

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)	
)	
Applications of Charter Communications, Inc.,)	MB Docket No. 15-149
Time Warner Cable Inc., and)	
Advance/Newhouse Partnership)	
For Consent to the Transfer of Control of)	
Licenses and Authorizations)	
)	

REPLY COMMENTS OF WRITERS GUILD OF AMERICA WEST, INC.

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I. INTRODUCTION AND SUMMARY

Writers Guild of America, West, Inc. (“WGAW”) respectfully submits this Reply in response to Charter Communications, Inc., Time Warner Cable Inc. and Advance/Newhouse Partnership (jointly, “Applicants”) Opposition¹ to our Petition to Deny² (“Petition”) their application for transfer of licenses and authorizations. While Applicants attempt to portray this merger as in the public interest, it presents many of the vertical and horizontal harms raised in the Comcast-Time Warner Cable merger. Instead of giving one company control of more than 50% of the national broadband market, this transaction will create a duopoly where two firms control upwards of 90% of the high-speed wired broadband market. Applicants bear the burden of providing sufficient evidence to demonstrate that the merger meets the FCC’s public interest standard, a showing they have failed to make. Instead, they continue to make assertions regarding their lack of incentive or ability to harm competition that are not supported by evidence and that contradict both the Commission’s findings in prior transactions and the information supplied by petitioners and commenters in this proceeding.

In our Petition, we outlined the increased incentive and ability of the merged firm (“New Charter”) to use vertical programming relationships and expanded horizontal control of distribution to harm competition, programming diversity and consumers. Our Petition described how the merger of three providers in national video and broadband distribution markets would be an anticompetitive outcome that limits consumer choice because it would allow New Charter to

¹ Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership, Opposition to Petitions to Deny and Response to Comments, MB Docket No. 15-149 (Nov. 2, 2015) (“Opposition”).

² Writers Guild of America, West, Inc., Petition to Deny, MB Docket No. 15-149 (Oct. 13, 2015) (“Petition”).

engage in practices that disadvantage competing multichannel video programming distributors (“MVPDs”), online video distributors (“OVDs”) and unaffiliated programmers. The fourfold growth in Charter’s size increases the likelihood of success of such strategies while also increasing the incentive to protect its video business from competition.

We also highlighted the vertical relationships that New Charter will have with major programmers Discovery Communications and Starz, a fact Applicants have attempted to minimize. The effect of these programming ties, which will transfer to a company much larger than Charter, must be carefully considered. The Commission has found in prior proceedings that “vertical transactions also have the potential for anticompetitive effects,” which may include “the incentive and ability to: (1) discriminate against particular rivals in either the upstream or downstream markets (e.g., by foreclosing rivals from inputs or customers); or (2) raise the costs to rivals generally in either of the markets.”³ Applicants’ response that Liberty Broadband will only control 25% of New Charter, effectively limiting any undue influence by John Malone, is not a credible defense. The Commission has found in prior transactions that the largest minority shareholder may have de facto control and corporate disclosures to shareholders provide evidence contradicting Applicant’s claim of Liberty Broadband and John Malone’s minimal role. In addition, statements made by John Malone make clear his intentions to use his related assets to determine the future of video distribution.

The horizontal combination of Charter Communications, Inc. (“Charter”), Time Warner Cable Inc. (“Time Warner Cable” or “TWC”) and Bright House Networks (“Bright House”) raises particular concerns in the national wired broadband market, where it will reduce the

³ General Motors Corp. and Hughes Electronics Corp., Transferors, and the News Corporation, Transferee, MB Docket No. 03-124, *Memorandum Opinion and Order*, 19 FCC Rcd. at 473, 508, ¶ 71 (2004) (“*News Corp.-Hughes Order*”).

number of distributors OVDs may use to reach consumers and create a broadband duopoly. Applicants continue to deny the existence of such a market, although the Commission has made clear that such national distribution markets exist and that the effect of mergers on these markets must be carefully assessed. If this merger is approved, New Charter will become the nation's third-largest MVPD and second-largest wired Internet service provider ("ISP"), which increases its power to engage in practices that limit the attractiveness of OVDs through, for example, restrictive licensing practices and pricing policies. Applicants' statements that they have no incentive to engage in such behavior are not supported by the facts or Commission findings in prior proceedings.

As outlined in our Petition, MVPD subscribers will account for a large share of New Charter's revenue. It is implausible to suggest that the company will not have a strong incentive to limit MVPD subscriber losses through practices that undermine demand for OVD services. Applicants go to great lengths to highlight broadband profits as evidence that they will not act to harm OVDs, but present no information to suggest that New Charter expects to be a "dumb pipe," interested only in the revenue generated by broadband subscribers. Rather, recent developments such as the introduction of Charter's Spectrum TV Stream, a product designed to compete with DISH's OVD service Sling, provide a clear indication that the company intends to continue to offer video service and compete more directly with OVDs. As such, the merged firm will have a strong incentive to use its expanded control of distribution to harm OVD competition. In addition, information Applicants have provided reveals that two-thirds of households in New Charter's service territory will have *no other choice* for broadband at speeds of 25 Mbps or

greater.⁴ New Charter will be unrestrained by competition post-merger and will be able to implement strategies that harm OVDs with little fear of losing customers.

Nothing Applicants have stated in response suggests that the harms we have outlined are unlikely to occur or are addressed by conditions. Rather, Applicants have provided further evidence to support our concerns. Applicants' voluntary commitments are particularly insufficient to protect the OVD market from the harms of this merger. Applicants only offer to abide by some aspects of the Commission's Open Internet Order while the industry association to which they belong simultaneously attempts to void the rules in court. These actions do little to convince us of New Charter's support for a fast, fair and open Internet where video competition can flourish.

Numerous petitioners representing the public, competitors and program suppliers have also raised credible concerns regarding the likely harms of this transaction. Given the evidence and the information Applicants have provided, we urge the Commission to deny this merger. In this Reply we offer additional information regarding the likely harms resulting from New Charter's increased incentive and ability to use vertical assets and control over distribution to harm competition and consumers.

II. THE PROPOSED MERGER IS LIKELY TO RESULT IN VERTICAL HARMS THAT EXISTING RULES DO NOT ADEQUATELY ADDRESS

In our Petition, WGAW raised concerns regarding the relationships to major programmers Discovery Communications ("Discovery") and Starz that New Charter will have through John Malone and Advance/Newhouse. We noted that as a result of these relationships,

⁴ Charter Communications, Inc., Response to FCC's Information and Data Request, MB Docket No. 15-149, at 61 (Oct. 16, 2015) ("Charter October 16 Response").

the merger will increase the incentive and ability of New Charter, through entities and individuals that control the largest shares of the company, to use the related programming to disadvantage competing MVPDs and OVDs and to use its expanded control of video distribution to harm unaffiliated programmers. We raised these concerns because Applicants have attempted to portray this merger as merely a combination of distributors with little local service overlap and minimal programming interests. By doing so, Applicants' filings do not fully examine the potential vertical harms of this transaction. While Applicants have continued to make light of the fact that we hold some concerns regarding these vertical relationships, it is evident from prior transactions and the Commission's current line of inquiry in this proceeding that the potential harms of a vertical merger, even if the vertical relationship is indirect, should not be taken lightly.

Applicants have primarily responded by stating that Liberty Broadband and John Malone will have little influence over the operations of New Charter, citing limitations on Liberty Broadband's stake in New Charter. In addition, they have argued that the related programming is not considered the type of marquee programming that the Commission is concerned about and that corporate governance rules and FCC rules will prevent any harms. We respond to these arguments below.

A. Liberty Broadband and John Malone Will Have Meaningful Influence over New Charter

Applicants contend that because Liberty Broadband will only be allowed to vote a maximum of 25.01% of New Charter's shares,⁵ this will limit the influence of Liberty Broadband

⁵ Charter October 16 Response at 105.

and Malone over New Charter. However, in Charter's annual report submitted to the Securities and Exchange Commission ("SEC"), the company discloses the following to shareholders:

Liberty Broadband Corporation owns a significant amount of Charter's common stock, giving it influence over corporate transactions and other matters.

Members of our board of directors include directors who are also officers and directors of our principal stockholder. Dr. John Malone is the Chairman of Liberty Broadband Corporation, and Mr. Greg Maffei is the president and chief executive officer of Liberty Broadband Corporation. As of December 31, 2014, Liberty Broadband Corporation beneficially held approximately 25.75% of our Class A common stock... Liberty Broadband Corporation's substantial influence over our management and affairs could create conflicts of interest if Liberty Broadband Corporation faced decisions that could have different implications for it and us.⁶

Such a disclosure belies the assertions made in this proceeding. According to the SEC filing, Liberty Broadband does not currently hold a meaningfully larger stake in Charter than the voting share it will be allowed in New Charter, and yet Applicants assert that Liberty Broadband and Malone will not have an appreciable influence on New Charter. In addition, in information provided to the Commission, Applicants have stated that Malone and Greg Maffei, CEO of Liberty Broadband and Chairman of the Board of Starz, will join the board of New Charter.⁷

It appears that Malone has exerted influence over Charter's strategy in the past and is likely to do so with New Charter. Malone has been advocating for consolidation in the cable industry since 2013⁸ and Charter has been a primary player in such consolidation attempts. In a recent interview Malone was asked about his plans for the cable industry, to which he responded,

⁶ Charter Communications, Inc., 2014 Annual Report (Form 10-K) at 25 (Feb. 24, 2015), available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjcxNzA2fENoaWxkSUQ9LTF8VHlwZT0z&t=1> (emphasis in original).

⁷ Charter October 16 Response at 107.

⁸ Julia Boorstin, *Liberty Media's Malone seeks cable consolidation*, CNBC (July 11, 2013), <http://www.cnbc.com/id/100879702>.

“I am an investor, I do not control these things, I invest in them. But, I try to coordinate their behavior if I can.”⁹

B. New Charter’s Related Programming Should Be Considered “Marquee”

Applicants also assert that vertical integration concerns are not warranted because the programming controlled by Discovery and Starz is not “marquee programming”¹⁰ that should concern the Commission, citing *Comcast-NBCU*. We disagree with this interpretation. In its review of transactions prior to *Comcast-NBCU*, the Commission identified broadcast stations and regional sports networks (“RSNs”) as programming networks that could be used by a vertically integrated firm to harm competition and thus warranted the imposition of transaction-related conditions to augment existing program access rules.¹¹ Notably, in *Comcast-NBCU*, cable programming networks were categorized along with broadcast stations and RSNs as “marquee programming...without good substitutes for other sources.”¹² The Commission rejected the contention that national programming networks never present a risk of foreclosure, instead noting that “[v]ideo programming has evolved over time—today certain national cable networks produce programming that is more widely viewed and commands higher advertising revenue than certain broadcast or RSN programming.”¹³ As such, for the first time the Commission chose to extend additional protections including commercial arbitration remedies to disputes that

⁹ Vanity Fair, *Chairmen of Discovery and Liberty Media Stay Tuned on Television – Full Conversation*, (Oct. 8, 2015) <http://video.vanityfair.com/watch/chairmen-discovery-liberty-media-stay-tuned-on-television> (“Malone Vanity Fair Interview”).

¹⁰ Opposition at 47 (citing *Comcast-NBCU Order*).

¹¹ Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, *Memorandum Opinion and Order*, MB Docket No. 10-56, 26 FCC Rcd. 4238, 4253, ¶ 35 (2011) (“*Comcast-NBCU Order*”).

¹² *Id.* at 4254, ¶ 36.

¹³ *Id.* at 4258, ¶¶ 45-46.

involve cable networks. The Commission did not further define which cable networks are considered marquee programming, choosing to apply the status to all of Comcast-NBCU's basic cable networks to preclude the merged firm's ability to circumvent protections by shifting content from cable networks defined as marquee to those that are not.¹⁴ There is evidence to indicate that Discovery's suite of programming networks should be considered marquee. In *Liberty Media-DirectTV*, the Commission wrote, "Liberty Media and Discovery each control popular programming networks that create similar nationally distributed and popular content without close substitutes."¹⁵ This was several years prior to the Commission's determination that cable networks qualified as must-have programming in *Comcast-NBCU*. Since the basic cable market has matured, the information WGAW provided in our Petition regarding the popularity of Discovery programming and the Starz network contradicts Applicants' assertion that such programming is not marquee. Commission precedent indicates that there should be a concern with how the popular programming of Discovery and Starz may be used to advantage New Charter and harm competition.

C. The Vertical Harms are not Adequately Mitigated by Corporate Governance Rules or Conditions

Applicants also claim that corporate governance rules such as fiduciary duty responsibilities, as well as limits on the number of directors nominated by Liberty Broadband and independent director review of related-party transactions, will sufficiently protect against any potential vertical harms. However, in Discovery's annual report submitted to the SEC, it

¹⁴ *Id.* at 4260, ¶ 53.

¹⁵ News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control, *Memorandum Opinion and Order*, MB Docket No. 07-18, 23 FCC Rcd. 3265, 3300, ¶ 78 (2008) (internal citations omitted) ("*Liberty Media-DIRECTV Order*").

discloses the following information regarding conflicts of interest relating to the board of directors and the ownership stakes of John Malone and Advance/Newhouse:

We have directors that are also related persons of Advance/Newhouse Programming Partnership (“Advance/Newhouse”) and that overlap with those of the Liberty Entities, which may lead to conflicting interests for those tasked with the fiduciary duties of our board.

Our ten-person board of directors includes three designees of Advance/Newhouse, including Robert J. Miron, who was the Chairman of Advance/Newhouse until December 31, 2010, and Steven A. Miron, the Chief Executive Officer of Advance/Newhouse. In addition, our board of directors includes two persons who are currently members of the board of directors of Liberty Media, three persons who are currently members of the board of directors of Liberty Global and two persons who are currently members of the board of directors of Liberty Interactive, all of which include John C. Malone as Chairman of the boards of those companies. The parent company of Advance/Newhouse and the Liberty entities own interests in a range of media, communications and entertainment businesses.

Advance/Newhouse will elect three directors annually for so long as it owns a specified minimum amount of our Series A convertible preferred stock. The Advance/Newhouse Series A convertible preferred stock, which votes with our common stock on all matters other than the election of directors, represents approximately 25% of the voting power of our outstanding shares. The Series A convertible preferred stock also grants Advance/Newhouse consent rights over a range of our corporate actions, including fundamental changes to our business, the issuance of additional capital stock, mergers and business combinations and certain acquisitions and dispositions.

None of the Liberty Entities own any interest in us. Mr. Malone beneficially owns stock of Liberty Media representing approximately 46% of the aggregate voting power of its outstanding stock, owns shares representing approximately 28% of the aggregate voting power of Liberty Global, shares representing approximately 37% of the aggregate voting power of Liberty Interactive, and shares representing approximately 22% of the aggregate voting power (other than with respect to the election of the common stock directors) of our outstanding stock. Mr. Malone controls approximately 29% of our aggregate voting power relating to the election of our seven common stock directors, assuming that the preferred stock owned by Advance/Newhouse has not been converted into shares of our common stock. Our directors who are also directors of the Liberty Entities own Liberty Media, Liberty Global and/or Liberty Interactive stock and stock incentives and own our stock and stock incentives.

These ownership interests and/or business positions could create, or appear to create, potential conflicts of interest when these individuals are faced with decisions that could have different implications for us, Advance/Newhouse and/or the Liberty Entities. For example, there may be the potential for a conflict of interest when we, on the one hand, or an Advance/Newhouse and/or the Liberty Entity, on the other hand, look at acquisitions and other corporate opportunities that may be suitable for the other.

The members of our board of directors have fiduciary duties to us and our stockholders. Likewise, those persons who serve in similar capacities at Advance/Newhouse or a Liberty Entity have fiduciary duties to those companies. Therefore, such persons may have conflicts of interest or the appearance of conflicts of interest with respect to matters involving or affecting both respective companies, and there can be no assurance that the terms of any transactions will be as favorable to us or our subsidiaries as would be the case in the absence of a conflict of interest.¹⁶

Discovery's annual report also includes the following information regarding the voting power of Malone and Advance/Newhouse:

John C. Malone and Advance/Newhouse each have significant voting power with respect to corporate matters considered by our stockholders.

For corporate matters other than the election of directors, Mr. Malone and Advance/Newhouse each beneficially own shares of our stock representing approximately 22% and 25%, respectively, of the aggregate voting power represented by our outstanding stock. With respect to the election of directors, Mr. Malone controls approximately 29% of the aggregate voting power relating to the election of the seven common stock directors (assuming that the convertible preferred stock owned by Advance/Newhouse (the "A/N Preferred Stock") has not been converted into shares of our common stock). The A/N Preferred Stock carries with it the right to designate three preferred stock directors to our board (subject to certain conditions), but does not vote with respect to the election of the seven common stock directors. Also, under the terms of the A/N Preferred Stock, Advance/Newhouse has special voting rights as to certain enumerated matters, including material amendments to the restated charter and bylaws, fundamental changes in our business, mergers and other business combinations, certain acquisitions and dispositions and future issuances of capital stock. Although there is no stockholder agreement, voting agreement or any similar arrangement between Mr. Malone and Advance/Newhouse, by virtue of their respective

¹⁶ Discovery Communications, Inc., 2014 Annual Report (Form 10-K) at 22-23 (Feb. 19, 2015), available at <https://www.sec.gov/Archives/edgar/data/1437107/000143710715000004/disca-2014123110k.htm> (emphasis in original).

holdings, Mr. Malone and Advance/Newhouse each have significant influence over the outcome of any corporate transaction or other matter submitted to our stockholders.¹⁷

These disclosures indicate that fiduciary duty and corporate governance rules may not be enough to limit the ability of John Malone or Advance/Newhouse from exercising influence over Discovery or New Charter in an anticompetitive manner. This is precisely the finding the Commission made in both *News Corp.-Hughes* and *Liberty Media-DirectTV* and is appropriate in this transaction review. In *News Corp.-Hughes*, the Commission was similarly confronted with proposals to use corporate governance and review of related-party transactions to limit potential vertical harms. Though the proposed merger did not give News Corp. majority control of DirecTV, the Commission still found that independent directors' review of related-party transactions was unlikely to fully address unfair self-dealing, writing, "We therefore discount the likelihood that corporate governance, corporate law or securities laws in general may be relied upon to adequately protect MVPD and video programming competitors from potential anti-competitive vertical foreclosure behavior on the part of Applicants."¹⁸ In discussing the vertical harms of the *Liberty Media-DirectTV* transaction, the Commission noted that Malone had an attributable interest in Discovery and was "well positioned to influence or even direct Discovery's decisions concerning whether or not to sell programming to an unaffiliated MVPD and how to set prices, terms, and conditions of such sales."¹⁹ The instant transaction raises the same concerns. Further, because this transaction combines Charter and Bright House, it will align Malone and Advance/Newhouse's distribution interests. The alignment of the two largest

¹⁷ *Id.* at 24 (emphasis in original).

¹⁸ *News Corp.-Hughes Order*, 19 FCC Rcd. at 520, ¶ 100.

¹⁹ *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3301, ¶ 78.

Discovery shareholders significantly increases the incentive to use Discovery to benefit New Charter.

**D. The Commission's Program Access Rules Will Not Effectively Limit
Anticompetitive Behavior**

Applicants, Starz and Discovery have also noted that the Commission's program access rules govern their behavior and limit any potential harms. However, in prior transactions the Commission has found that program access rules alone do not adequately address the potential harms of vertical integration, including transactions where the vertical relationship is one of minority ownership. In our Petition we outlined the possibility of foreclosure of related programming from competing MVPDs. We urge the Commission to conduct a detailed foreclosure analysis of Discovery and Starz programming. In the approval of prior transactions, where the Commission has found that foreclosure may be profitable, it has chosen to institute additional conditions to protect competition. In addition, while the program access rules prior to 2012 expressly prohibited exclusive contracts, this is no longer the case, leaving New Charter with the ability to foreclose competing MVPDs from affiliated content should such a strategy prove attractive. Further, and of significance given the power of New Charter in the wired broadband market, a vertically integrated MVPD-ISP could withhold programming content from OVDs, which would not violate the program access rules. A vertically integrated MVPD could also discriminate against unaffiliated programming through refusing to carry or placing in a more expensive tier. These issues remain unaddressed and New Charter's ability and incentive to engage in such behavior will increase significantly if this merger is approved.

In prior proceedings the Commission has noted that vertical transactions have been viewed more favorably because, in part, they may not increase concentration in either upstream or downstream markets and they may generate significant efficiencies. However, because this proposed transaction does not actually include the combination of Applicants with the corporate entities that operate the related programming networks, this merger produces none of the efficiencies that cause vertical combinations to be viewed more favorably. Instead, it raises only concerns regarding the anticompetitive effects of the vertical relationships.

III. THE PROPOSED MERGER WILL HARM COMPETITION IN THE BROADBAND MARKET

Our Petition also documented the harm that this transaction poses to competition in high-speed broadband distribution, for which the relevant market for analysis is wired connections of 25 Mbps or higher. At the local level, there is a dearth of competition, leaving consumers and OVDs vulnerable to anticompetitive practices. We also discussed the importance of analyzing the impact of this merger on the national broadband market and documented New Charter's incentive and ability to use control of broadband distribution to harm the development of an OVD market that competes against New Charter's own video services.

Applicants continue to deny that these markets and incentives exist. They repeat claims that they face vigorous competition from telco fiber overbuilders and other providers such as Google Fiber and municipal broadband, as well as from DSL and wireless providers.²⁰ They cite the increase in buildout from these providers to support their characterization of the market as competitive, and maintain that the relevant product market includes both wireless and wired

²⁰ Opposition at 34-39.

broadband.²¹ This depiction of vibrant competition is used to dismiss concerns that New Charter would be inclined or able to take anticompetitive action against OVDs, for instance by cross-subsidizing their MVPD service with profits from broadband.²² The specter of robust future competition is also used to support the claim that the proffered three-year commitments regarding interconnection, consumer pricing and last-mile Open Internet practices are more than sufficient to protect the public interest. Applicants’ economist argues that “broadband competition will limit any anticompetitive conduct in future years....In order to support...high growth in the demand for broadband, ISPs are expected to invest heavily in their networks. New players are expected to emerge and others will grow.”²³

As WGAW and others have documented, this competitive environment is largely fictional, and the level of competition is unlikely to dramatically increase in the foreseeable future. The Commission has recently affirmed that wireless Internet is not an adequate substitute for wired service due to the usage allowances and reliability, among other concerns.²⁴ Given Applicants’ positioning of New Charter as competing to serve video consumers using broadband, wireless broadband could not be considered viable competition. Within wired broadband, the speed and bandwidth requirements for online video viewing indicates that a 25 Mbps market definition is appropriate. As other commenters have noted in this and other proceedings, higher speeds are increasingly essential for online viewing, particularly as the number of broadband-

²¹ *Id.*

²² Opposition at 57.

²³ Declaration of Dr. Fiona Scott-Morton, MB Docket No. 15-149, ¶¶ 133, 134 (Nov. 2, 2015), attached as Exhibit A to Opposition (“Morton Second Declaration”).

²⁴ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry On Immediate Action to Accelerate Deployment, 30 FCC Rcd. 1375, 1379, ¶ 9 (2015).

reliant household devices and the quality of online video continue to rise.²⁵ Netflix suggests a connection speed of 5 Mbps to stream HD video and 25 Mbps for Ultra HD video.²⁶ The need for bandwidth is compounded by, for instance, the average household's multiple televisions streaming video at once, and will be increased further still as 4K streaming becomes more common.²⁷ A broadband market defined by wired, 25 Mbps connections will provide the most accurate representation of the viable distribution options for online video providers. And while there has been a small increase in competition from wired sources in recent years, the scope of the growth suggests that no more than a fraction of New Charter's customers will have real alternatives for high-speed service.

Indeed, Charter reports that just 34.5% of New Charter's service area will have wired, 25 Mbps or greater competition from any source, and just 22.8% will have competition from fiber.²⁸ Further expansion from municipal broadband providers and Google Fiber is unlikely to change this market share significantly given the comparatively tiny footprints of the providers involved.²⁹ Significantly increased competition from telco overbuilders is similarly unlikely, as Verizon has established that it will no longer be expanding the fiber to the home ("FTTH")

²⁵ DISH Network Corporation, Petition to Deny, MB Docket No. 14-57 at 29 (Aug. 25, 2014) ("DISH Petition in Comcast-TWC"); DISH Network Corporation, Petition to Deny, MB Docket No. 15-149 at 45-46 (Oct. 13, 2015) ("DISH Petition").

²⁶ *Internet Connection Speed Recommendations*, Netflix, <https://help.netflix.com/en/node/306> (last accessed Nov. 10, 2015).

²⁷ DISH Petition in Comcast-TWC at 28-29, noting that the average household has 3 TVs.

²⁸ Charter October 16 Response at 61.

²⁹ For instance, Chattanooga, Tennessee's EPB municipal network had fewer than 60,000 households in mid-2014. James O'Toole, *Chattanooga's super-fast publicly owned Internet*, CNN Money (May 20, 2014), <http://money.cnn.com/2014/05/20/technology/innovation/chattanooga-internet/>.

network that it announced in 2005.³⁰ As Free Press notes, aside from the limited deployments of Verizon and AT&T, “We’ve seen little telco FTTH deployment...no incumbent cable company network expansion outside of their existing footprints, nor any meaningful third-party overbuilding.”³¹ The existing level of competition is unlikely to change substantially in the foreseeable future, leaving two-thirds of New Charter’s customers and the OVDs who wish to reach them with no recourse against any anticompetitive action it might take.

Within this context, the level of control that this transaction proposes is profoundly concerning.³² Though New Charter downplays the impact of the transaction by focusing on its “less than 30%” national share of 25 Mbps+ broadband connections, New Charter and Comcast together will create a duopoly, controlling an overwhelming 80 to 90% of the nation’s high-speed broadband connections.³³ These companies will have the ability to steer the development of the market in a direction that protects their services by undermining the development of OVD competition.

As DISH notes, explicit “collusion,” though possible, would be unnecessary given this level of control.³⁴ The two companies would be able to coordinate actions, either in concert or in quick succession, simply by observing each other, for instance through press reporting. Any action to complicate OVD access to one company’s subscriber base, such as anticompetitive pricing (e.g., bundling, usage-based billing) or restricting OVD access to the video interface or

³⁰ Jon Brodtkin, *Verizon nears “the end” of FiOS builds*, Ars Technica (Jan. 23, 2015), <http://arstechnica.com/business/2015/01/verizon-nears-the-end-of-fios-builds/>.

³¹ Free Press, Petition to Deny, MB Docket No. 15-149 at 50-51 (Oct. 13, 2015) (“Free Press Petition”).

³² Petition at 22; DISH Petition at 26, 27, Free Press Petition at 3.

³³ Petition at 22; DISH Petition at 26, 27.

³⁴ DISH Petition at 29.

set-top box could be echoed by the other. This kind of coordinated foreclosure, affecting the vast majority of the nation's high-speed broadband subscribers, would be a dire threat to an OVD competitor.³⁵

DISH cites the DC Circuit Court in pointing out that this type of coordination is particularly nefarious because it is much harder to prevent or control through existing antitrust laws. In this context, it must be a goal of merger policy to prevent the market structures in which such coordination could occur,³⁶ and U.S. antitrust agencies have appropriately challenged mergers in the past that would have created such threatening duopolies.³⁷

Applicants respond that they have “little ability to collude with Comcast,”³⁸ arguing that technological differences in their video interfaces would make collusion impractical, and that there is “no plausible mechanism through which the two firms could collude even if they wanted to.”³⁹ But technological compatibility is not a prerequisite for firms to coordinate in anticompetitive conduct related to pricing, for instance. In addition, even if Comcast and New Charter differ in the technological foundations of their video interfaces, both interfaces control the manner and degree to which OVD content and services are integrated into the respective MVPD service. Both are gatekeeping structures, allowing each company to heavily influence what content is viewed on their systems. Applicants' characterization of the cloud-based Spectrum Guide, a new proprietary navigation interface with content search and recommendation

³⁵ *Id.* at 30.

³⁶ *Id.* at 30-31 (quoting DC Circuit Court in *F.T.C. v. Heinz Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001)).

³⁷ *Id.* at 31 (citing *United States v. H&R Block et al.*, No. 1:11-cv-00948, at 5 (Nov. 10, 2011) and *United States v. Anheuser-Busch InBEV SA/NV et al.*, No. 1:13-cv-00127 (Jan 31, 2013)).

³⁸ Opposition at 70.

³⁹ *Id.* at 71.

functions available to video subscribers, as “relatively easy for entities, including OVDs to design applications for”⁴⁰ does not change the fact that an OVD’s content cannot be accessed through the Spectrum Guide without Charter’s permission.

Moreover, neither of these arguments explains why the two firms would be precluded from observing each other’s behaviors in the marketplace and acting accordingly. For example, following the expiration of Applicants’ proposed three-year commitment not to impose usage-based billing, if Comcast has implemented such pricing practices across its service (as it appears poised to do),⁴¹ there would be nothing to prevent New Charter from following in kind, thereby increasing the price for high-speed broadband service and discouraging OVD usage. Despite the claim that New Charter has no incentive to raise broadband prices in this manner,⁴² it is clear that the combined company would benefit from impeding the use of third-party OVDs as a substitute for New Charter’s own video services.

Applicants’ economist also claims that none of the merging parties have any history of collusion against OVDs.⁴³ However, this ignores the point raised by DISH, that TWC—the largest of the Applicants—joined Comcast in throttling Netflix traffic through interconnection points, successfully raising Netflix’s costs by forcing it to accept paid peering arrangements with

⁴⁰ Opposition at 71.

⁴¹ Karl Bode, *As Florida Caps Go Live, Comcast Still Refuses to Admit They Cap*, DSL Reports (Oct. 1, 2015), <http://www.dslreports.com/shownews/As-Florida-Caps-Go-Live-Comcast-Still-Refuses-to-Admit-They-Cap-135270>; Kate Cox, *Comcast’s Holiday Gift to Subscribers: Data Caps Coming to More Users December 1*, Consumerist (Nov. 4, 2015), <http://consumerist.com/2015/11/04/comcasts-holiday-gift-to-subscribers-data-caps-coming-to-more-users-december-1/>.

⁴² Morton Second Declaration, ¶ 160.

⁴³ *Id.*, ¶ 171.

TWC, Comcast and several other ISPs.⁴⁴ It is clear that coordinated anticompetitive action against third-party OVDs is indeed possible in the current market, and will be even easier if this transaction is approved. Comcast and New Charter will be firmly positioned to define the “new normal” for high-speed broadband services, and to establish market conditions that undermine the attractiveness of unaffiliated OVD services.

A. The Proposed Merger Threatens a Competitive OVD Market

Applicants continue to assert that New Charter will have neither incentive nor ability to harm OVDs individually or through collusion with Comcast. They claim instead that “New Charter will have every incentive to collaborate with OVDs. Foreclosure is the exact opposite of the strategy Charter and the other Applicants have been pursuing, and is the exact opposite of where New Charter’s incentives will point.”⁴⁵ To support this notion, Applicants cite the value of Charter’s broadband business, its history of “support of OVD entry and innovation” in the form of consumer pricing and interconnection policy, its video interface and its differentiation from Comcast regarding pricing practices and content ownership.⁴⁶ Applicants then rely on their time-limited commitment to submit interconnection disputes to the FCC for arbitration, its partial commitment to the Open Internet Order, and the false notion of a competitive marketplace to argue that it would be unable to profitably foreclose OVDs.⁴⁷

⁴⁴ DISH Petition at 29-30.

⁴⁵ Opposition at 16.

⁴⁶ *Id.* at 16-20, 25, 69.

⁴⁷ *Id.* at 53, 54, 56, 57.

i. New Charter Will Have Incentive to Harm OVDs

It has been established by the WGAW⁴⁸ and multiple other commenters⁴⁹ in this proceeding that cable companies, as both MVPDs and ISPs, have incentive to interfere with third-party online video in order to preserve their video revenue. As Free Press notes, the combination of utility-level demand for broadband and the decline in demand for legacy video services create complex pressures on MVPD-ISPs, in which they benefit from the OVD services that promote demand for broadband but are also threatened by the OVD market as a potential alternative for consumers' time and money.⁵⁰ This incentive has been affirmed by the Commission and plainly stated by Commission staff as well as Department of Justice officials in numerous contexts, including those that do not specifically contemplate an MVPD-ISP with major content holdings.⁵¹ Applicants' repetition of the claim that they have no such incentive, separately or as a combined entity, and that New Charter will only benefit from OVD growth does not make it so.

⁴⁸ Petition at 13-14.

⁴⁹ DISH Petition at 47; Free Press Petition at 28.

⁵⁰ Free Press Petition at 28.

⁵¹ DISH Petition at 46 and 47 (citing Prepared Remarks of Bill Baer, Assistant Attorney General Antitrust Division U.S. Department of Justice, Video Competition: Opportunities and Challenges, at 3 (Oct. 9, 2015), *available at* <http://www.justice.gov/opa/file/782401/download>; Preserving the Open Internet, *Report and Order*, 25 FCC Rcd. 17905, 17918 ¶ 22 (2010); Competitive Impact Statement, *United States v. Comcast Corp., General Electric Co., NBC Universal, Inc.*, 1:11-cv-00106, at 11 (D.D.C. Jan. 18, 2011)). *See also* Jonathan Sallet, Federal Communications Commission General Counsel, Remarks as Prepared for Delivery at the Telecommunications Policy Research Conference at 12-13 (Sept. 25, 2015), *available at* <https://www.fcc.gov/document/speech-general-counsel-jon-sallet-lessons-recent-merger-reviews>; Applications of AT&T Inc. and DIRECTV for Content to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, MB Docket No. 10-56, ¶ 205 (2015); and Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, ¶ 140 (2015) ("2015 Open Internet Order").

The incentive to harm online video exists both for cable companies generally, all of which have experienced the maturation of the MVPD market, and for New Charter in particular. MVPDs have been forced to respond to the growth of OVDs and the related increase in demand for location- and time-shifted content. In an attempt to retain customers, MVPDs have begun offering customers access to their programming through online streaming means, often in the form of Internet-delivered applications (“apps”) such as TWC’s TWC TV app, Comcast’s Xfinity TV Go app, and Charter’s Spectrum TV app. Charter notes that post-transaction, “New Charter will develop and launch an integrated, Spectrum-branded application” which will combine features of the existing company apps.⁵² Charter has also joined other MVPDs in responding to competitive pressure from OVDs by launching its own “skinny” cable TV product in October of 2015, known as Spectrum TV Stream. This product will cost \$13.99 to \$20.99 per month, includes broadcast networks and a choice of premium networks, as well as an available add-on of cable channels including ESPN, AMC, FX, TBS and Discovery, and is clearly meant to compete against OVDs such as Sling TV in terms of price and content offered.⁵³ New Charter will have an increased incentive to use its downstream power in broadband distribution to discriminate against OVDs that compete with its various video services in upstream markets.

Spectrum TV Stream, the cloud-based Spectrum Guide and New Charter’s branded app position New Charter to offer an out-of-footprint over-the-top (“OTT”) service that would compete with other national OVDs. WGAW noted in its Petition that this merger forecloses potential future competition between the Applicants as separate companies providing an out-of-

⁵² Charter October 16 Response at 308.

⁵³ Erik Gruenwedel, *Charter Launches \$13 Monthly Streaming TV Service*, Home Media Magazine (Oct. 12, 2015), <http://www.homemediamagazine.com/cable/charter-launches-13-monthly-streaming-tv-service-36833>.

footprint OVD service.⁵⁴ DISH adds that the development of a national OVD service offering would increase New Charter's incentive to interfere with independent OVDs, as such OVDs would then compete with both New Charter's MVPD and OVD offerings and New Charter could gain customers nationwide from a foreclosure strategy, rather than only within its footprint.⁵⁵

ii. New Charter's Ability to Harm OVDs Will Not Be Mitigated By Existing Rules or Proposed Commitments

Applicants' repeated claim that New Charter lacks the ability to interfere with online video is similarly unpersuasive. Applicants' commitments regarding both interconnection and Open Internet practices are narrowly tailored, and the brief time periods offered are insufficient to limit the ability and incentive to harm OVDs. The motivation and pathways for harm will continue to exist in three years and will remain unrestrained because of the lack of broadband competition. As the Commission has explicitly stated, the Open Internet Rules were never meant to be a substitute for competition or antitrust enforcement, and yet that is how New Charter is presenting its commitment to follow a small subset of the existing rules.⁵⁶ Though New Charter offers to refrain from blocking, throttling and paid prioritization, it does not commit to following the "general conduct" rule against unreasonable interference or disadvantage, which Public Knowledge notes was intended to provide the Commission with flexibility to protect the Open Internet against new anticompetitive practices that may emerge.⁵⁷ Applicants are offering to refrain from only a small portion of actions currently identified as harmful, leaving consumers,

⁵⁴ Petition at 35-36.

⁵⁵ DISH Petition at 48-49.

⁵⁶ *2015 Open Internet Order*, ¶ 203.

⁵⁷ Public Knowledge, Common Cause, Consumers Union, and Open Mic, Petition to Deny, MB Docket No. 15-149 at 7 (Oct. 13, 2015) ("Public Knowledge Petition").

edge providers and OVDs unprotected against other known methods of interference as well as those that cannot yet be anticipated.

Commenters in this proceeding have identified a number of mechanisms for interference that would remain available to New Charter despite its minimal commitments. DISH notes that OVD foreclosure, through manipulation of various “choke points,” would be a viable option for the merged entity, particularly absent the protections of the Open Internet’s general conduct and anti-discrimination rules.⁵⁸ DISH also cautions that disputes regarding these pathways are not necessarily quick or simple to resolve, which is particularly threatening to emerging OVDs.⁵⁹ COMPTTEL adds that Applicants’ offered interconnection policy leaves Charter and the future New Charter with fairly significant leeway for interference.⁶⁰

New Charter’s proprietary video interface provides another point of discrimination against and control over OVDs that would not be precluded by any of Applicants’ offered commitments. It also represents a potential strategy for both New Charter and MVPDs generally to regain control over on-demand viewing and keep customers subscribing to the cable bundle. New Charter frames its Spectrum Guide user interface as a benefit of the merger and proof of its incentive to support OVDs, as OVD content “will increasingly sit alongside MVPD offerings” through the interface.⁶¹ However, as noted above, this video interface actually positions New Charter to become an online content gatekeeper. Though Applicants argue that Spectrum Guide

⁵⁸ DISH Petition at 4-5, 58.

⁵⁹ *Id* at 5.

⁶⁰ COMPTTEL, Petition to Deny, MB Docket No. 15-149 at 13-16 (Oct. 13, 2015).

⁶¹ Opposition at 18.

will promote integration of OVD content into New Charter's MVPD service,⁶² New Charter will retain a position of control and leverage over OVDs. An OVD that wishes to reach New Charter's MVPD subscribers through the Spectrum Guide will need to negotiate with the merged entity. New Charter's size and the documented lack of local competition will provide increased ability to use this leverage to protect its own video services. For instance, New Charter could extract anticompetitive terms in exchange for access, or foreclose certain competing OVDs from the Spectrum Guide interface, potentially determining the winners and losers of the OVD market.

In addition, the Spectrum Guide could be used as the type of unified on-demand TV Everywhere product that John Malone has called for the MVPD industry as a whole to adopt in order to compete against OVDs. In a recent interview Malone noted that, if he could coordinate with the rest of the cable industry, "[He] would say, why don't we get together with Comcast and have a common...platform that includes all of our cable stuff and HBO and Starz and Showtime and all the broadcasters, and let's do it off of one technical platform and let's offer that to all the other guys, all our brethren in the cable industry."⁶³ Comcast and other MVPDs could use the cloud-based Spectrum Guide and benefit from coordination in the national market through a product that positions an MVPD interface as the dominant means to access OVD content, and allows MVPDs to increase their control over the development of OVDs.

Pricing practices would also remain an available avenue for discrimination unimpeded by existing rules or Applicants' voluntary commitments. New Charter could make online video a less appealing alternative to MVPD service by lowering the price for MVPD service while

⁶² Charter October 16 Response at 137-138.

⁶³ Malone Vanity Fair Interview.

raising the price for broadband, particularly standalone broadband, thus cross-subsidizing its video service.⁶⁴ Such action would encourage subscribers to continue to purchase New Charter's bundled service and would discourage OVD substitution, while steering the pathway of consumer access to OVDs through the MVPD user interface.

Applicants claim that they would take no such action because the broadband market is highly competitive, and therefore "New Charter will have every incentive to reinvest broadband profits in broadband innovation. Using broadband profits to cross-subsidize video...would make New Charter a less vibrant broadband competitor."⁶⁵ Again, we reiterate that the market is simply not competitive; two-thirds of New Charter's customers will lack an alternative provider for 25 Mbps or higher wired broadband. Beyond this, there is little evidence that New Charter would need to reinvest substantial portions of the broadband profits in order to stay competitive. As Free Press has documented, the amount of capital that cable ISPs invest in the last mile of their networks has been declining for years following the initial capital expenditures of upgrading cable systems to fiber-coaxial cable.⁶⁶ "Deployment of additional capacity is a matter of upgrading the electronics at the end of the wires, which is something that can be done with little incremental investment, but enables substantial additional revenue generation."⁶⁷ In other words, the share of broadband profits New Charter would need to invest in the network to stay competitive is minimal. New Charter could easily raise broadband prices and use some of those profits to subsidize its MVPD service, thereby discouraging customers from cutting the cord.

⁶⁴ Public Knowledge Petition at 17; Free Press Petition at 35-37.

⁶⁵ Opposition at 57.

⁶⁶ Free Press Petition at 41-44; Free Press, Petition to Deny, MB Docket No. 14-57 at 44-45 (Aug. 25, 2014).

⁶⁷ Free Press Petition at 46.

Indeed, a New Street Research analyst has suggested that the industry do just this: increase broadband pricing significantly and lower pay-TV pricing to remove the threat of competition from online video.⁶⁸

New Charter may also use restrictive licensing practices to harm the OVD market, as noted by WGAW, Public Knowledge and DISH. DISH outlines five methods that New Charter could use to limit competing OVDs' access to content, including restricting third-party content providers from licensing their must-have content or other programming to OVDs or from giving OVDs preferential or equal windowing of content.⁶⁹ DISH notes that there is already evidence of this practice within the industry.⁷⁰ Applicants list various market benefits of restrictive contracting provisions such as Most Favored Nation and Alternative Distribution Means clauses as evidence that restrictive licensing is not an anticompetitive concern of the instant transaction.⁷¹ However, as the Commission noted in *Comcast-NBCU*, whether such contractual provisions are by definition anticompetitive is not the key point; the relevant question is whether the transaction gives New Charter “increased ability and incentive to reach such agreements for anticompetitive reasons.”⁷² Because New Charter will have an increased incentive to interfere with the development of online video and indisputably greater bargaining power in negotiations with programmers, these practices should be evaluated as a transaction-specific harm.

⁶⁸ Phillip Dampier, *Wall Street: Broadband is Underpriced – Slap On Caps and Usage Billing to Kill Cord-Cutting, Stop the Cap!* (Oct. 29, 2015), <http://stopthecap.com/2015/10/29/wall-street-broadband-is-underpriced-slap-on-caps-and-usage-billing-to-kill-cord-cutting/>.

⁶⁹ DISH Petition at 64.

⁷⁰ *Id.*

⁷¹ Opposition at 65-67.

⁷² *Comcast-NBCU Order*, 26 FCC Rcd. at 4267, ¶ 73, note 157.

IV. CONCLUSION

Under the Commission's public interest standard Applicants bear the burden of demonstrating, by a preponderance of evidence, that the proposed transaction will serve the public interest.⁷³ Instead, information provided by Applicants suggests that this merger is likely to significantly increase both the ability and incentive of New Charter to harm competition, particularly in the online video market. WGAW and other petitioners have outlined how this merger will reduce competition in the national broadband market and will transfer the programming connections of Charter to a company four times larger, raising significant concerns regarding how such programming may be used to disadvantage rivals and harm the OVD market. On balance, the merger as proposed does not serve the public interest and we urge the Commission to deny the transaction.

Respectfully submitted,

/s/

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/s/

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⁷³ See *Comcast-NBCU Order*, 26 FCC Rcd. at 4341, ¶ 251; *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3276-3277, ¶ 22; *AT&T-DirectTV Order*, ¶ 18; *News Corp.-Hughes*, 19 FCC Rcd. at 610, ¶¶ 316, 317.

DECLARATION

I, Ellen Stutzman, declare under penalty of perjury that:

1. I have read the foregoing “Reply Comments of Writers Guild of America, West, Inc.”
2. I am the Senior Director of Research & Public Policy for the Writers Guild of America, West (WGAW), a labor organization representing writers of feature films, television series and online video programs, who, to the best of my knowledge and belief will be adversely affected if the Commission approves the merger.
3. WGAW members create a majority of the original scripted television programming distributed by Applicants through their MVPD service as well as original series available online through OVDs, who rely on Applicants to reach viewers.
4. In my best knowledge and belief, WGAW members will be directly and adversely affected if the Commission allows the proposed merger of Charter and Time Warner Cable and Bright House Networks to proceed. They will face fewer creative and economic opportunities if this merger is approved.
5. The allegations of fact contained in the petition are true to the best of my personal knowledge and belief.

/s/

Ellen Stutzman
Senior Director of Research & Public Policy
Writers Guild of America, West Inc.

CERTIFICATE OF SERVICE

I, Laura Blum-Smith, Senior Research & Policy Analyst for the Writers Guild of America, West, Inc., certify on this 12th day of November, 2015, I caused true and correct copies of the foregoing reply comments to be served via electronic mail on the following parties listed below:

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