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April 10, 2019

VIA ELECTRONIC MAIL

Owen M. Kendler, Esq.
Chief, Media, Entertainment, and Professional Services Section
Antitrust Division
Department of Justice
Washington, DC 20530
atr.mep.information@usdoj.gov

Re: Divestiture of Regional Sports Networks in *United States v. The Walt Disney Company*, No. 18-cv-5800 (S.D.N.Y.).

Dear Mr. Kendler:

We write to express significant and pressing concerns regarding the integrity of the bidding process for the Divestiture Assets in *United States v. The Walt Disney Company*, No. 18-cv-5800 (S.D.N.Y.). Our client, Big3 Basketball LLC, intends to submit a bid for the regional sports networks ("RSNs") subject to divestiture as a result of the Proposed Final Judgment entered in this case, but is being systematically thwarted by Charter Communications, the nation's second largest cable company. At the same time, Liberty Media Corporation,[1] a major Charter shareholder, reportedly is also bidding for the divested RSNs, raising the question whether Charter's conduct toward Big3 is a coordinated and anticompetitive attempt to assist Liberty Media by crushing Big3's ability fairly to compete. Such an effort would taint the bidding process and frustrate the Department's purpose in ordering divestiture of the assets in the first place.

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

[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.

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. *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 Division should examine Charter's abrupt change in behavior. There are serious questions whether that change is connected with the interests of Liberty Media Corporation, 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.").

Charter's conduct raises serious questions regarding the integrity of the divestiture sale and whether Liberty may be using its controlling position over Charter to tilt the bidding process in its favor. 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.

DOJ is well aware of the issues that partial ownership can present. *See, e.g., U.S. v. AT&T Corp. and Tele-Communications, Inc.*, No. Civ. 98-cv-03170, 1999 WL 1211462, Complaint at 2 (D.D.C. Aug. 23, 1999) (challenging a merger that would give defendant a 23.5% equity interest in a principal competitor). And DOJ is rightly concerned about the harm to consumers that may result from vertically-integrated programmers. *See United States v. AT&T Inc., DirecTV Group Holdings, LLC, Time Warner Inc.*, 2017 WL 5564815, Complaint at 1-2 (D.D.C.) ("[V]ertically integrated programmers can much more credibly threaten to withhold programming from rival distributors and can use such threats to demand higher prices and more favorable terms.") (internal quotation marks omitted).

These risks warrant further investigation here. Indeed, the Proposed Final Judgment requires Disney to divest its entire ownership interest in the RSNs, yet Charter's conduct raises competitive concerns that are just as harmful and important. The Disney/Fox judgment should not perversely create an anticompetitive outcome with respect to RSN divestiture. *See Response of United States to Public Comment on the Proposed Final Judgment* at 11 ("[D]ivestiture of the assets to the proposed purchaser must not itself cause competitive harm.").

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

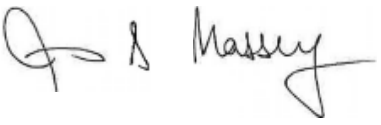
In addition to skewing the bidding process, Charter's actions could cause competitive harm if they enabled Liberty to prevail in the RSN bidding. Liberty's ownership of the RSNs could limit horizontal competition, as Charter is a co-owner of MLB and NHL channels, two of the three major sports on RSNs. Moreover, as DOJ observed in its analysis of the AT&T-Time Warner merger, vertical integration between programmers and distributors can lead to price increases to consumers. If Liberty owned the RSNs, it could seek supracompetitive affiliate fees from Charter's competitors, relying on its ability to recapture lost subscription fees in that market through new subscribers to Charter. Charter has already demonstrated its willingness to engage in this self-benefiting strategy with its own RSN, SportsNet LA. SportsNet LA, which has the exclusive rights to Dodgers games in the Los Angeles market, is not available on *any* MVPDs in Los Angeles *except* Charter.[3] As a result, Dodger games are available to only a fraction of local viewers – only about 1.5 million of the 5.6 million households in the Los Angeles area. This lack of access is hardly consonant with the public interest.

This is precisely why the American Cable Association noted in its comments on the Proposed Final Judgment that there are strong reasons to prefer a purchaser of the RSNs that is not an MVPD. *See* American Cable Association, Comments to *United States v. The Walt Disney Company* Proposed Final Judgment, No. 18-cv-5800, at 5-6 (S.D.N.Y.). Although Liberty is not itself an MVPD, it wields significant power over Charter as its largest shareholder, with significant voting and governance rights.

We therefore ask the Division to investigate the competitive concerns raised in this letter as soon as possible, as sealed bids are due on April 15, 2019. If the bidding process has been irreparably tainted, as we believe, then the Division should consider appropriate relief. We attach a letter to the FCC Enforcement Bureau raising additional issues about Charter's potentially discriminatory actions.

Sincerely yours,

Matthew M. Collette



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[3] *See* https://www.truebluela.com/2018/2/23/17045566/dodgers-television-debacle-sportsnet-la-simulcast-ktla-no-directv.

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Rosemary Harold
Bureau Chief, Enforcement Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554
rosemary.harold@fcc.gov

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*.

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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-

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[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.

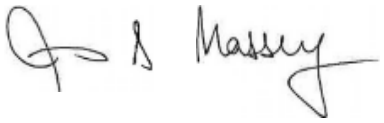
owned businesses. In the Order issued pursuant to Charter's merger with Time Warner and Bright House Networks, the FCC noted that "[s]everal commenters criticized the Applicants' commitment to diversity" and requested that conditions be imposed on Charter to maintain diverse programming for five years, 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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