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VIA ELECTRONIC MAIL

Rosemary Harold
Bureau Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
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Re: Investigation of Charter Communications Pursuant To 47 C.F.R. § 76.1301(c), 47 U.S.C. § 536(a)(3), and the Commission's Carriage Decision-Making Authority

Dear Ms. Harold:

We write to express serious and pressing concerns regarding Charter Communication's conduct in connection with carriage negotiations with our client, Big3 Basketball LLC, which is a potential bidder for regional sports networks ("RSNs") being sold in an auction for the Divestiture Assets in *United States v. The Walt Disney Company*, No. 18-cv-5800 (S.D.N.Y.). We believe that Charter's conduct raises serious questions under the Commission's carriage rules and warrants a prompt investigation by enforcement staff.

In proceedings regarding the merger of Disney and Fox Broadcasting, the Department of Justice required Disney to divest "all of Fox's interests in the Fox RSNs, including all of the assets, tangible or intangible, necessary for the operations of the Fox RSNs as viable, ongoing video networks or programming assets." Proposed Final Judgment, *United States v. The Walt Disney Company*, No. 18-cv-5800 (S.D.N.Y.) at 4. The Proposed Final Judgment also states the divestiture must "be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by the Acquirer(s) as part of a viable, ongoing business of selling, supplying, or licensing video programming." *Id*. at 7. Moreover, the Acquirer must show "that the Divestiture Assets will remain viable, and the divestiture of such assets will achieve the purposes of this Final Judgment and remedy the competitive harm alleged in the Complaint." *Id*.

Big3 is a sports and entertainment company founded by veteran industry professionals Ice Cube and Jeff Kwatinetz. Big3 has put together a creatively strong and desirably diverse ownership bid for the RSNs. Its vision is to create a network on which the RSNs provide 24/7 programming, supplementing sporting events with broader cultural and political topics and adding an inclusive voice to the national media landscape. Big3's team is diverse with respect to both race and gender and includes Kevin Hart, LL Cool J, Ice Cube, Serena Williams, Julius "Dr. J" Erving, Constance Schwartz and Michael Strahan's Smac Productions, Jemele Hill, Clyde Drexler, Lisa Leslie, Snoop Dogg, Amy Trask, Caroline Raefalian, Gary Payton, Metta World Peace,

Michael Rappaport, Chauncey Billups, and Jermaine O'Neal, among others. At a time of concentration in the U.S. media, new voices like Big3 are critical. As the Supreme Court has observed, "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). Congress has found that "the effects of past inequities stemming from racial and ethnic discrimination have resulted in a severe underrepresentation of minorities in the media of mass communications." H.R. Conf. Rep. No. 97-765, p. 43 (1982).

In formulating its bid, Big3 has had discussions with numerous entities including banks, private equity groups, and content partners. Key investors, lenders, and partners have made clear that to secure their commitment, Big3 needs to obtain visibility on the position of multichannel video program distributors ("MVPDs") regarding the terms on which they would continue to carry the RSNs post-transaction. It is clear that MVPDs continue to value RSNs highly. For example, AT&T recently renewed its carriage of RSNs reportedly at an approximate 44% price increase. Such price increases, as well as Big3's information as to most MVPDs, accord with DOJ's findings that the RSNs are "marquee" or "must have" properties for distributors. *See In The Matter Of Applications Of Charter Communications, Inc., Time Warner Cable Inc., And Advance/Newhouse Partnership*, 31 FCC Rcd. 6327, 6404 (2016).

Charter Communications is well known to be the pivotal MVPD for any potential bidder for the RSNs. Charter is the second biggest cable operator in the U.S. and the largest company in terms of subscribers to the Fox RSNs, with a full 25% of those subscribers. For that reason, investors rationally view a Charter carriage deal as critical to securing ownership of the RSNs.

Charter currently carries the RSNs and agrees to pay those networks for carriage. Early in the RSN bidding process, Charter asked Big3 for a proposal setting out the terms and conditions of RSN carriage in the event Big3 was the successful bidder. Big3 complied and provided two such proposals. Charter promised to make a counteroffer.

But then Charter's pattern of conduct abruptly changed. It never provided a counteroffer and instead suggested it would drop the RSNs from its channel lineup altogether. At a meeting between Charter and Big3, a Charter official said that "the RSNs fail our regression analysis" – *i.e.*, that Charter would drop the RSNs because its loss of subscribers would be outweighed by cost savings. At another point, the Charter official told Big3, "You don't have Fox News – what leverage do you have [for carriage]?" Notably, these statements by Charter contradict its prior representations to the FCC (in its application for license transfers following its merger with Time Warner Cable and Bright House Networks) that "there are no close substitutes for its RSNs." *Charter Communications*, 31 FCC Rcd. at 6461.

Big3's subsequent efforts to work with Charter have been met with repeated refusals, cancellations, evasions, and blunt dismissals. Charter has canceled scheduled phone calls with Big3, refused to answer communications, and indicated that vacation plans precluded time-sensitive discussions. This abuse of Charter's self-proclaimed "king-maker" status continues today. With less than one week remaining before sealed bids are due in the RSN auction process (on April 15, 2019), Big3 recently made a final request for a counteroffer from Charter or at least a phone call, but Charter denied both requests.

To be clear, Big3 is not asking Charter for a firm carriage deal in advance of the bid deadline, but it needs guidance and visibility into Charter's business plans and assurances that Charter would not completely drop the RSNs, as it has indicated. Otherwise, Charter's conduct risks effectively excluding Big3 from the bidding process and tainting the auction.

The Commission should examine Charter's abrupt change in behavior. It has been suggested to Big3's ownership that Charter has disseminated its threat to drop the RSNs to other members of the industry, thereby suppressing auction prices, chilling bidding, and ultimately hurting Disney's ability to secure the best price for the RSNs.

There are serious questions whether Charter's conduct is connected with the interests of Liberty Media Corporation,[1] Charter's largest shareholder, which has emerged as a bidder for the divested RSNs. (Another reported bidder for the RSNs is Major League Baseball. Liberty Media is the 100% owner of the Atlanta Braves.) In 2013, Liberty acquired a 27.3% ownership interest in Charter.[2] Four Charter Board members are current or recent officers of the Liberty Media empire, including Liberty's founder and Chairman, John Malone. Liberty also owns preemptive rights over Charter stock, and may well have access to non-public information regarding Charter's business plans. In short, Liberty wields significant influence through its ownership, control, and governance rights over Charter, as Charter acknowledges in its SEC filings and investor communications. *See, e.g.*, Charter Communications, Inc. Annual Report (Form 10-K), at 23 (2018) ("Liberty Broadband and [Advance/Newhouse Partnership] have governance rights that give them influence over corporate transactions and other matters."). These rights and interests make Liberty an "affiliate" for purpose of the carriage rules, since "any voting stock interest amounting to 5% or more of the outstanding voting stock of a corporation will be cognizable." 47 C.F.R. § 76.501, note 2.

The Commissioner's program carriage rules prohibit carriers from engaging in conduct that unreasonably restrains "the ability of an unaffiliated video programming vendor to compete fairly" by discriminating against such a vendor "on the basis of affiliation or non-affiliation." 47 C.F.R. § 76.1301(c); *see also* 47 U.S.C. § 536(a)(3). Moreover, the Commission has indicated that a complaint may be brought under the carriage rules for racial discrimination in carriage decisions.[3]

We believe investigation is warranted in light of Charter's conduct in this case, as well as its prior history. Numerous parties have raised questions about Charter's dealings with minority-

[1] Liberty Media Corporation is controlled by its Chairman, John Malone, who owns 47.7% of the voting power in Liberty. Mr. Malone also owns 21% of Discovery, Inc., a global media company and programmer whose portfolio includes Discovery Channel, TLC, Animal Planet, Food Network, HGTV, and The Science Channel.

[2] Available at https://www.businesswire.com/news/home/20130319005880/en/Charter-Communications-Liberty-Media-Corporation-Announce-Agreement.

[3] After describing complaints about Charter's behavior, the FCC (in its analysis approving the Charter/Time Warner merger) invited complaints under the carriage rules if a programmer believed Charter was discriminating in carriage decisions. *See Charter Communications,* 31 FCC Rcd. at 6462.

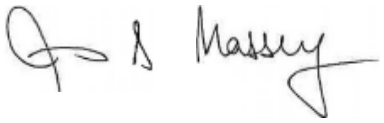
owned businesses. In the Order issued pursuant to Charter's merger with Time Warner and Bright House Networks, the FCC noted that "[s]everal commenters criticized the Applicants' commitment to diversity" and requested that conditions be imposed on Charter to maintain diverse programming for five years, negotiate in good faith with independent channels, and report to the FCC failures to continue carriage. *See Charter Communications*, 31 FCC Rcd. at 6458-59. The Order cited comments from Aspire Channel, UP Entertainment, the Greenlining Institute, DISH, beIN SPORTS, and the National Association of African-American Owned Media and Entertainment Studios. *Id.* Although no such conditions were imposed, Commissioner Clyburn issued a statement in the Order acknowledging these comments and noted his preference for a condition requiring the company to add additional independently owned-and-operated networks. *Id.* at 6665. Aspire-UP (an American cable television network targeting African American viewers) noted that while Time Warner and Bright House were two of their largest and most committed distributors, Charter did not carry their programming. *Id.* at 6458.

In addition, Charter was recently sued in federal district court in the Central District of California on the ground that its refusal to enter into a carriage contract with African American-owned television networks was racially motivated in violation of Section 1981 of the Civil Rights Act. In February 2019, the U.S. Court of Appeals for the Ninth Circuit upheld the trial court's ruling that plaintiffs had pleaded a plausible claim against Charter. *Nat'l Ass'n of African Am.-Owned Media v. Charter Commc'ns, Inc.*, 915 F.3d 617, 626 (9th Cir. 2019). The Ninth Circuit cited allegations echoing the circumstances here – that a Charter official "declined to meet with [minority] representatives or consider its channels for carriage. Plaintiffs alleged that, instead of engaging in a meaningful discussion regarding a potential carriage contract, [Allan Singer, Senior Vice President of Programming] and Charter repeatedly refused, rescheduled, and postponed meetings, encouraging Entertainment Studios to exercise patience and proffering disingenuous explanations for its refusal to contract." *Id.* at 620. In addition, the complaint included direct evidence of racial bias. "In one instance, Singer allegedly approached an African-American protest group outside Charter's headquarters, told them 'to get off of welfare,' and accused them of looking for a 'handout.'" *Id.* at 621. In another alleged instance, Entertainment Studios' owner Byron Allen attempted to talk with Charter's CEO, Tom Rutledge, at an industry event. According to the complaint, "Rutledge refused to engage, referring to Allen as 'Boy' and telling Allen that he needed to change his behavior." *Id.* "Plaintiffs suggested that these incidents were illustrative of Charter's institutional racism, noting also that the cable operator had historically refused to carry African American-owned channels and, prior to its merger with Time Warner Cable, had a board of directors composed only of white men." *Id.*

We therefore ask you to investigate as soon as possible (as sealed bids are due April 15, 2019) the concerns expressed in this letter and whether Charter Communications has engaged in carriage discrimination in violation of 47 C.F.R. § 76.1301(c), 47 U.S.C. § 536(a)(3), and the Commission's carriage decision-making authority.

Sincerely yours,

Matthew M. Collette



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