

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of the Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a Pro Forma Transfer of Control of Charter Fiberlink CA-CCO, LLC (U6878C).

Application No. 15-07-009
(Filed July 2, 2015)

**ENTERTAINMENT STUDIOS NETWORKS' AND NATIONAL ASSOCIATION OF
AFRICAN AMERICAN-OWNED MEDIA'S
COMMENTS ON PROPOSED DECISION**

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1. INTRODUCTION

Pursuant to the California Public Utilities Commission's Rules of Practice and Procedure, Rule 14.3, Entertainment Studios Network and National Association of African American-Owned Media (collectively, "Entertainment Studios") respectfully submit these comments on the Proposed Decision Granting Application to Transfer Control Subject to Conditions ("Proposed Decision") issued by Administrative Law Judge Bemserfer on April 12, 2016.

These comments are concurrently filed and served with Entertainment Studios' Motion Requesting Party Status. As stated in its party status motion, Entertainment Studios is a 100% African American-owned media company with a portfolio of seven 24-hour, high definition, television networks currently carried on AT&T U-verse, Verizon Fios, and DirectTV, among others. It is an independent programmer that serves diverse and multicultural audiences through its unique programming. This diversified media company produces, distributes, and sells advertising for 40 television programs, making it one of the largest independent producers/distributors of first-run syndicated television programming for broadcast television stations. Entertainment Studios provides video content to broadcast television stations, cable television networks, mobile devices, multimedia platforms, and the World Wide Web. Its mission is to provide excellent programming to its viewers.

Charter has intentionally excluded 100% African American-owned media companies, including Entertainment Studios, from contracting for channel carriage on its various media platforms.¹ The conduct is well documented. Indeed, Charter currently spends \$4 billion annually to license video programming via carriage agreements and, of this amount, nothing is paid to 100% African American-owned multichannel media companies. Without access to viewers and without licensing fees and advertising revenues from one of the largest video programming distributors in the country, Entertainment Studios and other similarly owned 100% African American-owned media companies are being shut out and severely damaged. If the Commission approves the transfer of control of Time Warner Cable to Charter without

¹ A carriage agreement is a contract between a multichannel video programming distributor, such as Charter, and a channel vendor/programmer, such as Entertainment Studios, granting the distributor the right to "carry" (that is, distribute) the programmer's channels.

addressing Charter's discriminatory conduct and its impacts on a large portion of American society, then the Commission will do so in a manner that violates the public interest.

2. COMMENTS

The Proposed Decision incorrectly concludes that the merger is in the public interest.² In its public interest discussion, the Commission tries to mitigate significant adverse consequences resulting from the merger by incorporating "Agreed-Upon Conditions"³ contained in a memorandum of understanding ("MOU") between the applicants and the National Diversity Coalition ("NDC"). As discussed below, the Proposed Decision's reliance on the MOU does not mitigate the adverse consequences of the merger and, as a result, it is based on factual, legal and technical error that, when corrected, support either denying the application or radically changing the Commission's conditions of approval.

A. **The Proposed Decision Is Not In the Public Interest Because the MOU's Programming Provisions Are Meaningless**

The Proposed Decision is based on legal and factual error because it cannot mitigate future discriminatory practices with its proposed conditions. The applicants entered into the Memorandum of Understanding with the National Diversity Coalition ("MOU") because of Charter Communication Inc.'s ("Charter") past practices of racial discrimination. The MOU does not mitigate these practices in the future. If the Proposed Decision is adopted, the applicants will enter into markets with a significant African American presence, yet the MOU does nothing to ensure that 100% African American-owned media companies participate in this expansion. Instead, the MOU provides that "Charter will expand carriage of and agree to at least one programming agreement extension with existing African-American focused programming

² See Assigned Commissioner's Scoping Ruling, dated November 13, 2015 ("Scoping Memo"), pp. 3-5.

³ Proposed Decision, p. 56; see also Id. at p. 68.

networks on the New Charter system....”⁴ First, this provision is anticompetitive because eligibility is only open to existing networks, none of whom are 100% African American-owned. Second, the provision does not require Charter to work with even partially African American-owned networks because it speaks only to the expansion of African American programming.⁵

Even if the Commission found the programming provisions to have some merit in advancing African American-owned network programming --which it does not-- the qualifiers contained in the provision render it illusory, one-sided, and legally unenforceable. Indeed, the relevant provisions are so absurd, it warrants setting them out herein:

“[...] Charter will expand carriage of and agree to at least one programming agreement extension with existing African-American focused programming networks [...] within nine (9) months after closing, *if at all*, of the transaction, *subject to*, negotiating customary terms for expanded distribution and the extension of programming agreement. The selection of such programming will be in *Charter or New Charter’s discretion.*”⁶

This provision obligates Charter and New Charter to do nothing with respect to expanding African American programming networks, much less 100% African American-owned networks. Moreover, the Proposed Decision’s condition to enforce it to mitigate future racial discrimination is illusory. Instead, the Commission should either deny the application or adopt as a condition of approval a clear, concise and measurable mitigation measure that is both enduring and consistent with the Commission’s policy of providing the widest possible

⁴ MOU, p. 10.

⁵ Notably, the paragraph dedicated to African American programming does reference African American-owned programming networks, but it only does so in the context of “developing a framework” for working with such networks if it “supports the business goals of New Charter.” This paragraph defines African American-owned programming networks as “substantially owned, operated, and controlled by African Americans,” not 100% African American-owned. *Ibid.*

⁶ *Ibid.*, [emphasis added].

dissemination of information from diverse sources. If it decides to adopt the Proposed Decision, the Commission should adopt the following concrete, measurable condition:

Notwithstanding any other provision on the MOU, New Charter shall set aside 10% of all its activated channel capacity, no fewer than 50 video programming services, for the carriage of 100% African American-owned channels.

Certainly, the MOU opens the door for this condition and the mitigation measure is clear, definite, and measurable. Moreover, the condition is in the public interest because compliance cannot be distorted by the applicants or New Charter.

B. The Proposed Decision Is Not In the Public Interest Because Diversity Programming Data is Not Available to the Public

The restrictions imposed on programming data completely undermine the public interest. In the MOU, New Charter agrees to share programming data with its External Diversity Council, however, the data is subject to a non-disclosure agreement and may only be used for internal discussions.⁷ Concealing this data and restricting its use blatantly ignores the public interest insofar as it hides New Charter's conduct behind a curtain. That curtain must be pulled back. Through the application, the Commission is being asked to dramatically expand Charter's management of a state-sponsored monopoly and Charter has used its monopolistic power in the past, in both known and documented ways, to exclude programming from 100% African American-owned networks. It is the Commission's duty to ensure that these practices do not continue. In fact, the public interest demands it. Therefore, the Commission should deny the deny the application or incorporate the following condition if it decides to adopt the Proposed Decision:

⁷ MOU, p. 11.

New Charter and its affiliates shall provide program-related data to any member of the public who requests it, within 10-days of receiving a written request. There are no restrictions on the use of the data. If New Charter or its affiliates do not comply with this condition, they shall be subject to sanctions, penalties, and reasonable fee awards, as well as mandatory document production requirements.

This condition is clear, concise and measurable. It also ensures that the public interest is protected because it allows public participation in compliance with the purported diversity goals of New Charter and its related affiliates.

C. The Proposed Decision Is Not In the Public Interest Because of Its Limited Enforcement Restrictions

In order to protect the public interest, the Proposed Decision must require the MOU to confer enforcement rights on all members of the public. In pertinent part, the MOU states that it is binding on New Charter and NDC, however, “it shall not confer upon any other party the status of a third-party beneficiary to this agreement or the right to bring any legal or equitable action against the parties hereto.”⁸ Third-party beneficiaries New Charter and NDC intend to exclude from enforcement include members of the public and the Commission itself. Thus, the provision is not in the public interest.

The Proposed Decision attempts to resolve this issue by conferring enforcement authority on the Commission and parties to the MOU, however, the condition does not go far enough to protect the public interest.⁹ The Commission’s resources are constrained. Moreover, neither the Commission, nor the parties to the MOU, have the subject-matter expertise to hold Charter and New Charter to obligations made in the MOU. For example, the MOU discusses the expanded

⁸ MOU, p. 13, para. 11. a.

⁹ Proposed Decision, p. 68, para. 2. c.

carriage and programming agreements, “subject to negotiating customary terms for expanded distribution and the extension of programming agreements.”¹⁰ Moreover, the MOU endeavors to develop a framework for “enhancing the carriage of programming networks owned and operated by African-Americans.”¹¹ The Commission and parties to the MOU do not have expertise concerning network carriage and programming agreements. Nor do they have a nuanced and developed understanding of customary terms and how they might be negotiated. Moreover, it is unlikely that the parties and the Commission have given any thought about how best to establish a framework to enhance African American-owned networks. On the other hand, a 100% African American-owned entity like Entertainment Studios, who has participated in the industry for more than 20 years and is one of the largest independent-owned networks in the country, has both the expertise and resources to ensure that New Charter honors the diversity programming commitments that are made in the MOU and are purportedly in the public interest.

In light of the limited subject-matter expertise of the Commission and the parties to the MOU, the Commission should adopt the following condition:

The purpose of the MOU is to protect the public interest and it shall be binding on New Charter and NDC. Moreover, the MOU shall confer third-party beneficiary status on any and all members of the public, such that any member of the public has the right to bring any legal or equitable action to enforce the terms of the MOU, as well as the conditions imposed by this decision.

By adopting this condition, the Commission will ensure that the Proposed Decision is in the public interest because it confers upon parties with subject-matter expertise the right to enforce the terms of the commitments identified in the MOU and the conditions of this decision.

¹⁰ MOU, p. 10.

¹¹ Ibid.

3. CONCLUSION

Based on the foregoing, Entertainment Studios respectfully requests that the Commission reject the Proposed Decision and deny the application. If, on the other hand, the Commission decides to grant the application and adopt the Proposed Decision, Entertainment Studios request that the Commission incorporate the conditions identified in these comments.

Dated: May 2, 2016.

Respectfully submitted,

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**APPENDIX A
PROPOSED REVISIONS TO PROPOSED DECISION**

Below are the Entertainment Studios Network's proposed revisions to the Proposed Decision.

PROPOSED REVISIONS TO ORDERING PARAGRAPHS

Add subparagraphs o-q to Ordering Paragraph #2 to read as follows:

2. The approval granted herein is subject to the following conditions:

- a. New Charter, and its regulated entities operating in California, shall abide by all the terms and conditions of the Memoranda of Understanding (MOUs) with the National Diversity Council and CETF.
- b. New Charter shall abide by all the terms and conditions of the agreements with the County of Monterey, and the City of Gonzales.
- c. Commission staff or any party to the MOUs with the National Diversity Council (NDC) or CETF or the agreements with the County of Monterey or the City of Gonzales may, at any time during the duration of the MOUs or the agreements, as the case may be, apply to this Commission for an order directing New Charter to perform one or more promises contained in the MOUs or the agreements. Additionally, Commission staff may monitor the performance of community beneficiaries who receive funds pursuant to the MOUs or the agreements. New Charter consents to the jurisdiction of this Commission to enter an order enforcing the MOUs or the agreements.
- d. The purpose of the MOU is to protect the public interest and it shall be binding on New Charter and NDC. Moreover, the MOU shall confer third-party beneficiary status on any and all members of the public, such that any member of the public has the right to bring any legal or equitable action to enforce the terms of the MOU, as well as the conditions imposed by this decision.
- e. Notwithstanding any other provision on the MOU, New Charter shall set aside 10% of all its activated channel capacity, no fewer than 50 video programming services, for the carriage of 100% African American-owned channels.
- f. New Charter and its affiliates shall provide program-related data to any member of the public who requests it, within 10-days of receiving a written request. There are no restrictions on the use of the data. If New Charter or its affiliates do not comply with this condition, they shall be subject to sanctions, penalties, and reasonable fee awards, as well as mandatory document production requirements.
- g. Within thirty days of the closing of the Transaction, executive officers of Charter Fiberlink, TWCIS and Bright House Networks shall cause their respective companies to comply with the certification requirements imposed by the

Commission in Decision (D.) 13-05-035 by executing, on behalf of their respective companies, the certification required by D.13-05-035.

- eh. Within one year of the closing of the Transaction, New Charter shall increase broadband download speeds for those households in its California service territory that are currently on an all-digital platform to not less than 60 Mbps.
- fi. Within 30 months of the closing of the Transaction, New Charter shall convert all households in its California service territory to an all-digital platform with download speeds of not less than 60 Mbps.
- gi. New Charter shall offer all customers the option of acquiring their own modems and cable set-top boxes without any associated increase in the price of services.
- hk. New Charter shall fully comply with all the terms and conditions of the Federal Communications Commission's Open Internet Order, regardless of the outcome of any legal challenge to the Open Internet Order. In addition, for a period of not less than three years from the closing of the Transaction, New Charter (a) will not adopt fees for users to use specific third-party Internet applications; (b) will not engage in zero-rating; (c) will not engage in usage-based billing; (d) will not impose data caps; and (e) will submit any Internet interconnection disputes not resolvable by good faith negotiations on a case-by-case basis.
- il. For a period of not less than three years from the closing of the Transaction, New Charter shall continue its settlement-free interconnection policy.
- jm. Within six months of the closing of the Transaction, New Charter's certificated carriers shall offer Lifeline phone service discounts to all eligible households (in accordance with CPUC Lifeline rules) within its service territory.
- kn. Within one year of the closing of the Transaction, New Charter shall meet all service quality standards for voice communication established in General Order 133-C.
- lo. New Charter shall comply with the guidelines for consumer education programs regarding backup power systems adopted by the Commission in D.10-01-026.
- mp. New Charter shall supply each existing or new Voice over Internet Protocol customer with a separate paper document devoted exclusively to providing information about the need for back-up power. New Charter shall make this and similar consumer information available in alternate formats including large print, Braille and audio. New Charter shall provide this disclosure to new customers at the time of sale.
- nq. The motion of the Office of Ratepayer Advocates for an Order requiring Joint Applicants to pay the costs of its expert witness Dr. Lee Selwyn is granted.