the Commission.

V. COMPLIANCE INSPECTION

A. For purposes of determining or securing compliance with this Final Judgment, or of determining whether the Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time duly authorized representatives of the Department of Justice, including consultants and other persons retained by the Department of Justice, shall, upon written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to Defendants, be permitted:

1. access during the Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide to the United States hard copy or electronic copies of, all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants, relating to any matters contained in this Final Judgment; and

2. to interview, either informally or on the record, the Defendants' officers, employees, or agents, who may have

their individual counsel present, regarding such matters. The interviews shall be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General in charge of the Antitrust Division, Defendants shall submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment as may be requested.

C. No information or documents obtained by the means provided in this section shall be divulged by the United States to any person other than an authorized representative of the executive branch of the United States or the Federal Communications Commission, except in the course of legal proceedings to which the United States is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. If at the time information or documents are furnished by a Defendant to the United States, the Defendant represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and the Defendant marks each pertinent page of such material, ''Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure,'' then the United States shall give the Defendant ten calendar days notice prior to divulging such material in any civil or administrative proceeding (other than a grand jury proceeding).

VI. RETENTION OF JURISDICTION

This Court retains jurisdiction to enable any party to apply to this Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

VII. NO LIMITATION ON GOVERNMENT RIGHTS

Nothing in this Final Judgment shall limit the right of the United States to investigate and bring actions to prevent or restrain violations of the antitrust laws concerning any past, present, or future conduct, policy, or practice of the Defendants.

VIII. EXPIRATION OF FINAL JUDGMENT

This Final Judgment shall expire seven years from the date of its entry. Notwithstanding the foregoing, the Defendants may request after five years that the Department of Justice examine competitive conditions and determine whether the Final Judgment continues to be necessary to protect competition. If after examination of competitive conditions the Department of Justice in its sole discretion concludes that the Final Judgment should be terminated, it will recommend to the Court that the Final Judgment be terminated.

IX. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. 16, including making copies available to the public of this Final Judgment, the Competitive Impact Statement, and any comments thereon and the United States' responses to comments. Based upon the record before the Court, which includes the Competitive Impact Statement and any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: ________________

Court approval subject to procedures set forth in the Antitrust Procedures and Penalties Act, 15 U.S.C. 16

____

United States District Judge

[FR Doc. 2016–11562 Filed 5–16–16; 8:45 am]

BILLING CODE 4410–11–P

DEPARTMENT OF LABOR

Employee Benefits Security Administration

181st Meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans Notice of Meeting

Pursuant to the authority contained in section 512 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1142, the 181st meeting of the Advisory Council on Employee Welfare and Pension Benefit Plans (also known as the ERISA Advisory Council) will be held on June 7–9, 2016.

The three-day meeting will take place at the U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210 in C5320 Room 6. The meeting will run from 9:00 a.m. to approximately 5:30 p.m. on June 7–8 and from 8:30 a.m. to 3:00 p.m. on June 9, with a one hour break for lunch each day. The purpose of the open meeting is for Advisory Council members to hear testimony from invited witnesses and to receive an update from the Employee Benefits Security Administration (EBSA). The EBSA update is scheduled for the morning of June 9, subject to change.

The Advisory Council will study the following topics: (1) Cybersecurity Considerations for Benefit Plans, on June 7 and (2) Participant Plan Transfers and Account Consolidation for the Advancement of Lifetime Plan Participation, on June 8. The schedule is subject to change. The Council will discuss both topics on June 9. Descriptions of these topics are available on the Advisory Council page of the EBSA Web site, at *www.dol.gov/ebsa/aboutebsa/erisaadvisorycouncil.html.*

Organizations or members of the public wishing to submit a written statement may do so by submitting 35 copies on or before May 31, 2016 to Larry Good, Executive Secretary, ERISA Advisory Council, U.S. Department of Labor, Suite N–5623, 200 Constitution Avenue NW., Washington, DC 20210. Statements also may be submitted as email attachments in word processing or pdf format transmitted to *good.larry@dol.gov.* It is requested that statements not be included in the body of the email. Statements deemed relevant by the Advisory Council and received on or before May 31 will be included in the record of the meeting and made available through the EBSA Public Disclosure Room, along with witness statements. Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. Written statements submitted by invited witnesses will be posted on the Advisory Council page of the EBSA Web site, without change, and can be retrieved by most Internet search engines.

Individuals or representatives of organizations wishing to address the Advisory Council should forward their requests to the Executive Secretary or telephone (202) 693–8668. Oral presentations will be limited to 10 minutes, time permitting, but an extended statement may be submitted for the record. Individuals with disabilities who need special accommodations should contact the Executive Secretary by May 31.