

Markham C. Erickson  
202 429 8032  
merickson@steptoe.com

**Steptoe**  
STEPTOE & JOHNSON LLP

1330 Connecticut Avenue, NW  
Washington, DC 20036-1795  
202 429 3000 main  
www.steptoe.com

**REDACTED – FOR PUBLIC INSPECTION**

October 13, 2015

*BY ECFS*

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

**Re: Applications of Charter Communications, Inc., Time Warner Cable Inc., and  
Advance/Newhouse Partnership for Consent to Assign or Transfer Control of  
Licenses and Authorizations, MB Docket No. 15-149**

Dear Ms. Dortch:

In accordance with the *Protective Order* in the above-captioned proceeding,<sup>1</sup> COMPTTEL hereby submits the attached public, redacted version of its Petition to Deny. COMPTTEL has denoted with “**{{BEGIN HCI END HCI}}**” symbols where Highly Confidential Information has been redacted. The designated Highly Confidential Information in the Reply was taken from or derived from Highly Confidential Information in the Applicants’ filings. A Highly Confidential version of this Petition is being simultaneously filed with the Commission and will be made available pursuant to the terms of the *Protective Order*.

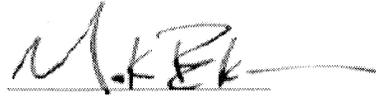
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<sup>1</sup> Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 15-149, Protective Order, DA 15-110 (Sept. 11, 2015) (“*Protective Order*”).

Marlene H. Dortch  
October 13, 2015  
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Please contact me with any questions.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. C. Erickson', with a horizontal line extending to the right.

Markham C. Erickson  
*Counsel for COMPTEL*

Enclosure

**REDACTED - FOR PUBLIC INSPECTION**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**PETITION TO DENY OF COMPTEL**

Markham C. Erickson  
Andrew W. Guhr  
Andrew Golodny  
**STEPTOE & JOHNSON LLP**  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 429-3000

Angie Kronenberg  
Karen Reidy  
**COMPTEL**  
1200 G Street N.W.  
Suite 350  
Washington, D.C. 20005  
(202) 296-6650

*Counsel for COMPTEL*

October 13, 2015

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**Before the  
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**PETITION TO DENY OF COMPTTEL**<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The United States is at a communications crossroads. At the very time when demand for broadband service is greater than it has ever been and the importance of access to broadband service has become undeniable, most consumers still lack meaningful options among high-speed broadband providers. Unfortunately, the proposed combination (“Transaction”) of Charter Communications, Inc. (“Charter”) Time Warner Cable, Inc. (“TWC”), and Advance/Newhouse

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<sup>1</sup> As the preeminent national industry association for competitive communications networks and service providers, COMPTTEL represents wireline and wireless providers in the broadband marketplace. Such providers include, for example, companies providing fiber-to-the-home as the third residential wireline provider in their communities in competition to the incumbent cable provider and the telephone company. In addition, COMPTTEL has among its membership companies that focus on the business broadband marketplace and offer services to small businesses, medium and large enterprises with multi-locations, as well as schools, libraries, and local, state, and federal government agencies, including services to public safety offices. COMPTTEL also represents companies that provide residential and business wireless services, transit providers that carry broadband and Internet traffic, and online video distributors (“OVDs”) that offer video programming over broadband Internet access services to consumers. Each of these members provides and/or relies on broadband capability, and the Commission’s role in encouraging broadband deployment and protecting and promoting broadband competition is key to ensuring that residential and business customers will have options for their broadband provider and for the services they may choose to take over those broadband connections.

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Partnership (“Bright House”) (collectively, “Applicants”)<sup>2</sup> represents retrenchment—not competition—and would serve as a significant new barrier to expanded future broadband competition.

In the face of the Federal Communications Commission’s (“Commission”) efforts to promote broadband adoption and availability, Applicants surprisingly do not provide an analysis of the proposed merger’s effect on broadband competition. In particular, Applicants neglect to analyze the well-understood, intertwined markets for linear video programming and broadband services. Consequently, Applicants have failed to meet their burden of demonstrating that the Transaction is in the public interest, and for this reason the Commission must deny the Application.<sup>3</sup> Further, while Charter’s new peering policy is a step in the right direction for addressing its new market power and ability to slow OVD competition, it needs to widely implement that policy and address several concerns with it. In addition, Charter should be required to abide by that commitment as a condition to the Transaction for seven years.

## II. STANDARD OF REVIEW

Pursuant to Section 310(d) of the Communications Act of 1934, the Commission must determine whether the proposed Transaction would serve “the public interest, convenience, and necessity.”<sup>4</sup> This review requires the Commission to evaluate whether the Transaction could

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<sup>2</sup> Applications of Charter Commc’ns, Inc., Time Warner Cable Inc., and Advance/Newhouse P’ship For Consent to the Transfer of Control Of Licenses and Authorizations, Public Interest Statement, MB Docket No. 15-149 (June 25, 2015) (“Application”).

<sup>3</sup> This Petition reflects the position of a majority of COMPTTEL members. Individual members may file separate comments in which they advocate positions on some issues that are different from those stated in this Petition to Deny. Some members do not join in these comments.

<sup>4</sup> 47 U.S.C. § 310(d); *Applications of Comcast Corp., Gen. Elec. Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4247 ¶ 22 (2011) (“Comcast-NBCU Order”).

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result in public interest harms by frustrating or impairing the objectives or implementation of the Act or related statutes, and whether the Transaction complies with specific applicable laws and regulations.<sup>5</sup> If the Transaction is consistent with the Act and its comprehensive objectives, the Commission also must assess whether the Transaction would enhance competition in an analysis informed by traditional antitrust principles and its broader public interest mandate. Applicants bear the burden of proving affirmatively that the Transaction would serve the public interest, convenience, and necessity and would be beneficial to competition. If for any reason the Commission is unable to find that the proposed Transaction serves the public interest or if the record presents a substantial and material question of fact, the Commission must designate the Application for hearing.<sup>6</sup>

The “broad aims of the Communications Act,”<sup>7</sup> which the Commission’s public interest determination must encompass, include a “deeply rooted preference for preserving and

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<sup>5</sup> See *Applications for Consent to the Transfer of Control of Licenses, XM Satellite Radio Holdings Inc., Transferor, to Sirius Satellite Radio Inc., Transferee, Memorandum Opinion and Order and Report and Order*, 23 FCC Rcd. 12348, 12363-64 ¶ 30 (2008) (“*Sirius-XM Order*”); *News Corp. and DIRECTV Group, Inc. and Liberty Media Corp. for Authority to Transfer Control, Memorandum Opinion and Order*, 23 FCC Rcd. 3265, 3276 ¶ 22 (2008) (“*Liberty Media-DIRECTV Order*”); *SBC Commc’ns Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order*, 20 FCC Rcd. 18290, 18300 ¶ 16 (2005).

<sup>6</sup> 47 U.S.C. § 309(e); see also *Sirius-XM Order*, 23 FCC Rcd. at 12363-64 ¶ 30; *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3277 ¶ 22; *Gen. Motors Corp. and Hughes Elecs. Corp., and The News Corp. Ltd., Memorandum Opinion and Order*, 19 FCC Rcd 473, 483 n. 49 (2004); *Application of EchoStar Commc’ns Corp., Gen. Motors Corp., and Hughes Elecs. Corp. and EchoStar Commc’ns Corp., Hearing Designation Order*, 17 FCC Rcd. 20559, 20574 ¶ 25 (2002).

<sup>7</sup> *Comcast-NBCU Order*, 26 FCC Rcd. at 4248 ¶ 23; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp., Memorandum and Order*, 15 FCC Rcd. 9816, 9822 ¶ 11 (2000).

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enhancing competition in relevant markets, accelerating private-sector deployment of advanced services, [and] ensuring a diversity of information sources and services to the public.”<sup>8</sup>

Key to this proceeding, moreover, is the mandate to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing in a manner consistent with the public interest . . . methods that remove barriers to investment” and “by promoting competition in the telecommunications market.”<sup>9</sup> In addition, and critical to an analysis of this Transaction, the Commission also must determine “whether a transaction will *enhance*, rather than merely preserve, existing competition.”<sup>10</sup>

### III. CONSUMERS LACK COMPETITIVE OPTIONS FOR BROADBAND SERVICE

Congress has tasked the Commission with promoting broadband deployment and competition.<sup>11</sup> The benefits of more broadband options are clear. To start with, competition promotes consumer welfare, drives innovation, and incentivizes further investment. Competition provides consumers the benefits of choice, better service, and lower prices.<sup>12</sup> Today, however, a

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<sup>8</sup> 47 U.S.C. § 521(4); *see also* 47 U.S.C. § 532(a); *Comcast-NBCU Order*, 26 FCC Rcd. at 4248 ¶ 23; Jon Sallet, General Counsel, FCC, *FCC Transaction Review: Competition and the Public Interest*, FCC BLOG (Aug. 12, 2014), <https://www.fcc.gov/blog/fcc-transaction-review-competition-and-public-interest>.

<sup>9</sup> Telecommunications Act of 1996 § 706(a), (b); 47 U.S.C. § 1302(a), (b).

<sup>10</sup> *See id.* The Commission also has noted that it must “be *convinced* that [a transaction] will enhance competition” to find that a merger is in the public interest. *Applications of Ameritech and SBC Commc’ns for Consent to Transfer of Control of Licenses and Authorizations, Memorandum Opinion and Order*, 14 FCC Rcd. 14712, 14738 ¶ 49 (1999) (emphasis added) (citing *Applications of NYNEX Corp., Transferor, and Bell Atl. Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, Memorandum Opinion and Order*, 12 FCC Rcd. 19985, 19987 ¶ 2 (1997)).

<sup>11</sup> 47 U.S.C. § 1302(a).

<sup>12</sup> FCC, *Connecting America: National Broadband Plan for America* 36 (Mar. 17, 2010), <https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf> (“*National Broadband Plan*”).

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majority of consumers have access to only one broadband provider offering speeds of 25 Mbps—the baseline speed for broadband services that are supported by the Commission.<sup>13</sup> Even at the lower speed of 10 Mbps, a majority of consumers have access to only one alternative provider.<sup>14</sup> This lack of competition lessens the incentive for broadband providers to deliver high-speed, high-quality services.

Not surprisingly, Chairman Wheeler has emphasized that broadband deployment remains a Commission priority:

It's pedal to the metal on broadband policy—for both consumers and competitors. Expanding broadband requires better network technology. It requires more competition. It requires that companies continue to invest to satisfy consumer demands for bigger, better, and more broadband. It requires that broadband providers not be able to limit competition in broadband-dependent markets.<sup>15</sup>

To achieve this goal, the Commission has recognized the importance of “removing barriers to investment and lowering the costs of broadband build-out.”<sup>16</sup>

**IV. THE TRANSACTION WOULD HARM BROADBAND DEPLOYMENT AND COMPETITION AND ADD A NEW BARRIER TO BROADBAND INVESTMENT**

**A. New Charter Would Have Increased Market Power as a Buyer of Video Programming**

The proposed merger would result in a substantial consolidation of the market for bundled broadband and video programming services, giving the combined entity (“New

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<sup>13</sup> Memorandum from William T. Lake, Media Bureau, FCC, to Marlene H. Dortch, Secretary, FCC, at Exhibit 3d, MB Docket No. 14-57 (Dec. 9, 2014).

<sup>14</sup> *Id.*

<sup>15</sup> Tom Wheeler, Chairman, FCC, Prepared Remarks at The Brookings Institution (June 26, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-334141A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-334141A1.pdf).

<sup>16</sup> Hearing on Oversight of the Fed. Commc’ns Comm’n: Before the Subcomm. on Comm’cns and Tech. Comm. on Energy and Commerce, 114 Cong. 4 (2014) (statement of FCC Chairman Tom Wheeler).

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Charter”) more bargaining power to elicit favorable terms from programmers and creating a substantial barrier to future broadband investment and competition.

New Charter would negotiate programming and content purchases for a combined 17.3 million video customers.<sup>17</sup> As such, the Transaction would result in New Charter becoming the second largest cable Multichannel Video Programming Distributor (“MVPD”) in the United States after Comcast.

Applicants passingly state that the “[t]ransaction is unlikely to materially enhance New Charter’s bargaining power in negotiations for video programming as compared to Time Warner Cable.”<sup>18</sup> This is both unlikely and irrelevant. Comparing New Charter to existing Charter is a more appropriate metric of the increase in bargaining power enjoyed by New Charter than comparing New Charter to TWC. According to Applicants’ own expert, New Charter would have a 304% increase in subscriber count for video services.<sup>19</sup> This increase represents the combined New Charter having 17.3 million video subscribers, up from Charter’s current 4.3 million—a difference of 13 million subscribers.<sup>20</sup> In addition, it is likely that even relative to TWC’s existing purchasing power, New Charter’s additional market power would result in cost

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<sup>17</sup> Public Interest Statement concerning the Merger of Charter, Bright House, and Time Warner Cable, Fiona Scott Morton, MB Docket No. 15-149, ¶ 7, Table 1 (June 24, 2015) (attached as Exhibit D to Application) (“Exhibit D”).

<sup>18</sup> Application at 57.

<sup>19</sup> Exhibit D, ¶ 7, Table 1.

<sup>20</sup> *Id.*

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savings for video programming, as the combined entity would represent 18% of all video programming subscribers, compared to TWC's existing 12% of subscribers.<sup>21</sup>

It is well understood, and the Commission previously has found, that an MVPD's bargaining power relative to video programmers is a function of the number of the MVPD's subscribers.<sup>22</sup> Further, Applicants have admitted that New Charter expects to realize **{{BEGIN HCI      END HCI}}** million by the third year in savings on programming costs by operating as a combined entity.<sup>23</sup> Whatever its consequences for other markets, New Charter's greater bargaining power in programming negotiations due to the proposed Transaction would undermine broadband competition, as explained below.

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<sup>21</sup> The percentages were calculated using numbers from: (1) Exhibit D, ¶ 7, Table 1; and (2) Leichtman Research Group, Inc., Research Notes 2Q 2015 (June 2015), [http://www.leichtmanresearch.com/research/notes06\\_2015.pdf](http://www.leichtmanresearch.com/research/notes06_2015.pdf).

<sup>22</sup> Applications of AT&T, Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations, Public Interest Statement, MB Docket No. 14-90, at 23-24 (June 11, 2014) ("U-verse video service lacks, and cannot achieve, the critical scale and value necessary for AT&T to negotiate for programming at costs that are competitive with Comcast and T[WC]."); *see also* *DIRECTV Sports Net Pittsburgh, LLC v. Armstrong Utils., Inc.*, CSR-8480-P, *Memorandum Opinion and Order*, FCC 14-73, ¶¶ 5, 19 (rel. July 16, 2014) ("[T]he more subscribers [an] MVPD serves, the lower the [programming] rate . . ."); *Applications for Consent to the Transfer of Control of Licenses Adelphia Commc'ns Corp., (and Subsidiaries, Debtors-in-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees Adelphia Commc'ns Corp., (and Subsidiaries, Debtor-in-Possession), Assignors and Transferors, to Comcast Corp. (Subsidiaries), Assignees and Transferees Comcast Corp., Transferor, to Time Warner Inc., Transferee, Time Warner Inc., Transferor, to Comcast Corp., Transferee, Memorandum Opinion and Order*, 21 FCC Rcd. 8203, 8236 ¶ 65 (2006) ("*Adelphia Order*") (stating that substantial discounts are negotiated based on the number of MVPD subscribers).

<sup>23</sup> Letter from John L. Flynn, Counsel for Charter, to Marlene H. Dortch, FCC, MB Docket No. 15-149, at 2 (July 10, 2015); Exhibit D, ¶ 23 ("[I]f New Charter can lower its programming costs for current Charter subscribers by purchasing all of its programming under TWC's terms, it will reduce New Charter's marginal cost per video subscriber."). Notably, New Charter has made no commitment to pass through to consumers the savings it anticipates from lower programming costs.

**B. Video Programming Costs Directly Relate to the Ability to Invest in Broadband Infrastructure**

To be competitive in the residential broadband marketplace, competitive wireline providers must offer broadband and linear video services. The Commission has long recognized that residential consumers continue to prefer to purchase both broadband and linear video services together in a bundled product.<sup>24</sup> As such, competitive networks must provide competitive linear video services—not just broadband services—to compete head-to-head with other wireline providers in the residential marketplace and to achieve higher broadband adoption rates by consumers.

As the Commission is well aware, obtaining the rights to provide video content is critical to offering linear video;<sup>25</sup> however, content costs continue to rise significantly. In recent comments on the state of competition in the MVPD marketplace,<sup>26</sup> for example, ACA submitted a research paper entitled “High and Increasing Video Programming Fees Threaten Broadband Deployment” (“ACA Research Paper”).<sup>27</sup> The ACA Research Paper stated that “[o]ver the last eight years, total programming fees for the US multichannel video industry have more than

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<sup>24</sup> See, e.g., *National Broadband Plan*, at 38. Indeed, “[w]hen smaller carriers are able to offer video and broadband services together, data shows that broadband adoption increases by 24 percent.” COMPTTEL, ITTA, NTCA letter to Chairman Thune on Video Reform, at 1, June 22, 2015, <http://www.ntca.org/images/stories/Documents/videohearingletter.pdf>.

<sup>25</sup> See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Sixteenth Report*, 30 FCC Rcd. 3253, at 3271 ¶ 39 (2015).

<sup>26</sup> See Public Notice, Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming, DA 15-784 (rel. July 2, 2015).

<sup>27</sup> American Cable Ass’n, High and Increasing Video Programming Fees Threaten Broadband Deployment Research Paper, MB Docket No. 15-158 (Aug. 21, 2015) (attached to American Cable Ass’n, Comments, MB Docket No. 15-158 (Aug. 21, 2015) (“ACA Research Paper”).

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doubled.”<sup>28</sup> Moreover, “[o]n an annual basis, per subscriber programming fees have increased an average of 9.4% a year between 2010 and 2015.”<sup>29</sup> For smaller MVPDs, the paper noted that an increase in fees has been even greater—10.6%—even excluding regional sports networks and retransmission consent fees.<sup>30</sup> Likewise, ATVA recently noted that retransmission consent fees grew 8,600% between 2005 and 2012.<sup>31</sup> It was recently reported that SNL Kagan released data showing that “the average amount paid per pay-TV subscriber for broadcast retransmission has increased 40 percent just in the last year.”<sup>32</sup> This same report notes that “[b]roadcast stations are, of course, looking to sustain these quickening fee increases.”<sup>33</sup>

The ACA Research Paper also predicted that “[p]rogramming fees will continue to grow rapidly in the future.”<sup>34</sup> It found that due to the increase in programming fees, the business case for new broadband deployment will be “less tenable” for rural expansion, new fiber

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<sup>28</sup> *Id.* at 5.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Letter from Mike Chappell, American Television Alliance, to Marlene Dortch, FCC, MB Docket No. 10-71, at 2 (July 17, 2015) (*citing* Broadcast Investor Deals & Finance: Retrans projections update: \$10.3B by 2021, SNL Kagan, June 30, 2015).

<sup>32</sup> Daniel Frankel, *Nexstar Makes \$4.1b Hostile Bid For Media General As Broadcast Consolidation Binge Kicks Into Overdrive*, FIERCECABLE (Sept. 28, 2015), <http://www.Fiercecable.Com/Story/Nexstar-Makes-41b-Hostile-Bid-Media-General-Broadcast-Consolidation-Binge-K/2015-09-28>.

<sup>33</sup> *Id.*

<sup>34</sup> ACA Research Paper at 5; *see also* *U.S. TV Station Owners’ Retransmission Fees Expected to Reach \$10.3 Billion by 2021, Versus the Projected Level of \$6.3 Billion this Year*, PRWEB (July 7, 2015), <http://www.prweb.com/releases/2015/07/prweb12829757.htm> (*citing* SNL Kagan estimates that TV broadcasters’ retransmission consent fees will reach \$10.3 billion by 2021 compared to the projected level of \$6.3 billion in 2015).

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deployments, and incumbent telco deployments in the near future.<sup>35</sup> This prediction already has become reality for COMPTEL's members. They offer linear video service at a loss, which necessarily impacts their ability to expand and upgrade their broadband networks. They are providing video simply to complete the bundle and support the provision of competitive broadband services.

Accordingly, for most competitive service providers, the increasingly high cost of video programming is a principal barrier to broadband investment. To win customers and support the investment in their existing and future networks, broadband providers today must offer subscribers access to linear video programming. Despite the attention that "cord-cutting" generates in the press, video cord-cutters represent a miniscule segment of the video viewing population.<sup>36</sup> Consumers today overwhelmingly demand that broadband providers also offer a multichannel video programming service. Even when the baseline for high-speed Internet was 200 kbps (or 0.2 Mbps, compared to 25 Mbps today), the Commission found that "broadband deployment and video entry are 'inextricably linked.'"<sup>37</sup>

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<sup>35</sup> ACA Research Paper at 9.

<sup>36</sup> See Tim Mullaney, *Cord-cutters: Why It's Apple's New Key Demographic*, CNBC (Mar. 17, 2015), <http://www.cnbc.com/2015/03/17/why-apples-newest-key-market-is-cord-cutters.html> (reporting that only 7.3% of households have cut the pay-TV cord).

<sup>37</sup> *Implementation of Section 621(a)(1) of the Cable Commc 'ns Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd. 5101, 5126 ¶ 51 (2006); *id.* at 5132 ¶ 62 ("The record here indicates that a provider's ability to offer video service and to deploy broadband networks are linked intrinsically, and the federal goals of enhanced cable competition and rapid broadband deployment are interrelated."). This link is even more pronounced today. For example, last summer, FCC Chairman Tom Wheeler wrote to the CEO of Time Warner Cable to inquire about the high price it was charging MVPDs to carry the SportsNet LA regional sports network, adding that he was "concerned about the negative impact that this dispute may have on the growth of broadband services in the Los Angeles area." Letter from Tom Wheeler, Chairman, FCC, to Robert D. Marcus, Chairman and CEO, Time Warner Cable, Inc. (July 29,

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The connection between video programming and broadband services make ever-rising programming costs a key impediment to widespread broadband investment, entry, and deployment.<sup>38</sup> Without having to supply video at a loss, COMPTEL members would have additional capital to invest in broadband infrastructure—building out their networks to more communities and providing competition to large broadband Internet access providers.<sup>39</sup>

New Charter’s increased scale as a purchaser of programming will strengthen its bargaining position over the existing footprints of Charter, TWC, and Bright House and enable it to negotiate significantly better prices than are made available to smaller MVPDs.<sup>40</sup> As the

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2014), [http://www.broadcastingcable.com/sites/default/files/public/Wheeler%20ltr%20to%20TWC%20re%20SportsNet%20LA%20\(7%2029%2014\).pdf](http://www.broadcastingcable.com/sites/default/files/public/Wheeler%20ltr%20to%20TWC%20re%20SportsNet%20LA%20(7%2029%2014).pdf).

<sup>38</sup> See Am. Cable Ass’n, Comments, GN Docket No. 14-126, at 2-9, 17 (Mar. 6, 2015); Am. Cable Ass’n, Reply Comments, GN Docket No. 14-126, at 24 (Apr. 6, 2015) (“Because of the harm to consumers and competition, high and increasing video programming fees have been a concern of the Commission’s for years, and it has initiated proceedings to consider how it might address this concern. . . . The [attached] ACA Video Study lends credence that the harm is tangible and immediate.”); Am. Cable Ass’n, Comments, MB Docket No. 14-16, at 4 (Mar. 21, 2014) (“[H]igher carriage fees . . . mean less money available for [smaller MVPs] to invest in their networks to deploy higher speed broadband to consumers in their existing footprint, and to edge out to deploy broadband in unserved areas.”).

<sup>39</sup> See Declaration of Mark Scully, *US Telecom v. FCC*, Case No. 15-1063, ¶¶ 7-8 (May 22, 2015) (attached as Exhibit 2 to Opposition of Intervenors to Petitioners’ Motion for Stay, *US Telecom v. FCC*, Case No. 15-1063 (May 22, 2015)) (“While . . . traditional large ILECs . . . are able to negotiate significant discounts from video programmers, we are required to pay whatever price the large programmers demand. ComSpan currently sells video services at a loss, simply so that we can maintain the complementary voice and data service subscriptions. . . . Without having to provide video at a loss, we could further invest in our broadband infrastructure.”).

<sup>40</sup> Cf. Exhibit D, ¶ 23 (“[I]f New Charter can lower its programming costs for current Charter subscribers by purchasing all of its programming under TWC’s terms, it will reduce New Charter’s marginal cost per video subscriber.”).

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Commission has acknowledged, the more subscribers an MVPD serves, the more favorable the rates, terms and conditions it is able to negotiate for programming.<sup>41</sup>

**C. Applicants Fail to Meet their Burden of Proof that this Transaction Will Not Substantially Harm Competition**

Because Applicants make no effort to analyze the increased bargaining power New Charter would obtain as a result of the merger, they also offer no analysis on its impact on broadband competition. Instead, Applicants offer the strange and unsubstantiated notion that the broadband marketplace is dynamic and competitive.<sup>42</sup> They make the added unsubstantiated claim that New Charter would face significant competition from competitive broadband providers—while simultaneously admitting that almost two out of every three subscribers in New Charter’s territory would not have access to another provider offering speeds of 25 Mbps or higher.<sup>43</sup> But even if their characterization of the market today were correct and well-documented, it would not be enough to carry the burden of proof under the Communications Act.

The crucial issue for determining whether the Transaction would be in the public interest is whether New Charter would face substantial competition *in the future*. If New Charter were to face “dynamic” broadband competition, it would come from the competitive community that COMPTTEL represents. The feedback from COMPTTEL’s membership, however, is that New Charter’s cost advantage for video programming would make irrational any thought of investing in broadband to compete against the new firm. Absent a demonstration by Applicants that the

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<sup>41</sup> *DIRECTV Sports Net Pittsburgh, LLC v. Armstrong Utils., Inc.*, CSR-8480-P, Memorandum Opinion and Order, FCC 14-73, ¶¶ 5, 19 (rel. July 16, 2014); *Adelphia Order* at ¶ 65 (stating that substantial discounts are negotiated based on the number of MVPD subscribers).

<sup>42</sup> See Application at 60-61 (“The broadband marketplace is especially dynamic . . . . New Charter faces robust and rapidly increasing competition throughout its service territory.”).

<sup>43</sup> See *id.* at 60 (“[M]ore than one in three households in the New Charter footprint already has access to at least one wireline alternative . . . offering download speeds of 25 Mbps or faster.”).

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Transaction can be undertaken without causing this significant harm to competition, the Application must be denied.

**V. CHARTER’S NEW INTERCONNECTION POLICY IS A STEP IN THE RIGHT DIRECTION, BUT IT HAS YET TO BE WIDELY IMPLEMENTED, ITS DURATION IS TOO SHORT, AND MODIFICATIONS ARE NECESSARY**

Earlier this year, Charter represented to the Commission that it had updated its peering policy, focusing on ensuring its customers would receive the Internet service they paid for rather than being used as leverage against edge providers, and to that end, providing for the exchange of Internet traffic with other networks on a settlement-free basis.<sup>44</sup> Charter asserted that this Policy would “further ensure that approval of the Transaction is in the public interest.”<sup>45</sup> At its existing size, Charter has not had the scale to demand payments from edge providers or others for access to its users. Charter’s promotion of the fact that it has never demanded payment for interconnection, or attempted to degrade its interconnection capacities, is not so much evidence of benign intent as the reality of its pre-merger market power. Nevertheless, Charter’s commitment to a bill-and-keep style interconnection policy was a welcome development that garnered considerable attention and resulted in public statements of support from key stakeholders, including from COMPTTEL and some of its members.<sup>46</sup>

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<sup>44</sup> Charter Communications, Inc., IP Interconnection Policy and Requirements, <https://www.charter.com/browse/content/peering> (“Policy”).

<sup>45</sup> Letter from Samuel L. Feder, Counsel for Charter, to Marlene H. Dortch, FCC, MB Docket No. 15-149, at 1 (July 15, 2015).

<sup>46</sup> Letter from Angie Kronenberg, COMPTTEL, to Marlene H. Dortch, FCC, MB Docket No. 14-90, at 1 (July 21, 2015); COMPTTEL, Press Release: Charter’s Peering Policy Move Good News for Open Internet, Over-the-Top Growth (July 15, 2015), [http://www.comptel.org/Files/filings/2015/7-15-15\\_Charters\\_Peering\\_Policy\\_Move\\_Open%20Internet\\_Over-the-Top\\_Growth.pdf](http://www.comptel.org/Files/filings/2015/7-15-15_Charters_Peering_Policy_Move_Open%20Internet_Over-the-Top_Growth.pdf); Letter from Christopher D. Libertelli, Netflix, Inc., to Marlene H. Dortch, FCC, MB Docket No. 15-149, at 1 (July 15, 2015); Letter from Robert N. Beury Jr., Cogent, to Marlene H. Dortch, FCC, MB Docket No. 15-149, at 1 (July 15, 2015).

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Nevertheless, New Charter will have the incentive and ability, with exclusive gatekeeper power over access to close to 20 million broadband subscribers, to use interconnection to slow the development of video competition by OVDs.<sup>47</sup> Consequently, if the merger were to be approved, the Commission should condition such approval on New Charter's implementation of its Policy. Such condition should extend for seven years from the approval date, rather than the three years contemplated in the existing Policy.<sup>48</sup> Given that consumers are increasingly using OVD services, but only a small percentage has cut the video cord, it is important that the Commission allow sufficient time for OVD competition to further develop, while holding New Charter to its new peering Policy commitment for a full seven years from closing.

Further, it is COMPTTEL's understanding that Charter has not widely implemented the new Policy. In fact, parties seeking to interconnect with Charter have learned that Charter's implementation of the Policy is not straightforward. Those discussions have revealed several significant flaws in the Policy that also must be addressed; otherwise, the policy will not be effective in addressing New Charter's market power. These flaws are:

*Trial Period.* The Policy allows Charter, at its sole discretion, to require a company seeking interconnection under it to first participate in a "trial."<sup>49</sup> This is a non-standard clause that potentially allows Charter to refuse to interconnect with any entity it chooses, because there are no specified criteria as to how a company would pass the trial. There is no indication how

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<sup>47</sup> To ensure that coordination has not begun among Applicants and other remaining large Internet Service Providers ("ISPs"), the Commission should request from Charter, Comcast, AT&T, TWC, and Bright House Networks all correspondence regarding Charter's new peering policy.

<sup>48</sup> See Letter from Samuel L. Feder, Counsel for Charter, to Marlene H. Dortch, FCC, MB Docket No. 15-147, at 1 (July 15, 2015).

<sup>49</sup> See Policy § I ("Charter may require a trial connection with any party seeking interconnection under this policy.").

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long the trial could last. And, it appears that even existing peering partners could be required to submit to a trial to take advantage of the Policy.

*Interconnection Locations.* The Policy lists nine locations where Charter would require peering partners to connect.<sup>50</sup> It allows Charter to unilaterally demand additional interconnection locations at any other geographical location of Charter's choosing. Nine locations are sufficient to allow Charter to benefit from its requirement that interconnecting parties "deliver traffic to the Charter POP closest to the location at which the corresponding Internet customer traffic terminates," which is what Charter's Policy is meant to effectuate.<sup>51</sup> That is not to say that it would be unreasonable for Charter to wish to add additional interconnection locations or replace existing locations. However, any new location should be mutually agreed upon, rather than unilaterally imposed by Charter.

*Augmentation Provision.* Charter's Policy contains an augmentation provision, which states:

In the event there is an increase in the maximum data transfer rate into or out of Charter's network of more than 5.9% per month over a rolling 12-month period ("Peak"), Charter and the interconnecting party agree to upgrade interconnection capacity within 90 days after Peak, if Peak is sustained for a time period greater than 10 days and has surpassed 70% of a circuit's port capacity.<sup>52</sup>

This provision appears to permit Charter to allow its ports to congest for a full year before it adds capacity. In most interconnection agreements, the timeframe for addressing congestion is days,

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<sup>50</sup> *Id.* § I.1.

<sup>51</sup> *Id.* § I.2.

<sup>52</sup> *Id.* § I: Network Planning and Augmenting Capacity.

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not months. There is no reasonable basis to require congestion to persist for a year before any augmentation threshold is triggered.

In addition, there is no reason for the 5.9% threshold. The pertinent question is whether the ports are above a reasonable threshold of utilization. Charter seems to acknowledge that 70% is a reasonable threshold, and that should be all that is required to trigger augmentation.

Also, this Policy should encompass new networks that could be added by either Charter or an interconnecting party. The Policy as drafted does not require Charter to migrate ports reasonably to maintain adequate interconnection or to promote efficient interconnection; it also could be read to provide Charter an excuse to discontinue augmentation or cease interconnection with an interconnection partner that acquires another company.

*Suspension Policy.* It is reasonable for Charter to wish to protect the security of its network. Its suspension policy, however, conflates Internet traffic volume with network security.<sup>53</sup> Natural growth in the use of the Internet by Charter's subscribers does not represent a "Critical Network Threat."

Moreover, a 5.9% growth rate in traffic or 10% higher "peak" do not necessarily represent extraordinary—much less unreasonable—amount of growth. A single customer moving from one transit provider to another could cause a traffic shift like this. There is no justification for suspending the Policy in such an event.

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<sup>53</sup> *Id.* § I: Suspension.

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**VI. CONCLUSION**

Applicants have failed to conduct the basic analysis required to show that the proposed Transaction would not harm competition in the broadband market. The Commission's recent interest in promoting broadband access depends critically on ensuring that consolidation by large MVPDs and ISPs does not result in creating new barriers for competitive carriers to invest and compete against incumbent providers. As proposed, therefore, this Application must be denied.

Respectfully submitted,

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/s/

Markham C. Erickson  
Andrew W. Guhr  
Andrew Golodny  
**STEPTOE & JOHNSON LLP**  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(202) 429-3000

Angie Kronenberg  
Karen Reidy  
**COMPTEL**  
1200 G Street N.W.  
Suite 350  
Washington, D.C. 20005  
(202) 296-6650

*Counsel for COMPTEL*

October 13, 2015

**CERTIFICATE OF SERVICE**

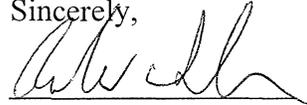
I, Andrew W. Guhr, hereby certify that on October 13, 2015, I caused true and correct copies of the foregoing to be served by first class mail upon the following counsel:

Matthew A. Brill  
Latham & Watkins LLP  
555 11th Street, NW  
Suite 1000  
Washington, DC 20004  
matthew.brill@lw.com

John L. Flynn  
Jenner & Block LLP  
1099 New York Avenue, NW  
Suite 900  
Washington, DC 20001  
jflynn@jenner.com

Steven J. Horvitz  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, NW  
Suite 800  
Washington, DC 20006  
stevehorvitz@dwt.com

Sincerely,



Andrew W. Guhr