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November 2, 2015

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VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **MB Docket No. 15-149**
Charter Communications Response to FCC's Information and Data Request

Dear Ms. Dortch:

Enclosed please find the public version of the Applicants' Opposition to Petitions to Deny and Response to Comments in connection with the applications in the above-referenced proceeding. Consistent with the instructions in the Protective Order, the Highly Confidential version is being hand-filed under separate cover, and copies are being provided to the Media Bureau.

Please let me know if you have any questions.

Sincerely,

/s/ John L. Flynn

John L. Flynn

Enclosures

cc: V. Lemmé

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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

OPPOSITION TO PETITIONS TO DENY AND RESPONSE TO COMMENTS

November 2, 2015

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INTRODUCTION AND EXECUTIVE SUMMARY

This Transaction¹ will deliver a pro-broadband, pro-consumer, pro-OVD communications platform. While some commenters criticize different aspects of the Transaction, almost all of them seek conditions rather than outright denial, thus recognizing that at bottom this Transaction is in the public interest.

As explained in the Applicants' Public Interest Statement, the merger of Charter, Time Warner Cable, and Bright House Networks will yield significant benefits. Leveraging increased scale and the strengths of each company, New Charter will improve and expand broadband service, offer consumers advanced video options, and broaden the footprint of Charter's industry-leading commitment to an open Internet. New Charter will also bring jobs back to the United States, embrace Time Warner Cable's widely acclaimed commitment to diversity, and improve broadband access in low-income communities. New Charter will do all of this without any reduction in competition or other public-interest harm.

Transaction-specific efficiencies: The Transaction will deliver efficiencies totaling hundreds of millions of dollars. New Charter will pass these efficiencies along to consumers in the form of more competitive subscriber fees and increased investment. Commenters provide no persuasive reason to discount the value of these benefits. Nor do they provide any persuasive reason why reductions in programming costs are anticompetitive. As the Commission

¹ The Transaction consists of two mergers, one between Charter Communications, Inc., ("Charter") and Time Warner Cable Inc. ("Time Warner Cable"), and another between Charter and Bright House Networks. Charter, Time Warner Cable, and Bright House Networks's parent, Advance/Newhouse Partnership (Advance/Newhouse), are the "Applicants." The Transaction is described in more detail in the Applicants' Public Interest Statement. *See Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to the Transfer of Control of Licenses and Authorizations*, Public Interest Statement, MB Docket No. 15-149, at 1, 7-16 (July 25, 2015) ("*Public Interest Statement*").

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recognized in *AT&T-DirecTV*, programming cost reductions are likely to be “passed through to subscribers” and to support broadband investment, and thus constitute public interest benefits.²

Expanding consumer-friendly broadband policies: The Transaction will enable New Charter to enshrine its consumer-friendly broadband policies throughout the Applicants’ combined footprints. While stakeholders have expressed concerns about broadband providers’ using potentially anticompetitive tools such as data caps to thwart OVD competition, New Charter has committed to refrain from such practices, and it also maintains industry-leading interconnection policies and charges no cable modem rental fees.

Supporting OVD entry and innovation: The Transaction will enable New Charter to be a better platform for Online Video Distributors (“OVDs”) than any of the Applicants would be on its own. New Charter’s fast broadband speeds and Open Internet commitments will ensure that its broadband subscribers will have unparalleled access to OVD services. Charter’s settlement-free interconnection policy goes well beyond the interconnection conditions imposed in *AT&T-DirecTV*. That Netflix and Cogent (among others) support the Transaction is therefore unsurprising. New Charter will have strong incentives to facilitate OVD growth: New Charter’s broadband business, which enjoys growth and much higher gross margins than in its video service, depends on the success of OVDs. New Charter will in fact embrace OVDs’ success by integrating OVD content into Charter’s Spectrum Guide interface. Particularly against this background, commenters’ fears that New Charter will foreclose OVDs—either on its own or in concert with Comcast—are unfounded. Moreover, no commenter disputes Dr. Scott Morton’s

² *Applications of AT&T Inc. and DirecTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd 9131, 9243 ¶¶ 290-291 (2015) (“*AT&T-DirecTV Order*”).

conclusion that the Transaction will meaningfully increase the incentives to invest in technological improvements.

Increasing competition: Thanks to New Charter's broadened footprint and increased regional density, as well as its \$2.5 billion commitment to expanded commercial build-out, the Transaction will heighten competition among providers of enterprise services. Businesses with multiple locations will find that New Charter serves more of those locations than any of the Applicants does individually. AT&T's purported concerns about New Charter's provision of enterprise services—coming right on the heels of the Commission's approval of its merger with DirecTV—appear related to AT&T's own competitive position, rather than any harm to competition.

New Charter's commitment to perform one million line extensions over the next four years will similarly increase competition in the residential market. And its commitment to deploy at least 300,000 new out-of-home WiFi Access Points will drive competition among providers of wireless voice and data services. Contrary to some commenters' claims, deployment of access points on this scale would be unlikely without the Transaction.

Enhancing customer service by investing in New Charter's workforce: New Charter will improve customer service by in-sourcing more jobs and investing in workforce training, providing yet another public interest benefit in an industry that has been criticized on this score.

Absence of vertical harms: The Transaction will not cause harms that some associate with the vertical integration of distribution infrastructure and programming content. In sharp contrast to the proposed Comcast-Time Warner Cable transaction, this transaction involves hardly any national programming content, and no commenters claim harm associated with the programming that the Applicants *do* control. Instead, commenters focus on programming

associated with John Malone. As a threshold matter, New Charter has no incentive to favor this content. Further, as explained below in Dr. Salop’s detailed quantitative analysis, Dr. Malone will lack the *incentive* to restrict access to the programming in question or to prevent New Charter from carrying other programmers’ content. Equally importantly, he will not have the *ability* to exert any such influence. His interest in New Charter will be indirect, through a separate publicly traded company in which he has an interest, Liberty Broadband, which itself own no content. Governance structures further insure that any Board of Directors decisions about programming will be made by independent directors.

Absence of horizontal harms: The Transaction will not cause harms associated with horizontal integration either. Unlike parties to a horizontal merger, the Applicants do not compete with each other now, and their merger will not reduce competition in any way. While commenters offer theories in which the increased scale of New Charter could enable it to harm OVDs, programmers, or equipment manufacturers, economic analysis shows that New Charter will lack the incentive and the ability to harm any of these entities. Some parties further argue that New Charter’s horizontal integration will raise the specter of a “collusive duopoly” with Comcast. But as Dr. Scott Morton’s analysis demonstrates, such collusion theories are wholly implausible.

Absence of any other harm: Finally, commenters fail to show any other harm resulting from the Transaction. For instance, New Charter’s increased scale will not harm the set-top box business, nor will it cause harm in connection with the provision of cable modems. Charter CPE policies are among the most pro-competition in the industry (*e.g.*, Worldbox). Nor do commenters provide any credible reason to question New Charter’s debt level. Commenters are also incorrect that the Transaction will have adverse effects on diversity, service to low-income

households. Quite the contrary, New Charter has committed to implement Time Warner Cable's commitment to diversity and inclusion and dramatically increase the number of low-income households that have access to a low-cost broadband offering. Finally, New Charter will maintain strong relationships with PEG programmers across the country.

I. THE TRANSACTION SERVES THE PUBLIC INTEREST, AND CHALLENGES TO ITS BENEFITS ARE MERITLESS.

We provided a detailed explanation of the public interest benefits produced by this Transaction in our Public Interest Statement.³ A wide range of commenters recognizes those benefits and supports the Transaction.⁴ The significant benefits demonstrated by the Applicants and the lack of harm strongly support the approval of the Transaction.

A. The Transaction Will Increase Broadband Competition and Accelerate Broadband Innovation.

By enabling investment in broadband infrastructure and technology, and by continuing and expanding the Applicants' consumer-friendly policies (*e.g.*, no data caps or usage-based

³ See *Public Interest Statement* and accompanying exhibits.

⁴ See, *e.g.*, RFD-TV Comments (Oct. 13, 2015); Letter from Christopher D. Libertelli, Vice President – Global Public Policy, Netflix Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (July 15, 2015); Hispanic Leadership Alliance Comments (Aug. 28, 2015); California Black Chamber of Commerce Comments (Aug. 14, 2015); Governor John Hickenlooper Comments (Aug. 28, 2015); National Conference of State Legislatures Comments (Oct. 2, 2015); Mexican American Opportunity Fund Comments (Aug. 18, 2015); Boys and Girls Clubs of the Greater Chippewa Valley Comments (Aug. 27, 2015); Chamber of Reno, Sparks, Northern Nevada Comments (Oct. 16, 2015); City Scholars Foundation Comments (Oct. 13, 2015); Connected Nation Comments (Oct. 13, 2015); Florida Chamber of Commerce Comments (Aug. 17, 2015); Lexington Medical Center Foundation Comments (Sept. 11, 2015); Lieutenant Governor Peter Kinder Comments (Aug. 21, 2015); Los Angeles Opportunities Industrialization Center Comments (Oct. 13, 2015); Planting the Seed Foundation Comments (Aug. 28, 2015); Rochester Institute of Technology Comments (Oct. 1, 2015); San Gabriel Valley Economic Partnership Comments (July 22, 2015); Senator Rick Gunn Comments (Sept. 17, 2015); Senator Bob Huff Comments (Aug. 25, 2015); Senator Paul Wieland Comments (Oct. 19, 2015); Walla Walla Public Schools Comments (Sept. 3, 2015). Unless otherwise noted, all citations to comments, letters, or petitions refer to documents filed in MB Docket 15-149.

billing and high minimum speeds) across the merged New Charter footprint, the Transaction will improve broadband service and promote broadband competition for residential and business customers throughout the nation.

Infrastructure and Technology. The Transaction will increase New Charter’s ability and incentive to develop and deploy advanced broadband technology more successfully than any Applicant could on its own. As the Commission held in its Order approving the AT&T-DirecTV merger, increased deployment of advanced broadband technology reliably has a “positive effect on competition.”⁵ Here, within four years of the Transaction’s close, we will build out one million line extensions of our networks to homes in our franchise areas. We will also invest at least \$2.5 billion in building out our broadband networks into commercial areas within our footprint. And we will transition Time Warner Cable and Bright House Networks’s systems to all-digital networks within 30 months of the Transaction’s close.⁶ Due to their capital intensity, the size and speed of these investments will be feasible only if the Transaction is completed.⁷

In addition to increasing the sheer number of broadband passings, these commitments will also increase broadband speeds for hundreds of thousands of consumers. Currently, Charter

⁵ *AT&T-DirecTV Order*, 30 FCC Rcd at 9265 ¶ 345 (noting that AT&T’s upgrade plans would have positive effects on broadband competition); see also *Applications of Comcast Corp., Gen. Elec. Co., & NBCUniversal, Inc., for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4248 ¶ 23 (2011) (“*Comcast-NBCU Order*”) (noting that “accelerat[ed] private-sector deployment of advanced services” supports a finding of a transaction’s public-interestedness).

⁶ It is possible that systems serving fewer than 1% of homes may not be taken all-digital due to the challenges in interconnecting to the remaining New Charter network.

⁷ See Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 287-288 (Oct. 13, 2015). Such commitments to invest greater resources are transaction-specific public interest benefits. See *Applications of SoftBank Corp., Starburst II, Inc., Sprint Nextel Corp., and Clearwire Corp. for Consent to Transfer Control of Licenses and Authorizations; Petitions for Reconsideration of Applications of Clearwire Corp. for Pro Forma Transfer of Control*, Memorandum Opinion and Order, Declaratory Ruling, and Order on Reconsideration, 28 FCC Rcd 9642, 9682 ¶ 102 (2013).

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offers 60+ Mbps downstream broadband to nearly 100% of its customers. In contrast, Time Warner Cable's most popular speed is currently 15 Mbps downstream.⁸ While Time Warner Cable is in the process of upgrading many of its service areas, the basic service tier across its footprint (particularly in more rural areas) would not reach the 60 Mbps level in the foreseeable future absent this Transaction and the Applicants' commitment to make 60 Mbps the minimum tier almost everywhere within 30 months.⁹ The Transaction will thus be a boon to users of data-hungry applications such as video and gaming, and will encourage new consumers to utilize speed-dependent broadband uses going forward. No opponent disputes our ability to deliver these benefits swiftly and comprehensively.

Also undisputed is Dr. Scott Morton's conclusion that New Charter will have increased incentives to invest in improvements to broadband infrastructure and technology.¹⁰ Because "more fixed cost investments will be undertaken as the number of subscribers, or scale, increases" across the merged firms, New Charter's research and development efforts will continually outpace the efforts the Applicants could undertake absent the Transaction.¹¹ New

⁸ See *Public Interest Statement* at 21 n.51.

⁹ See *id.* at 19. While Time Warner Cable offers its "Maxx" service in certain areas, Stop the Cap errs in arguing that the program is more beneficial to subscribers than Charter's commitment to roll out 60 Mbps Internet speeds throughout its footprint. Time Warner Cable has only partially rolled out Maxx, and the baseline Maxx service is 50Mbps, while its most widely deployed speed tier remains 15 Mbps. Charter will offer 60 Mbps and continue offering the Maxx top speed of 300 Mbps.

¹⁰ See Declaration of Dr. Fiona Scott Morton, Theodore Nierenberg Professor of Economics at the Yale School of Management and Senior Consultant at Charles River Associates ¶ 199 (Nov. 2, 2015) ("Second Dr. Scott Morton Decl.") (attached as Exhibit A). Free Press's indirect challenge to this point—the suggestion that "cable companies (Verizon and FiOS too) can turn up their speeds at will," Free Press Petition to Deny at 12 (Oct. 13, 2015)—is incorrect. Charter has invested [billions] over three years to upgrade its network and provide faster speeds to its customers, and its incentives to invest more as New Charter will increase as a result of the Transaction.

¹¹ See Second Dr. Scott Morton Decl. ¶ 199.

Charter’s increased ability and incentive to innovate will apply to any fixed-cost investment—whether data centers, customer premise equipment, software, WiFi technology, or an as-yet-unforeseen technology that will bring untold broadband benefits.¹² Indeed, Dr. Scott Morton documents numerous areas of potential innovation where Time Warner Cable’s existing scale has prevented it from investigating, including “Home as a Hot Spot” technology, “Internet of Things” services, and cloud-based video guide technology.¹³ Charter too has recognized areas where lack of resources or scale has delayed the deployment of new technologies, including [BEGIN HIGHLY CONFIDENTIAL INFORMATION]

[END HIGHLY CONFIDENTIAL INFORMATION] New Charter is more likely to blaze a path of technological progress in these areas than any of the Applicants on their own.

Open Internet. The Transaction will also lead to the continuation and expansion of New Charter’s consumer-and OVD-friendly Open Internet policies and policies across the Applicants’ footprints. As discussed in our Public Interest Statement, New Charter will not block or throttle Internet traffic or engage in paid prioritization, regardless of the outcome of the litigation over the *Open Internet Order*.¹⁶ Nor will New Charter charge consumers additional fees to use third-

¹² See *id.* ¶¶ 200-206 (discussing customer premise equipment, software, and WiFi, and explaining fixed-cost incentives generally).

¹³ See *id.* ¶ 207.

¹⁴ See *id.* ¶ 208; Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 308 (Oct. 13, 2015).

¹⁵ See *id.* at 308-309.

¹⁶ See *Public Interest Statement* at 18-19; Declaration of Mr. Christopher L. Winfrey, Chief Financial Officer and Executive Vice President of Charter ¶¶ 38, 40 (June 24, 2015) (“Winfrey

party applications, engage in zero-rating, or impose data caps.¹⁷ Charter has also committed to a settlement-free interconnection policy that facilitates the ability of edge providers to have robust and frictionless access to Charter customers.¹⁸ These commitments go well beyond the conditions the Commission imposed in *AT&T-DirectTV*—conditions the Commission found would address “any potential for anticompetitive activity by the combined entity in its interconnection practices” and “any increased incentive AT&T will have to use [usage-based billing] practices to hinder the development of third-party OVDs.”¹⁹

A wide range of stakeholders has lauded the Applicants’ commitments. For example, Netflix, which vehemently opposed Comcast’s proposed acquisition of Time Warner Cable, is unequivocal in its support:

Charter’s interconnection policy is the right way to scale the Internet. It means consumers will receive the fast connection speeds they expect. The Charter/TWC transaction, with this condition, would deliver significant public interest benefits to broadband consumers, and we urge its timely approval.²⁰

Likewise, Cogent—a leading Internet backbone provider—states that Charter’s policy is a “significant public interest benefit of the merger,” both because of its effects on New Charter

Decl.”). The Commission’s *Open Internet Order—Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601, 5666-69 ¶¶ 151-153 (2015) (“*Open Internet Order*”)—is on appeal before the Court of Appeals for the D.C. Circuit, see *U.S. Telecom Ass’n v. FCC* (D.C. Cir.), No. 15-1063.

¹⁷ See Winfrey Decl. ¶ 41; *AT&T-DirectTV Order*, 30 FCC Rcd at 9278, ¶ 395.

¹⁸ See Letter from Samuel L. Feder to Marlene H. Dortch, Secretary, FCC, at 1 (July 15, 2015) (committing to a settlement-free interconnection policy through December 31, 2018).

¹⁹ *AT&T-DirectTV Order*, 30 FCC Rcd at 9214, 9278 ¶¶ 218, 395.

²⁰ Letter from Christopher D. Libertelli, Vice President – Global Public Policy, Netflix Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (July 15, 2015).

subscribers' Internet experience, and also because of the example New Charter will set for the industry.²¹

Multiple industry organizations have also praised the Applicants' Open Internet commitments. The Open Technology Institute ("OTI"), for instance, states that the Applicants "deserve credit for taking unprecedented steps"—including interconnection terms that go "farther than anything to which Time Warner Cable, AT&T, or Comcast has been willing to publicly commit."²² And even INCOMPAS,²³ which has expressed some concerns with the Transaction (discussed below),²⁴ recognizes that Charter's policy "promotes consumer access and choice of over-the-top content" and is a "welcome development" in the marketplace.²⁵

Approving the Transaction will expand the reach of Charter's policies almost four-fold, bringing the attendant benefits to edge content providers serving millions of consumers across the combined footprint and generating increased competition. As Reed Hastings, Netflix's CEO, has stated, "The key thing about the Charter deal is it's all Internet companies that benefit—us, Hulu, Amazon, HBO Now—so that we can all compete for consumers' affection."²⁶ That competition among edge providers will fuel demand for broadband services, which will further

²¹ Letter from Robert N. Beury Jr., Chief Legal Officer, Cogent Communications, Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (July 15, 2015).

²² New America's Open Technology Institute Comments at 5 (Oct. 13, 2015) ("OTI Comments").

²³ INCOMPAS is the new name of the organization formerly known as COMPTTEL. See John Eggerton, *COMPTTEL Changes Name To INCOMPAS*, *Broadcasting & Cable* (Oct. 19, 2015), <http://www.broadcastingcable.com/news/washington/comptel-changes-name-incompas/145088>.

²⁴ We note that not all INCOMPAS members joined in INCOMPAS's Petition to Deny. See COMPTTEL Petition to Deny at 2 n.3. (Oct. 13, 2015).

²⁵ *Id.* at 13; Press Release, *COMPTTEL: Charter's Peering Policy Move Good News for Open Internet, Over-the-Top Growth*, at 1 (July 15, 2015).

²⁶ Emily Steel, *Netflix Posts Mixed Results, but New Memberships Surge*, *N.Y. Times* (July 15, 2015), http://www.nytimes.com/2015/07/16/business/media/netflix-q2-earnings-charter-time-warner-bright-house.html?_r=0.

enable New Charter to invest in advanced broadband deployment, thereby “promot[ing] the virtuous circle of innovation that has characterized the Internet since its inception.”²⁷

While some commenters express concern with aspects of New Charter’s commitments, we believe those concerns are misplaced, and thus clarify our commitments as explained below.

Interconnection Policy Trial Period. INCOMPAS and Level 3 express concern that New Charter’s policy regarding “trial” interconnection will enable us to refuse to interconnect with any entity we choose.²⁸ The period contemplated by this policy is designed to ensure that new partners in fact meet the technical criteria of the policy, which ensures that New Charter customers do not experience disruptions resulting from harmful network events caused by new interconnection partners. To clarify its scope, we will apply the trial period only to parties with whom we have not interconnected in the past.

Exclusivity. OTI states that New Charter should not enter into exclusive arrangements that require interconnecting parties to send all of their traffic directly to New Charter, rather than routing their traffic through alternate routes if they choose to do so.²⁹ There is nothing in the policy that requires exclusivity; parties merely must meet their per-POP minimum traffic.

Eligibility. OTI and Level 3 request that New Charter’s interconnection policy extend beyond large, established edge providers and transit companies.³⁰ New Charter’s interconnection policy is open to all entities that meet the policy’s criteria. Moreover, Charter currently interconnects (on a settlement-free basis) with a number of parties that do not meet the

²⁷ Letter from Robert N. Beury Jr., Chief Legal Officer, Cogent Communications, Inc., to Marlene H. Dortch, Secretary, FCC, at 1 (July 15, 2015).

²⁸ See COMPTTEL Petition to Deny at 14-15; Letter from Joseph C. Cavender, Vice President & Assistant General Counsel—Federal Affairs, Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, at 2 (Oct. 20, 2015) (“Cavender Letter”).

²⁹ See OTI Comments at 5.

³⁰ See OTI Comments at 5-6; Cavender Letter at 2.

technical criteria of the new interconnection policy, and New Charter will continue to do so. New Charter will engage in good faith negotiations to interconnect with any entity that wishes to do so.

Scope of Traffic Exchange. Level 3 states that New Charter’s policy should explicitly cover all Internet traffic, including CDN traffic.³¹ That was our intent, and we clarify that the policy covers all Internet traffic.

Nondiscrimination. Level 3 also asks that New Charter’s policy should prohibit either interconnection partner from discriminating against interconnection traffic in any way based on origin, destination, or content of traffic.³² That was our intent, and we clarify that New Charter will not discriminate against any interconnection partner or any traffic that meets the qualifications laid out in our policy.

Duration. INCOMPAS, OTI, and Level 3 argue that the terms of New Charter’s settlement-free interconnection commitment ought to extend beyond three years.³³ Similarly, other commenters seek extension of additional commitments for as much as seven years. While we understand their desire for even more regulatory safeguards, our commitments already go far beyond conditions the Commission imposed on AT&T (with its 16 million Internet subscribers), which the Commission deemed adequate to prevent any anticompetitive behavior.³⁴ New Charter’s network is core to its business and is ever changing to meet the dynamic needs of the marketplace and competition. Three years represents a significant time commitment given the rapid changes in our industry and the level of importance of the network to New Charter’s

³¹ *See id.*

³² *See id.*

³³ *See* COMPTTEL Petition to Deny at 14; OTI Comments at 5; Cavender Letter at 2.

³⁴ *AT&T-DirectTV Order*, 30 FCC Rcd at 9290-9293, App’x B, §§ IV-V.

business and future. Because it is impossible to predict what new technologies will alter current practices in the future, New Charter needs to maintain some flexibility to change and adapt. Further, as Dr. Scott Morton notes, three years are more than sufficient to ensure that market conditions mature to make concerns about OVD foreclosure obsolete.³⁵

Interconnection Locations. INCOMPAS and Level 3 state that new interconnection locations should be mutually agreed upon by New Charter and our partners.³⁶ While we understand their desire for flexibility, our policy's interconnection location requirements address expansion to the former Time Warner Cable and Bright House Networks territories and allow for the addition of POPs where Time Warner Cable and Bright House Networks exist. Ensuring that Internet traffic is brought close to all of our customers will improve network performance and the customers' experience.

Augmentation. INCOMPAS's and Level 3's concern over the length of time the policy allows for augmentation is misplaced.³⁷ Our policy calls for regular meetings between the interconnecting parties to make sure the parties are planning ahead for augmentation and management of the network, which will minimize instances in which augmentation is needed quickly to address increases in traffic. In addition, because we will start augmenting our capacity when ports reach 70% utilization at peak, the typical augmentation process will start before notable congestion occurs. Finally, augmentation will typically be complete within 90 days, assuming any third parties perform their work within this timeframe, as well.

³⁵ See Second Dr. Scott Morton Decl. ¶ 132.

³⁶ See COMPTTEL Petition to Deny at 15; Cavender Letter at 2.

³⁷ See COMPTTEL Petition to Deny at 15-16; Cavender Letter at 2.

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INCOMPAS and Level 3 also suggest that our policy should encompass new networks and corporate subsidiaries.³⁸ We clarify that all of our interconnection agreements will be applicable not only to our interconnection partners, but also to any subsidiaries in which we have an ownership interest of greater than 50%.

Suspension. INCOMPAS and Level 3 argue that a 5.9% compound growth rate in peak traffic over a rolling six-month period, or a 10% higher peak compared to the prior peak, do not represent extraordinary growth, and ought not trigger suspension of the policy.³⁹ We respectfully disagree. A 5.9% monthly compounded traffic growth is approximately equivalent to a doubling of traffic in a 12 month period. A 10% higher peak would be equivalent to a rate of increase that would be a doubling of traffic in about 7 months. We established this threshold based on the largest growth we have ever experienced and added some additional headroom. If growth beyond this threshold were to happen, it would negatively impact our customers and our ability to provide reliable service. We note, however, that so long as the parties meet and plan together as contemplated by our policy, spikes of this nature should not occur.

Transparency. OTI argues that the Commission ought to require public disclosure of New Charter's interconnection agreements, capacity, and utilization.⁴⁰ The agreements are confidential business arrangements between Charter and the interconnection partner. The agreements can contain information that is unique to each party's network and network practices. Disclosing such practices and characteristics could put Charter and/or the interconnecting partner in a compromising position from a competitive, vendor relationship, and security perspectives.

³⁸ See COMPTTEL Petition to Deny at 16; Cavender Letter at 2.

³⁹ See COMPTTEL Petition to Deny at 16; Cavender Letter at 2.

⁴⁰ See OTI Comments at 6.

At root, we intend to have New Charter serve as a reliable, industry-leading interconnection partner. The aforementioned clarifications to our plans for the extension of Charter’s settlement-free interconnection policy serve as evidence of our good faith in this endeavor.

B. The Transaction Will Better Enable New Charter to Support OVD Entry and Innovation.

New Charter will be a better platform for OVDs than any of the Applicants would offer on their own, contrary to the contentions of some opponents. As Dr. Scott Morton explains, OVDs have unfettered access to broadband subscribers and New Charter’s fast broadband speeds are ideally suited to streaming video. And for OVDs that seek business partnerships with broadband providers offering video, New Charter will be an optimal choice. As Dr. Scott Morton has noted, a valuable partner for an OVD “has three characteristics: a modern technology platform, incentives to promote the OVD, and scale.”⁴¹ “On each of these dimensions,” she concludes, “New Charter will be a better partner for OVDs than any of Charter, TWC, or BHN as a standalone company.”⁴² No opponent disputes that New Charter’s scale will benefit interested OVDs by simplifying their system-integration activities.⁴³ Nor has any opponent disputed that Charter possesses industry-leading technical expertise to support OVD integration. And while opponents allege that our incentives will lead us to foreclose OVDs, an accurate analysis reveals the opposite. In Dr. Scott Morton’s words, “New Charter has strong

⁴¹ See Second Dr. Scott Morton Decl. ¶ 27.

⁴² *Id.*

⁴³ Arguments that New Charter’s increased scale will allow it to harm OVDs through interconnection, which are incorrect, are discussed below.

financial incentives to make sure high-quality OVD services are easily accessible to consumers in order to attract profitable broadband subscribers.”⁴⁴

Incentives. Contrary to the assertions of some opponents, 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. That is because growth in broadband subscribership will be the leading driver of top-line and bottom-line growth for New Charter, and OVD services are a “major driving force” of broadband subscriber growth. OVDs also increasingly complement New Charter video subscribers’ viewing experiences.⁴⁵ Applicants’ broadband subscribers already exceed their video subscribers by roughly 2.6 million.⁴⁶ And, “the tilt of subscribers towards broadband,” Dr. Scott Morton notes, “is likely to continue into the future.”⁴⁷

New Charter’s broadband interests also will outweigh its MVPD interests. Broadband subscriptions are growing while MVPD subscriptions are stagnant, and the Applicants’ average gross margins for broadband are **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** higher than those for video service.⁴⁸ These incentives make foreclosure economically irrational. Dr. Scott Morton estimates that New Charter would need to add or maintain more than ten MVPD

⁴⁴ *Id.* ¶ 221.

⁴⁵ See Second Dr. Scott Morton Decl. ¶¶ 78, 103-105. For instance, Netflix has spent significant capital to acquire licenses to Disney content. See Shirley Pelts, *Netflix’s Deal with Disney for Original Content*, Yahoo! Finance (Aug. 24, 2015), <http://finance.yahoo.com/news/netflix-deal-disney-original-content-130655793.html>. See Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 94-95 (Oct. 13, 2015).

⁴⁶ See Declaration of Dr. Fiona Scott Morton, Theodore Nierenberg Professor of Economics at the Yale School of Management and Senior Consultant at Charles River Associates, ¶ 40 (June 24, 2015).

⁴⁷ *Id.*

⁴⁸ See Second Dr. Scott Morton Decl. ¶ 101, tbl. 5.

subscribers for every one OVD subscriber that left New Charter in response to the foreclosure.⁴⁹

As Dr. Scott Morton explains, this ratio is unlikely to obtain under any plausible set of circumstances.⁵⁰ Accordingly, even if there *were* a tradeoff between supporting OVDs and earning MVPD revenues—a fallacy we refute in detail below—New Charter’s broadband interests will lead it to support OVDs.⁵¹

OVDs’ growing importance buttresses their centrality to New Charter’s broadband strategy. OVDs have surged in popularity and expanded in range. OVDs such as Netflix and Hulu are already among the most popular video programming distributors in the country, and multiple upstarts are poised to contribute to the vibrancy of the medium. Netflix, for instance, serves over 69 million viewers across over 60 countries.⁵² Other, more recent OVD entrants are financed by some of the largest companies in the world. Their services, such as Amazon Prime, Sling TV, YouTube Red, and Sony Vue are thus well-positioned to increasingly win consumer favor. The market will reward New Charter for keeping pace with the exploding bandwidth needs of these content providers as consumers increasingly demand their services.

⁴⁹ See *id.* ¶ 119.

⁵⁰ See *id.* ¶¶ 120-126. This conclusion is further reinforced by the fact that broadband growth *itself* creates growth in video and voice revenue. *Id.* ¶ 103 (noting that “[a]lthough the products themselves are not directly related, improving the value of one service can increase the demand for [New Charter’s] bundle” of services as a unified offering).

⁵¹ The Commission’s *AT&T-DirectTV Order* is not to the contrary. There, the Commission “disagree[d] that the Applicants’ incentive to attract and retain broadband subscribers precludes any incentives to engage in conduct that hinders consumers’ access to unaffiliated OVDs.” *AT&T-DirectTV Order*, 30 FCC Red at 9207 ¶ 205 (emphasis added). But Dr. Scott Morton has established, with quantitative analysis, that for *these* merging parties, the economics are such that New Charter will have no such incentives.

⁵² See Netflix, *Overview*, ir.netflix.com (last visited Oct. 29, 2015).

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Even New Charter’s MVPD-specific incentives point toward supporting OVDs. Over 40% of pay TV subscribers *also* subscribe to Netflix, and that number is growing rapidly.⁵³ As Dr. Scott Morton notes, “[i]t is likely that OVD subscribers are typically among the consumers who view, or at least pay for, the most video content.”⁵⁴ This assessment is consistent with Charter’s strategy: to compete more effectively with other multi-play providers, OVD content will increasingly sit alongside MVPD offerings through the integrated Spectrum Guide user interface.⁵⁵

The Applicants’ history and current practices further reflect New Charter’s commitment to support OVDs. For example, as Dr. Scott Morton explains, “The primary rationale for [Charter’s] speed increases”—from 1 Mbps to 60 Mbps in the course of five years⁵⁶—“is to *facilitate* use of streaming video services.”⁵⁷ Charter’s consumer contracting practices and interconnection policy—including no data caps, no termination fees, and the availability of settlement-free interconnection—similarly demonstrate its support of OVD entry and innovation, and Charter has committed to continue these practices post-merger.⁵⁸ Similarly, both Charter and Time Warner Cable advertise to subscribers that they can use our high-speed data services to better view OVDs.

⁵³ See Second Dr. Scott Morton Decl. ¶ 87.

⁵⁴ *Id.* ¶ 90.

⁵⁵ Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 88 (Oct. 13, 2015).

⁵⁶ See *Public Interest Statement* at 9.

⁵⁷ Second Dr. Scott Morton Decl. ¶ 218.

⁵⁸ Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 185 (Oct. 13, 2015); *cf.* Jonathan Sallet, FCC, The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews at 9, 11 (Sept. 25, 2015), <https://www.fcc.gov/document/speech-general-counsel-jon-sallet-lessons-recent-merger-reviews> (identifying the use of data caps as harmful to OVDs).

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Contrary to the claims of some commenters, allegations of hostility to OVDs that have been attributed to Comcast (regardless of their merit) cannot credibly be applied to Charter.⁵⁹ Similarly, Netflix has contended that Comcast engaged in months-long foreclosure of Netflix,⁶⁰ which is a tactic no one alleges Charter has ever done (nor could it). And in September, Comcast began imposing usage-based billing in select cities⁶¹—something Charter does not do and has no plans to do.⁶² As discussed *infra*, the Transaction implicates none of the concerns raised in the Comcast-Time Warner Cable transaction.⁶³

Technological expertise. The Transaction will combine the Applicants' expertise in providing video apps to third party devices (e.g., Android, iOS and Roku) and Charter's OVD-integration expertise across the entire New Charter footprint. As Dr. Scott Morton explains, Charter's Spectrum Guide electronic programming guide ("EPG") enables OVD integration directly into the user interface—a feature that differentiates Charter from other MVPDs.⁶⁴ Spectrum Guide's cloud-based design also enables Charter to serve OVDs with quality improvements via low-cost remote updating.⁶⁵ And from the OVD's perspective, Spectrum Guide helps it economize on software programming costs because it uses a content delivery

⁵⁹ See *Comcast-NBCU Order*, 26 FCC Rcd at 4272 ¶ 85 (noting that the record was "replete with emails from Comcast executives and internal Comcast documents showing that Comcast believes that OVDs pose a potential threat to their businesses, that Comcast is concerned about this potential threat, and that Comcast makes investments in reaction to it").

⁶⁰ See DISH Network Corp. Petition to Deny at 29-30. (Oct. 13, 2015) ("DISH Petition to Deny").

⁶¹ See Stacey Higginbotham, *Your Next Comcast Bill May Be Priced Per Gigabyte*, Fortune (Sept. 30, 2015), fortune.com/2015/09/30/comcast-broadband-pricing-wireless/.

⁶² See *Public Interest Statement* at 3.

⁶³ We address the specific arguments of DISH, Free Press, and the Writers Guild of America, West, Inc., ("WGAW") that we may nevertheless attempt to foreclose OVDs in Section III.D.1 below.

⁶⁴ See Second Dr. Scott Morton Decl. ¶ 26.

⁶⁵ See *id.* ¶ 42.

system that relies on HTML5—a common programming language that enables easy entry into the system.⁶⁶

New Charter will build on the technical expertise Charter is gaining through its Spectrum Guide integration efforts. Charter has sought to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION] As a result, New Charter will be well-positioned to build on Charter’s efforts to integrate OVDs nationwide.

Scale. While the successes of OVDs like Netflix, YouTube, and MUBI demonstrate the ability of OVDs to launch and succeed without partnering with a broadband provider, New Charter will provide interested OVDs a helpful additional path for quickly reaching a sizable audience. As a large broadband provider (albeit not as large as Comcast or AT&T-DirecTV), New Charter will be able to facilitate OVDs’ access to a large number of broadband subscribers, for example, through integration into New Charter’s Spectrum Guide, significantly reducing

⁶⁶ *See id.* ¶ 43.

⁶⁷ Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 92-96 (Oct. 13, 2015).

⁶⁸ *See id.*

their distribution costs.⁶⁹ Instead of contracting with the three Applicants individually and developing three forms of compatible technology, OVDs will be able to economize by working with one unified deployment partner. OVDs that wish to partner with New Charter thus will be able to reach subscribers more quickly and with lower capital outlay as a result of the Transaction.⁷⁰

C. New Charter Will Be a Better Competitor in the Enterprise Services Market Due to the Transaction.

The Transaction will provide clear benefits for enterprise customers. As we showed in our initial filings, the Transaction will enable New Charter to better serve a larger range of enterprises throughout the nation due to greater geographic reach and increased regional density.⁷¹ **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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will be better-covered by New Charter than they have been by any of the individual Applicants.⁷² Furthermore, while Charter **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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⁶⁹ See Second Dr. Scott Morton Decl. ¶ 27-29.

⁷⁰ See *id.*

⁷¹ See *Public Interest Statement* at 36-39.

⁷² See Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 327-328 (Oct. 13, 2015).

⁷³ See *id.* at 327-328.

the Applicants’ coverage will foment increased competition for enterprise contracts, and thus deliver a clear public interest benefit.⁷⁴

The Transaction will also enable New Charter to deliver higher-quality enterprise services across its footprint by building on each Applicant’s specialized expertise. Charter’s proficiency in wholesale data delivery over the last mile and Metro Ethernet service will combine with Time Warner Cable’s comparable strengths and its added expertise in hosting and cloud services.⁷⁵ By leveraging these skills across an expanded footprint, New Charter will provide much-needed enhancements to competition among providers of enterprise services.

No one casts doubt on these benefits. Rather, AT&T seeks to turn the discussion of this Transaction’s clear enterprise benefits into one regarding general regulation in an arena where it does not wish to see enhanced competition from New Charter.⁷⁶ This is not appropriate, especially given AT&T’s history of market power in the enterprise space and special access services.⁷⁷ This Transaction will enable New Charter to improve services and reduce prices for enterprise customers throughout its footprint—a win for competition and innovation.

D. The Transaction Will Accelerate the Deployment of Innovative Video Services and Technologies.

The Transaction will deliver clear benefits to video services consumers. *First*, the Transaction will generate benefits through build-out and increased scale. Our transaction-

⁷⁴ *Applications Filed for Transfer of Control of Insight Commc’ns Co. to Time Warner Cable Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 497, 508 ¶ 24 (2012) (“*Insight-Time Warner Cable Order*”); see also Jonathan Sallet, FCC, The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews at 2 (Sept. 25, 2015), <https://www.fcc.gov/document/speech-general-counsel-jon-sallet-lessons-recent-merger-reviews>.

⁷⁵ See *Public Interest Statement* at 37-38.

⁷⁶ See AT&T Inc. Comments at 4-5. (Oct. 13, 2015) (“AT&T Comments”).

⁷⁷ See *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order Initiating Investigation and Designating Issues for Investigation, WC Docket No. 15-247, DA 15-1194 (rel. Oct. 16, 2015).

specific commitment to build out one million line extensions will bring video competition to new households throughout our merged footprint. Our commitment to quickly transition to all-digital delivery will enable us to deliver increased HD and VOD offerings to our video subscribers.⁷⁸ And our increased scale will enhance our incentive and ability to engage in research and development of innovative video technology—for instance, by attracting the very best engineering talent, and by investing in new technologies that might not be cost-effective for any of the Applicants to develop alone.⁷⁹ No opponent disputes these benefits.

Second, New Charter will be better equipped to compete for video consumers upon combining the Applicants' best technologies.⁸⁰ We will roll out our innovative Worldbox CPE and Spectrum Guide EPG across the entire New Charter footprint. As Dr. Scott Morton explains, the design of Worldbox will benefit customers by offering advanced DVR and time- and space-shifting capabilities.⁸¹ Spectrum Guide—which is compatible with any digital STB—will complement Worldbox by offering cloud-updated access to programming, including via third party devices such as Roku.⁸² Thus, Spectrum Guide will enable New Charter video subscribers to enjoy a seamless viewing experience across multiple platforms and devices. No opponent disputes that the widespread deployment of these and other technologies represents a transaction-specific improvement over the status quo.

⁷⁸ See *Public Interest Statement* at 10.

⁷⁹ See further discussion *infra* Part II.F.

⁸⁰ See *Public Interest Statement* at 25-27, 31-32.

⁸¹ See Second Dr. Scott Morton Decl. ¶¶ 36-39.

⁸² For instance, Charter has initiated Spectrum Guide's integration into Roku, Roku's Streaming Stick, iOS, and Android devices. See John Eggerton, *Charter Lineup Joins Roku*, Multichannel News (Oct. 12, 2015), <http://www.multichannel.com/news/video/charter-lineup-joins-roku/394487>.

E. The Creation of New Charter Will Benefit Wireless Consumers Throughout the Applicants' Footprints.

This Transaction will also drive competition among providers of wireless voice and data services. Many wireless users currently opt for service packages that accommodate heavy data usage over licensed spectrum. New Charter's plan to deploy at least 300,000 out-of-home WiFi Access Points within four years will enable New Charter broadband customers to purchase mobile service packages with lower data allocations, due to their ability to use WiFi more reliably. Building on this WiFi-first strategy, New Charter could possibly partner with an owner of spectrum licenses to offer a blended mobile service. Or, as Charter CEO Tom Rutledge has noted publicly, it may make sense for New Charter to procure spectrum licenses, enabling it to offer complete wireless services alongside its current triple-play bundle.⁸³ Either of these WiFi-enabled strategies would bring competition to the wireless arena. They would also help the Commission meet its goal of "managing spectrum in the public interest" by enabling consumers to put both WiFi and licensed spectrum to their most efficient uses.⁸⁴

The Applicants' excellent WiFi track record will position the merged company to lead the industry in developing new, innovative uses for WiFi. Third-party testing declared Charter's WiFi the fastest of any broadband provider in 2014, and Time Warner Cable has been a leader in the CableWiFi initiative.⁸⁵ By leveraging the Applicants' leadership and technological capabilities across its entire footprint, New Charter will deliver "more competition for the benefit

⁸³ See Phil Goldstein, *Charter's Rutledge: We Should Have a Mobile Wireless Product*, FierceCable (Aug. 5, 2015), <http://www.fiercewireless.com/story/charters-rutledge-we-should-have-mobile-wireless-product/2015-08-05>.

⁸⁴ *Applications filed by Qwest Commc'ns Int'l Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer of Control*, Memorandum Opinion and Order, 26 FCC Rcd 4194, 4199 ¶ 8 (2011).

⁸⁵ See Allion Engineering Services USA, *Allion USA Internet Service Provider Gateway Competitive Analysis* at 11 (June 15, 2015).

of American consumers” in the mobile wireless space.⁸⁶ The fact that AT&T—the second largest national wireless provider with a huge stockpile of spectrum—seeks to stoke fears about the “unrivaled reach” of the Cable WiFi consortium in its comments merely underscores the competitive possibilities.⁸⁷

Contrary to claims by DISH—another company with a huge stockpile of spectrum—our commitment to deploy 300,000 *additional* WiFi Access Points is transaction-specific. New Charter’s ability to engage in this deployment depends on the capital investment enabled by the Transaction, and on the synergistic sharing of expertise in WiFi deployment between the three Applicants. Without the benefit of the merged footprint, our incentives as stand-alone companies would not drive us to deploy WiFi Access Points on such a widespread basis.⁸⁸ Certainly, partnering with a spectrum license-holder or becoming one ourselves might not even be a possibility absent the Transaction.

F. The Transaction Will Generate Efficiencies that Will Drive Public Interest Benefits.

The Transaction will enable New Charter to produce benefits directly related to its increased scale. Charter estimates that this scale will generate cost savings of approximately \$800 million annually—approximately [BEGIN HIGHLY CONFIDENTIAL

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⁸⁶ Jonathan Sallet, FCC, *The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews* (Sept. 25, 2015), <https://www.fcc.gov/document/speech-general-counsel-jon-sallet-lessons-recent-merger-reviews>.

⁸⁷ AT&T Comments at 3.

⁸⁸ *See* Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 242-246, 304, 307 (Oct. 13, 2015).

INFORMATION].⁸⁹ And they will benefit consumers, both in the form of expected pass-through of savings,⁹⁰ and in the form of increased working capital to support the deployment of advanced broadband services.

Opponents do not cast doubt on the benefits of scale-justified research and development.⁹¹ They contend instead that the programming cost savings generated by this Transaction ought not be cognized as a public interest benefit. Their arguments are mistaken, as Dr. Katz shows⁹²—as well as directly opposed to the comments of other petitioners, discussed below, that argue the programming cost savings will be *too* high and *too* transaction-specific.

Contrary to Free Press’s assertions, these programming cost savings will be passed on to consumers. As Dr. Katz explains, New Charter is likely to pass through [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] of programming savings per month per subscriber on legacy Charter systems, in the form of subscriber fees that are lower than they would be in the alternate no-merger world.⁹³ The Commission recognized exactly this kind of benefit in its review of the *AT&T-DirectTV* transaction: “We acknowledge that the change in consumer

⁸⁹ See *id.*, at 80, 265.

⁹⁰ See Declaration of Dr. Michael L. Katz, Sarin Chair Professor of Economics at the Berkeley Haas School of Business and Senior Consultant at Compass Lexecon, ¶¶ 65-67 (Nov. 2, 2015) (“Dr. Katz Decl.”) (Attached as Exhibit B).

⁹¹ Dr. Scott Morton reiterates this principle in her attached declaration: “New Charter will have an increased incentive to invest in new and upgraded technology and services, because the post-merger firm will have increased scale and scope relative to any of the stand-alone firms. This increased incentive is procompetitive and will lead New Charter to increase its investments. Those increased investments will benefit subscribers.” Second Dr. Scott Morton Decl. ¶ 200. As she notes, products and services from software to set-top boxes all involve significant fixed-cost investments.

⁹² Dr. Katz Decl. ¶¶ 68-109.

⁹³ *Id.* ¶¶ 65-67.

surplus would be small *were the transaction not to lead to programming payment reductions.*⁹⁴

As in *AT&T-DirectTV*, programming payment reductions will substantially increase consumer surplus here.

Lower costs will also give New Charter more working capital to support the deployment of advanced broadband services. Consumers will benefit through improved and more widespread access to these services.

Finally as Dr. Katz explains, these programming cost savings, which result from the scale of the merged entity, are simply not achievable absent the merger. In particular, cooperative purchasing arrangements are unlikely to achieve these savings: different MVPDs have different business strategies, programming lineups, and licensing priorities, making such arrangements essentially unmanageable. A merger of the three Applicants is the only way to achieve the savings in question.⁹⁵

Free Press and the Greenlining Institute wrongly doubt the value of other cost-saving synergies delivered by the Transaction⁹⁶—synergies that will reduce expenses [BEGIN

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⁹⁴ *AT&T-DirectTV* Order, 30 FCC Rcd at 9174 ¶ 110 (emphasis added); *see also id.* at 9170-73 ¶¶ 96-104.

⁹⁵ Dr. Katz Decl. ¶¶ 37-39.

⁹⁶ Free Press Petition to Deny at 23-27; Greenlining Institute Petition to Deny at 15-16 (Oct. 13, 2015).

⁹⁷ *See* Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 273 (Oct. 13, 2015).

functions, will redound to the benefit of consumers via passed-through cost savings, and via investment in infrastructure and innovation.

G. Low-Income Households Will Benefit Due to the Transaction.

Several petitioners and commenters, including the Greenlining Institute, the Coalition for Broadband Equity, Free Press, and the California Emerging Technology Fund, raise concerns that the Transaction could result in increased prices or decreased access to broadband for low-income consumers.⁹⁸ These concerns are unfounded, as multiple other commenters realize.⁹⁹ Charter has made an enforceable commitment to the Commission that it intends to extend Bright House Networks's program for low-income consumers to millions of current Charter and Time Warner Cable homes and to expand the program by offering higher speeds and broadening eligibility while continuing to offer the service at a significant discount.¹⁰⁰ Charter will begin making the offer available within six months after the transaction closes, and will offer it across the New Charter footprint within three years of closing.¹⁰¹ Charter is still developing the details of the low-income program as it collects input from a diverse range of stakeholders in order to develop a strong, consumer-focused offering. There is nothing in the record, and no transaction-specific harm, that would support imposing the additional low-income broadband requirements proposed by petitioners.¹⁰²

⁹⁸ See Free Press Petition to Deny at 58-59; Greenlining Institute Petition to Deny at 9-12; Coalition for Broadband Equity Comments at 6-11 (Oct. 13, 2015); California Emerging Technology Fund Comments at 11-12 (Oct. 13, 2015).

⁹⁹ See, e.g., Nevada Succeeds Comments at 1 (Aug. 14, 2015); NYC Black Chamber of Commerce Comments at 1 (Oct. 27, 2015); Ronald McDonald House Charities of the Carolinas Comments at 1 (Sept. 30, 2015); Saint Mark Lutheran School Comments at 1 (Oct. 23, 2015).

¹⁰⁰ See *Public Interest Statement* at 20.

¹⁰¹ See *id.*

¹⁰² Some petitioners claim that Charter has not provided sufficient information about the terms of Bright House Networks's program. See Greenlining Institute Petition to Deny at 9; Writers

Greenlining Institute also speculates that if the Commission approves the Transaction, Charter might not provide Lifeline telephone service in California and might cease Time Warner Cable's Lifeline offerings. There is no evidence in the record to support these assertions, and they are untrue. Charter has not requested approval of any changes in rates, terms, or conditions of service in California.¹⁰³

H. The Transaction Will Benefit New Charter's Workforce and Domestic Employment By Supporting a Renewed Focus on Customer Service.

The Transaction will result in improved customer service due to New Charter's efforts to maintain and further develop a highly-skilled, U.S.-based workforce, as Applicants explained in their Public Interest Statement.¹⁰⁴ Petitioners raise concerns that the proposed merger will worsen customer service, claiming, for example, that, "larger cable companies tend to do even more poorly than smaller cable companies when it comes to customer service."¹⁰⁵ But Charter takes customer service very seriously, as evidenced by our hiring of thousands of customer-

Guild of AmericaWest, Inc., Petition to Deny at 37 (Oct. 13, 2015) ("WGAW Petition to Deny"). But information about the program is publicly available. *See, e.g.,* everyoneon, *Connect2Compete*, <http://everyoneon.org/about/c2c/> (last visited Oct. 28, 2015) (describing the program, which provides qualified households with high-speed internet access for \$9.95 a month). Additionally, Free Press's statement that "Charter . . . has a history of increasing prices at a higher annual rate (and to a higher absolute level) than TWC," Free Press Petition to Deny at 58, is based on mistaken premises. Increasing revenue per residential relationship in Charter's case is often due to customers subscribing to more and better services. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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¹⁰³ *See* Joint Application of Charter Communications, Inc., et al., at 26 & n.42, Proceeding No. A1507009 (Cal. Pub. Utils. Comm'n July 2, 2015).

¹⁰⁴ *See Public Interest Statement* at 39-42.

¹⁰⁵ Public Knowledge, Common Cause, Consumers Union, and Open Mic Petition to Deny at 18 (Oct. 13, 2015) ("Public Knowledge Petition to Deny"). And to the degree that petitioners raise legitimate customer service complaints, the merger review process is not the proper forum in which to resolve them.

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facing employees (call center representatives and service technicians) and our commitment to increasing customer satisfaction.¹⁰⁶

Nevertheless, recognizing the negative view that many people have of cable customer service, we are focused on improving New Charter's customer service and will leverage the Transaction to better our relationships with customers across New Charter's footprint. As we have explained, Charter has invested heavily in call center and field operations infrastructure, and has developed increasingly in-sourced customer care and field operations workforces.¹⁰⁷ Charter has brought back jobs from overseas call centers and hired thousands of people to improve service, both when on the phone with customers and when working inside customer homes.¹⁰⁸ Charter's more in-sourced workforce is better trained, more properly incentivized, and better equipped to serve customers with standardized tools, test equipment and software.¹⁰⁹

¹⁰⁶ See *Public Interest Statement* at 20. The Commission long ago concluded that customer service issues are not part of a transferee's character qualifications, see, e.g., *Applications for Consent to the Transfer of Control of Licenses from Comcast Corp. & AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, Memorandum Opinion and Order, 17 FCC Rcd 23,246, 23,327-28 ¶ 212 (2002), *aff'd sub nom. Consumer Fed'n of Am. v. FCC*, 348 F.3d 1009 (D.C. Cir. 2003), and it has rejected claims to establish retail customer service requirements as part of a transaction proceeding in the absence of a showing that customer service is likely to suffer as a result of the transaction. Thus, requests to deny or condition the Transaction on this basis should be rejected for these reasons alone. *Applications for Consent to the Assignment and/or Transfer of Control of Licenses of Adelpia Commc'ns Corp. (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, Adelpia Commc'ns Corp., (and Subsidiaries, Debtors-In-Possession), Assignors and Transferors, to Comcast Corp. (Subsidiaries), Assignees and Transferees*, Memorandum Opinion and Order, 21 FCC Rcd 8203, 8305-06 ¶ 238 n.735 (2006) ("*Adelpia Order*"). In any event, as set forth below, combining the Applicants' strengths will lead to better, not worse, customer service.

¹⁰⁷ See *Public Interest Statement* at 40-42.

¹⁰⁸ See *id.*

¹⁰⁹ See also Response of Charter Communications, Inc. to Information and Data Requests Dated September 21, 2015, No. 83 (Oct. 13, 2015) (providing detailed information on the number and percentage of in-sourced customer care jobs).

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These efforts have led to faster problem resolution times, and fewer calls per customer, both of which have been driving fewer customer transactions, including service calls, downgrades and customer churn. In addition, Charter's customer satisfaction has improved with Charter's increased focus on delivering superior customer service.¹¹⁰

New Charter will build on and expand this strong foundation. To begin with, we plan to in-source Time Warner Cable and Bright House Networks's call center employees.¹¹¹ We expect that the total number of additional American call center jobs will easily be in the thousands. This additional in-sourcing will enable New Charter to continue to improve its customer service. It will also enable New Charter to affirm its commitment to attracting, retaining, and promoting a skilled workforce that reflects its diverse customer base. The Greenlining Institute's assertion that these benefits would be provided in the absence of the Transaction is mistaken.¹¹² Time Warner Cable and Bright House Networks currently have no plans to repatriate such a significant number of jobs; rather, the benefit will be driven by the fact that Charter's management team believes this strategy is key to New Charter's success.

¹¹⁰ See Exhibit 87-2 to Response of Charter Communications, Inc. to Information and Data Requests Dated September 21, 2015 ("Slides from H1 2013_H2 2013 CSAT Legacy vs New").

¹¹¹ Time Warner Cable and Bright House Networks currently out-source approximately **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** and **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** call center jobs offshore, respectively.

¹¹² Greenlining Institute Petition to Deny at 16.

I. The Transaction Will Benefit Advertisers.

As described in the Applicants' Public Interest Statement, local, regional, and national advertisers will all be better served by New Charter than they have been by the three Applicants standing alone. No opponent has claimed otherwise.¹¹³

II. THE TRANSACTION WILL NOT HARM COMPETITION OR THE PUBLIC INTEREST.

A. Opponents' Broadband Market Definitions Are Out of Step with Economic Reality and Ignore Major Competitive Forces.

A number of opponents rely on inaccurate market definitions as the basis of their objections.¹¹⁴ The relevant product market for examining broadband competition is the wireline and wireless broadband services market. This consumer market is, of course, local because each consumer selects from options available at his or her location.¹¹⁵ As explained below, the Transaction poses no threat of harm to these markets, and, even if different market definitions were used, this Transaction poses no harm.¹¹⁶

¹¹³ While the National Association of Broadcasters ("NAB") raises complaints about its members' abilities to compete to sell advertising, competition is a *benefit* this Transaction brings, not a harm. See National Association of Broadcasters Petition to Hold in Abeyance at 14-18 (Oct. 12, 2015) ("NAB Petition"). We address NAB's general comments regarding the sale of local advertising in Part III.D.8 below.

¹¹⁴ To offer sound analysis of a given event's effects on competition, the "first step" must be to offer an accurate definition of the relevant market. *E.g.*, Michael L. Katz & Howard A. Shelanski, *Mergers and Innovation*, 74 *Antitrust L.J.* 1, 8 (2007).

¹¹⁵ *Cf. AT&T-DirectTV Order*, 30 FCC Rcd at 9161-62 ¶ 71.

¹¹⁶ The Applicants overlap in fewer than 1% of their census blocks, meaning that the Transaction will not reduce competition in any of the Applicants' local markets. See *Adelphia Order*, 21 FCC Rcd at 8234 ¶ 59. And even this statistic is likely significantly overstated because the Applicants typically provide service in different parts of a census block.

1. There Is No National Market for OVD Access to Consumers at 25+ Mbps.

Applicants do not agree that there exists a national market for OVD “access” to a critical mass of end users. But even if there were, that market would not consist solely of download speeds of 25 Mbps and higher.

The Commission’s competitive analysis must encompass speeds broadband consumers today actually consider and choose for Internet service. The only basis offered for a 25 Mbps standard is the Commission’s 2015 Broadband Progress Report, which used that speed to assess “*advanced telecommunications capability*.”¹¹⁷ That standard reflects the Commission’s assessment of households’ “emerging needs” and providers’ “capabilities,” but does not constitute an assessment of a “relevant market” for microeconomic analysis.¹¹⁸ As Free Press concedes, “[t]he Commission’s focus on this line of demarcation is largely forward-looking,” and “can be misleading.”¹¹⁹

A proper definition of a “relevant market” must “rest[] on a determination of available substitutes.”¹²⁰ In the broadband market, the range of download speeds that consumers treat as substitutes includes speeds well below 25 Mbps. As the Commission acknowledged in its *Connect America Fund Order*, a download speed of 10 Mbps represents the speed that is

¹¹⁷ DISH Petition to Deny at 45-46. *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment*, 30 FCC Rcd 1375, 1377, 1403-08 ¶¶ 3, 45-55 (2015) (“*2015 Broadband Progress Report*”).

¹¹⁸ 30 FCC Rcd at 1405 ¶ 49. The Commission went out of its way to “emphasize” that 25 Mbps was adopted “to respond to the directives in section 706,” and nothing else. *Id.* at 1407 ¶ 54.

¹¹⁹ Free Press Petition to Deny at 16.

¹²⁰ *E.g., United States v. Microsoft*, 253 F.3d 34, 54 (D.C. Cir. 2001) (en banc) (per curiam) (quotation marks omitted).

“reasonably comparable” to the advanced broadband services available in most urban areas.¹²¹ That judgment of reasonable comparability is akin to a judgment of substitutability, and it reflects a reasonable assessment of the uses to which people put their broadband.

This is consistent with the Commission’s analysis in its recent *AT&T-DirectTV* order. The Commission treated speeds down to 10 Mbps as relevant to analysis of AT&T’s market share.¹²² And a 10 Mbps level is conservative. Even cutting-edge, data-intensive applications like HD video streaming do not require more than 5 to 8 Mbps.¹²³ Indeed, Hulu and Amazon advertise HD speed requirements of 3 and 3.5 Mbps, respectively.¹²⁴ And while we are proud to have augmented our baseline speeds from the 1 Mbps range to 15 Mbps (Time Warner Cable) and 60 Mbps (Charter) over the past few years, we do not consider ourselves free from the vigorous competition of telco, DSL, and wireless companies who aggressively compete for subscribers by offering speeds both above and below 25 Mbps. The fact that **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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INFORMATION].¹²⁵

¹²¹ See *Connect America Fund*, Report and Order, 29 FCC Rcd 15,644, 15,649 ¶ 15 (2014).

¹²² *AT&T-DirectTV Order*, 30 FCC Rcd at 9205 ¶ 199.

¹²³ Dr. Scott Morton Decl. ¶ 47.

¹²⁴ Hulu, *Hulu Subscription System Requirements*, <http://www.hulu.com/help/articles/166380> (last accessed June 16, 2015); Amazon, *Amazon.com Help: System Requirements for Streaming on Your Computer*, <http://www.amazon.com/gp/help/customer/display.html?nodeId=201422810> (last accessed June 16, 2015).

¹²⁵ **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**
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Regardless of the broadband speeds the Commission considers, it ought not overlook the tumultuous dynamism of the real broadband market in the United States. As INCOMPAS acknowledges, the relevant question is “whether New Charter would face substantial competition *in the future*.”¹²⁶ No one can doubt that competition from telco and municipal fiber providers, mobile wireless providers, and growing new entrants is increasing, and will continue to do so. Competition in real time is continuing to spur tremendous broadband upgrades and innovation.¹²⁷ Snapshots of speed levels will be out of date within months, with current leaders falling behind the next high-speed build-out. Indeed, as Akamai’s 2015 *State of the Internet* report explains, “On a year-over-year basis, all 51 states saw higher average connection speeds compared with the first quarter of 2014, and all but two of the states saw double-digit gains.”¹²⁸ This dynamic will continue to play out after the Transaction’s approval, as New Charter and its competitors vie to provide better and better broadband offerings to consumers. By the same token, any broadband provider that adopts policies that impede access to OVD services would only drive customers to more OVD-friendly competitors, even if those providers offer slower speeds.

Our existing competitors are already visibly raising their speeds throughout the New Charter footprint. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

¹²⁶ COMPTTEL Petition to Deny at 12 (emphasis in original).

¹²⁷ See, e.g., William R. Levesque, *Google To Explore Bringing its Fiber Optic High-Speed Internet Service to Tampa*, Tampa Bay Times (Oct. 28, 2015), <http://www.tampabay.com/news/business/google-to-explore-bringing-its-fiber-optic-high-speed-internet-service-to/2251616> (“‘We want to help usher in the next chapter of what the web will look like,’ said Jill Szuchmacher, director of expansion for Google Fiber. The service would trigger ‘the same kind of innovation we saw when we all as Americans got to step up from dial-up to broadband. We’re excited to usher in this next chapter. . . . Competition does work.’”).

¹²⁸ Akamai, *Akamai’s State of the Internet Q1 2015 Report* at 18, www.akamai.co.jp/enja/dl/soti/q1-2015-soti-fullreport-a4.pdf (last visited Nov. 1, 2015).

[END

HIGHLY CONFIDENTIAL INFORMATION] The same is true for CenturyLink’s gigabit fiber deployment, which will reach 700,000 homes by the end of 2015, and is on course to reach

¹²⁹ Based on analysis of National Broadband Map annual data, *see* Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 63-64 (Oct. 13, 2015).

¹³⁰ *See id.*

¹³¹ *See* Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 64 (Oct. 13, 2015).

¹³² *See id.* at 65.

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residents of sixteen cities in the near future.¹³³ Eight of those are home to substantial subscriber bases for New Charter.¹³⁴ And the 40 municipalities delivering 1 Gbps service to their citizens as of February 2015 also serve as a harbinger of competition to come.¹³⁵

Google is similarly making a strong entry into broadband. Though its Google Fiber launched four years ago in Palo Alto,¹³⁶ its footprint is growing at a fast (and well-capitalized) clip. Today, it offers gigabit FTTP service in three cities, is deploying its FTTP in six cities, and is considering entry into six more.¹³⁷ **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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New Charter will also face rising competition from wireless providers. Mobile LTE currently peaks at 94 Mbps downstream, and its fastest average download speeds are 20 Mbps.¹³⁹ Yet, five years ago, LTE technology had not even been deployed.¹⁴⁰ Indeed, the

¹³³ Jeff Baumgartner, *CenturyLink Expands 1-Gig Reach*, Multichannel News (Sept. 15, 2015), <http://www.multichannel.com/news/content/centurylink-expands-1-gig-reach/393753>.

¹³⁴ See Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 70 (Oct. 13, 2015).

¹³⁵ See *2015 Broadband Progress Report*, 30 FCC Rcd at 1383-85 ¶ 16.

¹³⁶ See Haelin Cho, *Google Fiber Tests Ultra High-Speed Network on Campus*, Stanford Daily (July 14, 2011), <http://www.stanforddaily.com/2011/07/14/google-fiber-tests-ultra-high-speed-network-on-campus/>.

¹³⁷ See Google Fiber, *Expansion Plans*, <https://fiber.google.com/newcities/> (last visited Oct. 28, 2015).

¹³⁸ See Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 74 (Oct. 13, 2015).

¹³⁹ See Sascha Segan, *Fastest Mobile Networks 2015*, PC Magazine (June 22, 2015), <http://www.pcmag.com/article2/0,2817,2485837,00.asp>.

¹⁴⁰ Verizon began its deployment in December 2010. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; FCC, *Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Including Commercial Mobile Services, Fifteenth Report*, 26 FCC Rcd 9664 ¶¶ 108-14 (2011) (“Fifteenth Report”), (describing the four

development of LTE is only the first step in this process: Wireless 5G technology, which is set to launch in Asia in 2020, is capable of delivering ultra-high definition video at speeds peaking at 10 Gbps.¹⁴¹ By the end of 2016, Adobe projects that the majority of all video viewed on the Internet will be delivered on mobile devices¹⁴²—and Chairman Wheeler recently announced the Commission’s intention to pave the way for the deployment of 5G services.¹⁴³ Already, some wireless competitors, such as Vivint Wireless, reliably deliver download speeds faster than those of many fiber and cable competitors.¹⁴⁴ The idea that cable’s only competition comes from other wireline broadband providers is, quite simply, out of date.

This competition will continue at a relentless pace. Charter estimates that it takes only six to twelve months for telcos and mobile operators to upgrade their technology to deliver higher speeds, and twelve to twenty-four months for new entrants like Google and municipal

nationwide mobile broadband providers’ initial efforts to test and deploy LTE services); *see also* *Blazingly Fast: Verizon Wireless Launches The World’s Largest 4G LTE Wireless Network On Sunday, Dec. 5*, VerizonWireless.com (Dec. 3, 2010), <http://www.verizonwireless.com/news/2010/12/pr2010-12-03.html> (touting Verizon’s LTE network, which launched in 38 cities in December 2010, as “the world’s largest”).

¹⁴¹ *See* John McKinnon, *FCC Proposes Rules for 5G Network*, Wall St. J. (Oct. 22, 2015), <http://www.wsj.com/articles/fcc-proposes-rules-for-5g-network-1445533829>; James Bourne, *The 5G Puzzle for Operators: Asia Most Likely to Lead Way on Deployment*, TelecomsTech (July 30, 2015) <http://www.telecomstechnews.com/news/2015/jul/30/5g-puzzle-operators-asia-most-likely-lead-way-deployment/>; Jess Bolluyt, *5G Wireless: What We Know (and Don’t Know) So Far*, Gear & Style Cheat Sheet (Sept. 7, 2015) <http://www.cheatsheet.com/gear-style/5g-wireless-what-we-know-and-dont-know-so-far.html/?a=viewall> (in-home).

¹⁴² *See* Vebeka Guess, *Are Your Videos Ready for the Mobile Majority?*, Adobe Digital Marketing Blog (Apr. 21, 2015), <http://blogs.adobe.com/digitalmarketing/web-experience/videos-ready-mobile-majority/>.

¹⁴³ Tom Wheeler, *Leading towards Next Generation “5G” Mobile Services*, Official FCC Blog (Aug. 3, 2015), <https://www.fcc.gov/blog/leading-towards-next-generation-5g-mobile-services>.

¹⁴⁴ *See* Netflix, *ISP Speed Index*, <http://ispspeedindex.netflix.com/country/us/?small=True> (last visited Oct. 28, 2015).

broadband operators.¹⁴⁵ These short timelines render any current knowledge on the state of the broadband market a quickly fading snapshot. For the Commission to properly assess New Charter's role within the real broadband market, it must adopt a dynamic timeframe.

Finally, assessing broadband competition at a static 25 Mbps would not only ignore reality, it would penalize providers such as Applicants for their massive investment to deliver swift, OVD-friendly speeds to consumers—and to price it competitively for the vast majority of consumers, rather than pricing it out of their reach. Applicants should not be criticized as anti-competitive for doing the very thing that brings competition to the broadband market: investing in broadband networks. Such a market definition would lessen investment incentives for future broadband development.

2. Even Wrongly Assuming a National Market for Access to 25+ Mbps Customers, the Transaction Does Not Harm Competition.

Even if the Commission were to (wrongly) assume a national market in “access” to 25+ Mbps customers,¹⁴⁶ this Transaction would not harm competition within that so-called “market.” Under this assumed market definition, New Charter would still serve fewer than 30% of such

¹⁴⁵ See Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 76 (Oct. 13, 2015).

¹⁴⁶ Contrary to some opponents' claims, see DISH Petition to Deny at 45-46; Free Press Petition to Deny at 15-17, there is no national market for access to broadband consumers. While there are markets for advertising, programming, video distribution, and other goods or services, there is no such thing as a contract selling access to broadband subscribers. It is the burden of the opponents to explain what, exactly, it would mean to have such a market in the first place. Likewise, the claim of some opponents that the “market” should not only be limited to speeds at 25 Mbps and above but should also count only homes currently taking such service (rather than those where it is available) is even more arbitrary and punitive. The fact that a home chooses not to subscribe to an available service has no bearing on market definition, and counting only homes taking service penalizes providers for providing a service consumers desire.

broadband subscribers.¹⁴⁷ In 2001, the D.C. Circuit rejected a 30% national threshold for analysis of market power regarding access to MVPD subscribers, explaining that only a monopsony-based ownership cap of 60% or higher was supported by the record in that case.¹⁴⁸ Even on a record developed to respond to the court’s earlier criticisms of the 30% cap, the D.C. Circuit again vacated it in 2009.¹⁴⁹ Any similar threshold regarding high-speed broadband would similarly lack rationality. A national “market” share below 30%—especially in a field of technology as dynamic as this one—does not pose a threat to competition. Furthermore, the 30% threshold is even less relevant in the broadband context because—unlike in the MVPD context—content providers do not need the permission or consent of ISPs to reach broadband consumers. For edge providers who deliver content over broadband, the Open Internet rules ensure that all

¹⁴⁷ This number is a conservative estimate; the exact percentage cannot be known at this time because the Applicants do not have knowledge of the total number of 25/3+ Mbps subscribers nationwide. As of December 31, 2014, Charter had [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] 25/3+ Mbps subscribers, Time Warner Cable had [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION] and Bright House Networks had [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]. The 25/3+ Mbps nationwide total for 2013, the last period for which this data is publicly available, is 29.4 million subscribers. Adding the increase in 25/3+ Mbps subscribers between 2013 and 2014 for just the three Applicants brings the nationwide total to [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]. This yields a percentage of the total served by the Applicants of [BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]. And the real percentage is lower than this figure because other providers are rapidly increasing their speeds as well and serving more subscribers at those greater speeds. (And even then, the percentage of 25+ *customers* nationwide would overstate New Charter’s share. The relevant metric would be consumers *offered* 25 Mbps, as only that would not penalize ISPs that offer 25+ at a reasonable price.)

¹⁴⁸ See *Time Warner Cable Entm’t Co., L.P. v. FCC*, 240 F.3d 1126, 1136 (D.C. Cir. 2001).

¹⁴⁹ See *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009).

broadband customers constitute the “open field” for content-distribution, and thus the Commission’s own justification for the 30% threshold is lessened.¹⁵⁰

The Commission’s resistance to Comcast’s attempt to purchase Time Warner Cable in no way undermines that fact.¹⁵¹ That transaction would have left Comcast with 57% of national 25+ Mbps subscribers.¹⁵² New Charter’s below-30% share is modest in comparison, and will continue to face rapidly escalating speeds from other broadband providers. Free Press argues in error that Comcast’s share of national 25+ broadband subscribers would have been somewhere around 50% in a year or two after its merger with Time Warner Cable—a figure they claim is not so different from what New Charter’s would be.¹⁵³

This claim is wrong on three counts. *First*, New Charter’s post-merger share of 25+ Mbps subscribers will be far lower than what Comcast’s share would have been, no matter one’s approach to calculating it. New Charter will serve less than 30% of 25+ broadband subscribers nationwide. This level is well below any hypothetical Comcast-Time Warner Cable level. It is also well below the *actual* level of Comcast today, which DISH’s economist has conceded is not high enough to enable foreclosure of OVDs.¹⁵⁴ Under any analysis, there is simply no way that New Charter’s less-than-30% share can be a cause for remedial action here.

¹⁵⁰ See *The Commission’s Cable Horizontal and Vertical Ownership Limits*, Fourth Report & Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, 2143 ¶¶ 18-20 (2008) (discussing the “open field” approach).

¹⁵¹ See Free Press Petition to Deny at 13-15.

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ *Applications of Comcast Corp., Time Warner Cable Inc., Charter Commc’ns, Inc., and SpinCo to Assign and Transfer Control of FCC Licenses and Other Authorizations*, Petition to Deny of DISH Network Corp., Exh. B (Decl. of Professor David Sappington), MB Docket No. 14-57, ¶ 20 (Aug. 25, 2014) (noting Comcast-Time Warner Cable would have controlled 49.9% of 25M broadband connections in the country); *id.* ¶ 48 (“Unlike Comcast and [Time Warner Cable] individually, the combined entity may have the potential to preclude the profitable operation of an OVD.”).

Second, there is no basis for the claim that the putative ~50% number the commenter attributes to Comcast was in fact relied upon by the Commission.¹⁵⁵ *Finally*, the broadband market is highly dynamic, as described above, and it is likely that New Charter’s share of 25+ subscribers nationally will *decrease* as customers of other ISPs increase their purchases of 25+ speed offerings.

B. The Relevant Market for MVPD Video Services Is Local as Well.

Geographic market. Under clear Commission precedent, the relevant geographic market for providing MVPD video services to end user customers is local.¹⁵⁶ NAB’s suggestion to define local competition in terms of control at the designated market area (“DMA”) level is wrong, as consumers make choices based on what is available to them in their homes, not across town.¹⁵⁷ But even if the Commission were to consider DMA-level analysis for a given purpose, NAB’s comments miss the mark. While it may be true that New Charter will serve over 40% of video subscribers in DMAs ranging from Cleveland to Presque Isle, Maine,¹⁵⁸ NAB identifies no harms that follow from this arbitrary 40% figure. In fact, of the top 20 DMAs, New Charter will be the largest MVPD in only 4—and those are the same DMAs in which Time Warner Cable and

¹⁵⁵ To the contrary, the Commission plainly relied on a much higher number. *See* Jonathan Sallet, FCC, *The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews* (Sept. 25, 2015), <https://www.fcc.gov/document/speech-general-counsel-jon-sallet-lessons-recent-merger-reviews> (“As the Department of Justice noted, in language equally applicable to the FCC staff perspective, ‘the transaction would [have left] Comcast with *close to 60 percent* of all high-speed broadband subscribers in the United States, strengthening its ability to block the adoption of innovative products’” (emphasis added) (citation omitted)).

¹⁵⁶ *See, e.g., AT&T-DirectTV Order*, 30 FCC Rcd at 9161-62 ¶ 71; *Comcast-NBCU Order*, 26 FCC Rcd at 4255-56 ¶ 40.

¹⁵⁷ *See* NAB Petition at 5-8; *Adelphia Order*, 21 FCC Rcd at 8235-36 ¶ 64.

¹⁵⁸ NAB Petition at 6.

Bright House Networks already have the largest presence.¹⁵⁹ Of the other top-20 DMAs, the Transaction will only lead to increased density in 6.¹⁶⁰ And in 5 of these 6 DMAs, New Charter will not even be the second-largest MVPD, let alone the first.¹⁶¹ Finally, the effects of market share growth in these DMAs is beneficial, as increased local and regional density produce increased competitiveness in the advertising and enterprise services markets, and greater operating efficiencies.

Product Market. The relevant product market for video service was defined in *AT&T-DirecTV* as “multichannel video programming service as offered by all MVPDs.”¹⁶² Indeed, competitive MVPDs have consistently entered the market, and that trend is slated to continue. Leading telcos are now major market players, with Verizon offering competitive MVPD services in its footprint and AT&T-DirecTV offering service throughout the nation.¹⁶³ Telco MVPD subscriber bases have more than doubled since 2010, and SNL Kagan predicts them to grow from 13.7 million as of 2014 to 20.7 million by 2022.¹⁶⁴ Google Fiber, too, is poised to continue to garner market share.¹⁶⁵ And wireless streaming services continue to innovate as well. For example, Verizon recently reached a deal with the NFL to stream certain games to smartphone

¹⁵⁹ See *Public Interest Statement* at 47. The DMAs are Los Angeles, Tampa-St. Petersburg, Orlando-Daytona-Melbourne, and Cleveland-Akron/Canton.

¹⁶⁰ These are Boston, Dallas, Denver, Detroit, Houston, and New York. Analysis based on SNL Kagan MediaCensus Q4 2014.

¹⁶¹ The exception to this is Dallas. More broadly, out of the 184 DMAs served by the Applicants, they have a common presence in only 35.

¹⁶² *AT&T-DirecTV Order*, 30 FCC Rcd at 9159 ¶ 68 (internal quotation marks omitted).

¹⁶³ See Verizon, *Check Out the FiOS Experience*, <http://www.verizon.com/home/fios/> (last visited Oct. 28, 2015); AT&T, *AT&T U-Verse TV Plans and Packages*, <https://www.att.com/shop/tv/u-verse.html>. (last visited Oct. 28, 2015).

¹⁶⁴ See RFI Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 32-33 (Oct. 13, 2015).

¹⁶⁵ Cf. Google Fiber, *TV Channels*, <https://fiber.google.com/cities/kansascity/channels/> (last visited Oct. 28, 2015).

devices.¹⁶⁶ The Commission must take note of these competitors when analyzing the market for video services.

C. The Programming Holdings of New Charter and Its Investors Will Not Harm the Public Interest.

Programming interests, whether held by the Applicants or linked to their investors, pose no threat of harm in this Transaction. In sharp contrast to the Comcast-NBCU and AOL-Time Warner mergers, New Charter will own virtually no national programming content. And as to programming owned or controlled by investors such as John Malone, there is no incentive or ability to foreclose, and the scope and scale of the content is fundamentally different.

New Charter. As explained in the Applicants' Public Interest Statement, New Charter's programming interests will be very limited—much like the applicants in *AT&T-DirectTV*, which held “only minor programming interests.”¹⁶⁷ Aside from news and public affairs programming that is solely of local interest, New Charter's programming holdings will consist primarily of the RSNs that Time Warner Cable currently controls. Those holdings pale in comparison to those held, for example, by Comcast.¹⁶⁸

The Transaction's opponents barely even mention New Charter's actual programming interests as a source of possible harm. And with good reason: a strategy of foreclosure is unlikely to be profitable even with respect to the two Los Angeles-oriented RSNs that air Dodgers and Lakers games. As for discrimination against unaffiliated programming, meanwhile, the Transaction is no different than *AT&T-DirectTV*, in which the Commission concluded that

¹⁶⁶ See Todd Spangler, *Verizon Wireless Drops \$5 Monthly Fee to Watch NFL Live Games for All Customers*, Variety (Sept. 3, 2015), <http://variety.com/2015/digital/news/verizon-wireless-nfl-mobile-free-streaming-1201585307/>.

¹⁶⁷ See *AT&T-DirectTV Order*, 30 FCC Rcd at 9223 ¶ 238.

¹⁶⁸ See *Comcast-NBCU Order*, 26 FCC Rcd at 4252 ¶ 32 (stressing that the vertically-integrated firm would control 12.8% of MVPD program network revenues).

there were “few, if any, vertical integration concerns that the combined entity would discriminate against unaffiliated programmers.”¹⁶⁹

Liberty Broadband/John Malone. Unable to make arguments based on New Charter’s programming interests, opponents focus instead on the programming interests held (directly or indirectly) by John Malone. But New Charter will have no incentive to benefit programming interests that it does not own and for which it receives no benefit; Dr. Malone has no incentive to foreclose this programming, as Professor Salop explains;¹⁷⁰ and New Charter’s governance and FCC rules will prevent any undue influence in carriage decisions.¹⁷¹

The attenuated connection between New Charter and the programming at issue is as follows:

- Liberty Broadband holds a 25.7% equity interest in Charter today and, after the Transaction, will be entitled to vote no more than 25.01% of New Charter’s shares.
- Dr. Malone has a 46.6% voting interest and 8.7% equity interest in Liberty Broadband.¹⁷²
- Dr. Malone also has a 6% equity interest in Liberty Interactive, which will hold an approximately 1.8% stake in New Charter upon the close of the Transaction.¹⁷³

¹⁶⁹ See *AT&T-DirectTV Order*, 30 FCC Rcd at 9223 ¶ 238.

¹⁷⁰ See Declaration of Dr. Steven C. Salop, Professor of Economics and Law at Georgetown University Law Center and Senior Consultant to Charles River Associates; Robert Stillman, Vice President of Charles River Associates; Serge X. Moresi, Vice President of Charles River Associates; Jarrod R. Welch, Senior Associate of Charles River Associates, ¶¶ 17-66 (Nov. 2, 2015) (“Dr. Salop Decl.”) (Attached as Exhibit C).

¹⁷¹ See *id.* ¶¶ 84-105; RFI Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 105-114 (Oct. 13, 2015).

¹⁷² See *id.* at 79, 102.

¹⁷³ See *id.*; *Public Interest Statement* 15 n.26.

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- Based on his interests in Liberty Broadband and Liberty Interactive, Dr. Malone will hold an approximately 1.7% indirect interest in New Charter.
- Liberty Broadband does not own or control any programming.
- Dr. Malone has a 28.7% voting interest in Discovery Communications (in which Advance/Newhouse also has an interest)¹⁷⁴ and a 47.2% voting interest in Starz, as well as indirect interests in other programming.¹⁷⁵
- After the Transaction, New Charter will not own or control, either directly or indirectly, *any* of this programming (except for programming currently controlled by Time Warner Cable). Instead, ownership and control of that programming will remain vested in the entities that own and control it today.

Thus, following the Transaction, Dr. Malone will have an indirect interest of approximately 1.7% in New Charter, as well as minority interests in Discovery, Starz, and other programming. Once again, these circumstances contrast starkly with those of Comcast and NBC-Universal, in which the merger resulted in the merged company *itself* owning and controlling the vast programming assets of NBC-Universal.¹⁷⁶

To the extent that the Transaction's opponents focus on the programming in which Dr. Malone has an interest, they largely ignore the facts set forth above. For instance, the American

¹⁷⁴ While Advance/Newhouse Partnership itself has no direct ownership in Discovery Communications, Advance/Newhouse Programming Partnership ("ANPP"), an entity affiliated with Advance/Newhouse, holds a minority ownership interest in Discovery Communications. For purposes of this analysis, we have attributed the economic interests of Advance/Newhouse and ANPP to each other based on the commonality of their corporate parents and refer to the interests of both as being held by Advance/Newhouse for simplicity.

¹⁷⁵ See RFI Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 102 (Oct. 13, 2015); Starz, Proxy Statement (Schedule 14A), at 4 (Apr. 23, 2015).

¹⁷⁶ See *Comcast-NBCU Order*, 26 FCC Rcd at 4244 ¶¶ 13-15.

Cable Association (“ACA”) asserts that these programming assets will be “attributable to Charter,” but *in fact* New Charter will not own or control *any* of them, nor will New Charter derive any benefit from the financial success of programming in which Dr. Malone has an interest. ACA refers to alleged “opportunity costs for New Charter in selling its affiliated programming to [newly overlapping] MVPDs”—even though *in fact* New Charter cannot face any opportunity costs regarding programming it does not own or control and, hence, cannot sell or withhold in the first place.¹⁷⁷ ACA even goes so far as to assert, without any support, that “New Charter will be in a position to influence the negotiating decisions of Discovery and Starz”—even though New Charter will in fact have no influence over these entirely separate entities.¹⁷⁸

In any case, Dr. Malone will lack the incentive to keep affiliated programming from competing MVPDs and OVDs so as to benefit New Charter. For instance, the most prominent programming source affiliated with Dr. Malone is Discovery Communications—whose programming, though widely viewed, is not “marquee programming” of the sort that concerned the Commission when it reviewed the merger between Comcast and NBC-Universal.¹⁷⁹ As Dr. Salop explains, “[t]here are numerous substitutes for the broad array of programming carried on The Discovery Channel and the other [Discovery Communications] channels.”¹⁸⁰ Even if Dr. Malone were to act in tandem with Advance/Newhouse, Dr. Salop explains, foreclosure would

¹⁷⁷ American Cable Association Comments at 10 (Oct. 13, 2015) (“ACA Comments”).

¹⁷⁸ *Id.* at 13; *see also* Public Knowledge Petition to Deny at 19; WGAW Petition to Deny at 18.

¹⁷⁹ *Comcast-NBCU Order*, 26 FCC Rcd at 4254 ¶ 36.

¹⁸⁰ Dr. Salop Decl. ¶ 36.

not make sense because Dr. Malone and Advance/Newhouse's gains in fact would *not* outstrip their losses.¹⁸¹

Nor will Dr. Malone (or Advance/Newhouse) have the ability to keep Discovery and other affiliated programming from New Charter's competitors. All directors of Discovery—including Dr. Malone and any other directors nominated by Liberty Broadband or Advance/Newhouse—owe a duty of loyalty to Discovery. That duty requires them to act in the best interests of Discovery and all of its shareholders, and not to take actions that benefit themselves at the expense of the company and its other shareholders. Any breach of the duty of loyalty can result in shareholder derivative suits, with the very real possibility of personal liability for directors.

The fact that the relevant interests may all be deemed attributable to Dr. Malone¹⁸² does not mean that the public interest would be harmed here. Charter is aware of no Commission precedent for the notion that commonly held attributable interests (which can be as low as 5%) in a programmer and a cable operator are *per se* harmful. In some instances, of course, common control may trigger the Commission's program access rules or other safeguards. But particularly in the face of economic analysis such as that presented by Dr. Salop, the attributable-interest label is not a talismanic indicator of competitive harm from a merger.¹⁸³

¹⁸¹ Dr. Salop Decl. ¶¶ 45-47. Any foreclosure strategy, moreover, would have to take place on a national basis, not on a locality-by-locality basis. The barriers are both economic and technological: not only would contracting with rival MVPDs to deliver Discovery on a locality-by-locality basis entail prohibitive transaction costs, but it would also require reengineered geofencing technology. National foreclosure would be an exceedingly blunt tool with which to artificially support meager gains to New Charter. *See id.* ¶ 60.

¹⁸² *See* ACA Comments at 9-10.

¹⁸³ Reports that Starz previously withheld programming from Netflix, *see* Cincinnati Bell Extended Territories LLC Comments at 6-7 (Oct. 13, 2015) ("Cincinnati Bell Comments"); WGAW Petition to Deny at 15, are beside the point. Even assuming (without any factual basis)

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The Commission’s *Liberty-News Corp.-DirecTV Order*, on which ACA relies heavily, in no way undermines this analysis. There, the merger was to give Liberty Media an interest in DirecTV exceeding 40%, so that Liberty Media (of which Dr. Malone was Chairman) had “*de facto* control” over DirecTV.¹⁸⁴ At the time, moreover, Dr. Malone was Chairman of the Board and Chief Executive Officer of Discovery Holding Company, which held a two-thirds interest in Discovery.¹⁸⁵ No similar circumstances are present here.¹⁸⁶

Equally off-point is the *Comcast-NBCU Order*, on which WGAW relies.¹⁸⁷ Again, in *Comcast/NBCU*, a vast array of high-quality NBC-Universal programming was at issue—and the proposed transaction was to give Comcast direct majority ownership of NBC-Universal.¹⁸⁸

Finally, there is no merit to ACA’s argument that New Charter’s higher per-subscriber video profits (relative to Charter today) are a reason to infer vertical harm from the Transaction

that Dr. Malone does not wish to deal with Netflix, Cincinnati Bell and WGAW offer no reason to conclude that this “harm” is merger-specific. And in all events, these concerns are strongly belied by the fact that Netflix has gone on record as *supporting* the Transaction.

¹⁸⁴ *News Corp. and the DirecTV Group, Inc., Transferors, and Liberty Media Corp., Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 23 FCC Rcd at 3265, 3267 ¶ 2 (2008) (“*Liberty-News Corp.-DirecTV Order*”).

¹⁸⁵ *Id.* at 3273 ¶ 12.

¹⁸⁶ Because there is no realistic possibility of harm flowing from Dr. Malone’s programming interests, there is no reason to impose programming-related conditions—such as those requested by Cincinnati Bell and ACA—as part of the Transaction’s approval. If anything, these conditions would harm the public interest by injecting additional regulation and litigation into the programming marketplace. To the extent that ACA, Public Knowledge or other entities are concerned about certain aspects of volume discounts as a general matter, this is an industry-wide issue appropriate for resolution through a rulemaking. As these parties and the Commission know, Charter has participated in ongoing efforts and expressed its own concerns about potential abuses in this area. *See* Comments of Cablevision Systems Corp. & Charter Communications, Inc., MB Docket No. 10-71 (June 26, 2014).

¹⁸⁷ *See* WGAW Petition to Deny at 15.

¹⁸⁸ No more helpful to the Transaction’s opponents is the *News Corp.-Hughes Order*. *See* WGAW Petition to Deny at 13. Although the Commission suggested that a strategy of temporary foreclosure might have been profitable in that case, WGAW offers no economic analysis suggesting that it would be profitable for Dr. Malone *here*.

in connection with Dr. Malone's programming interests. ACA argues that (a) New Charter's per-subscriber video profits will be higher than Charter's; (b) Dr. Malone's opportunity cost associated with Discovery's (or Starz's) sale of programming to other MVPDs therefore will rise; and (c) as a result, Discovery and Starz might charge more to other MVPDs than they would absent the transaction.¹⁸⁹ This is incorrect. Dr. Salop explains that the costs of Malone-affiliated programming will not increase materially as a result of the transaction. That is because Dr. Malone lacks the incentive and ability to seek to foreclose other MVPDs from any content.¹⁹⁰

Program Carriage. Alternatively, and even though New Charter itself will have no interest in Discovery, commenters contend that Dr. Malone's interest in Discovery and other programming will cause New Charter to favor that programming at the expense of other high-quality programming.¹⁹¹ That course of conduct is implausible. New Charter will be a publicly traded company with bylaws protecting against undue interference by one shareholder; a professional management team; and a board of directors, the majority of whom will be independent of both Liberty Broadband and Advance/Newhouse and who owe fiduciary duties to New Charter. Indeed, as we have previously explained, the agreements underlying the Transaction contain a plethora of protections to prevent Dr. Malone and Liberty Broadband (as well as Advance/Newhouse) from causing New Charter to take actions that do not promote the

¹⁸⁹ ACA Comments at 11-12.

¹⁹⁰ See Dr. Salop Decl. ¶¶ 33-66; 78-83.

¹⁹¹ See WGAW Petition to Deny at 16-17. No similar contention is even possible with respect to the RSNs currently controlled by Time Warner Cable. As the Commission has previously recognized, RSNs have "no readily available close substitutes," see *General Motors Corp. and Elecs. Corp., Transferors and News Corp. Ltd., Transferee, for Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd 473, 535 ¶ 133 (2004), so their success logically could not be threatened by an MVPD's carriage of other channels.

interests of all of its shareholders.¹⁹² More generally, business decisions within New Charter will be controlled on a day-to-day basis by the managerial leadership, not by Dr. Malone. New Charter's officers would violate the corporate duty of loyalty by favoring Dr. Malone at the expense of other shareholders,¹⁹³ and Dr. Malone would violate the duty of loyalty by asking them to do so.¹⁹⁴

Nor would Dr. Malone (or Advance/Newhouse) even have the incentive to try to sway New Charter to act against its interests by carrying a subpar programming lineup. Refusal to carry high-quality programming that competes with Discovery, or with other programming affiliated with Dr. Malone, would cause New Charter to lose subscribers and suffer reputational harm. Dr. Malone himself would bear the brunt of some of that harm, by virtue of his substantial indirect interest in New Charter, as would Advance/Newhouse.¹⁹⁵ And as Dr. Salop explains, the countervailing gains to Dr. Malone and Advance/Newhouse, via their interests in Discovery, would fall well short of offsetting that harm.¹⁹⁶

¹⁹² See RFI Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 105-116 (Oct. 13, 2015). WGAW complains that these protections “fail to sufficiently insulate New Charter’s decision-making from the outsized influence” of Dr. Malone, and cites the *Liberty-News Corp.-DirecTV Order* for the proposition that “even a nominally ‘independent’ board could still be subject to the influence of a controlling or influential shareholder.” WGAW Petition to Deny at 17-18. WGAW nowhere explains, however, *why* the proposed protections are insufficiently protective. Nor does WGAW mention that the problem in *Liberty-News Corp.-DirecTV* was that Dr. Malone had an interest in a direct competitor of DirecTV-Puerto Rico—a circumstance with no analogue here. See *Liberty-News Corp.-DirecTV Order*, 23 FCC Rcd at 3283-84, 3286-87, 3292-93 ¶¶ 38-39, 44-45, 60, 62.

¹⁹³ See, e.g., *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 723 (Del. 1971).

¹⁹⁴ See, e.g., *Thorpe ex rel. Castleman v. CERBCO, Inc.*, 676 A.2d 436 (Del. 1996).

¹⁹⁵ Dr. Salop Decl. ¶ 87-88.

¹⁹⁶ *Id.* ¶ 93-105.

D. The Transaction Poses No Threat of Horizontal Harms.

Horizontal integration of the three Applicants will create no harms either. We share a presence in only a miniscule number of census blocks, and even this *de minimis* group of census blocks likely overstates the extent of geographic overlap between our service areas.¹⁹⁷ Thus the merger will not result in *any* reduction of competition in *any* markets.¹⁹⁸ To the contrary, the Transaction’s geographic integration will *increase* competition in the enterprise services and advertising markets.¹⁹⁹ And, as addressed below, the opponents’ other theories of indirect harm from horizontal integration are incorrect.

1. The Transaction Poses No Threat of Harm to OVDs Because New Charter Will Lack the Incentive and Ability to Foreclose Them.

As explained above, Applicants disagree that a national broadband “market” for OVDs to reach a critical mass exists, let alone that it would be limited to speeds of 25 Mbps and up. And as also detailed above, New Charter will have every incentive to support OVDs,²⁰⁰ notwithstanding some opponents’ assertions to the contrary.²⁰¹ New Charter’s financial success will increasingly depend on its broadband business, just as Charter’s already does today, and demand for OVDs is the major fuel for broadband demand. It would be foolish for New Charter

¹⁹⁷ See *Public Interest Statement* at 42.

¹⁹⁸ *Adelphia Order*, 21 FCC Rcd at 8234 ¶ 59. Along these lines, Free Press’s contention that “combining these three companies would present a textbook violation of the . . . Horizontal Merger Guidelines” demonstrates a basic misunderstanding of antitrust law. Free Press at 10. The Transaction produces *no* material increased concentration in the broadband market for service to consumers. To the extent that Free Press means to discuss OVDs reaching a critical mass of end users, this has not been deemed a market, and Free Press provides no analysis regarding any concentration according to the Herfindahl-Hirschman Index (“HHI”) the antitrust regulators use to measure horizontal concentration. U.S. Dep’t of Justice & Fed. Trade Comm’n, Horizontal Merger Guidelines § 5.3 (2010).

¹⁹⁹ See *Public Interest Statement* at 35-39.

²⁰⁰ See discussion *supra* Part II.B.

²⁰¹ WGAW Petition to Deny at 25-30; DISH Petition to Deny at 46-57; AT&T Comments at 2.

to harm OVDs in any way. But even if a national broadband “market” did exist and even if New Charter (acting against its interest) attempted to harm OVDs, both our network technology and our legal commitments would keep us from doing so.

DISH is wrong, for example, that New Charter will be able to foreclose or degrade OVDs at the point of interconnection.²⁰² New Charter’s commitment to strong interconnection management practices will ensure that OVD content is delivered according to best-efforts requirements at all times. Charter maintains **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** levels across its interconnection points.²⁰³ Charter also employs software that uses protocol- and source-agnostic deprioritization techniques to manage rare peak congestion periods.²⁰⁴ OVDs will be able to monitor the real-time results of this service via end-point tools such as SamKnows.²⁰⁵ Furthermore, New Charter’s commitment to submit to FCC arbitration of interconnection disputes provides an effective enforcement backstop for any anticompetitive interconnection practices.²⁰⁶

Also incorrect is DISH’s claim that New Charter will be able to thwart OVDs over the public Internet portion of its pipes, either by blocking or degrading traffic directly or through using specialized services to “squeeze” out specific traffic.²⁰⁷ The Commission adequately

²⁰² See DISH Petition to Deny at 4.

²⁰³ Response of Charter Communications, Inc., to Information and Data Requests Dated Sept. 21, 2015, at 177 (Oct. 13, 2015).

²⁰⁴ *Id.*

²⁰⁵ See *id.* at 335; see also FCC, *Fixed Broadband Requirements*, Measuring Broadband America <https://www.measuringbroadbandamerica.com/fixed-broadband/fixed-broadband-requirements/> (last visited Nov. 1, 2015).

²⁰⁶ See *Public Interest Statement* at 19.

²⁰⁷ DISH Petition to Deny at 4.

addressed such concerns in the *Open Internet Order* and New Charter has pledged to abide by the relevant provisions.²⁰⁸

So too will New Charter's traffic management practices, which include strong interconnection commitments, a commitment to augmenting capacity to ensure reliable service, and the peak management practices just described.²⁰⁹ New Charter does not mark IP packets for throttling, blocking, degradation, or deprioritization among best-efforts Internet services.²¹⁰

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CONFIDENTIAL INFORMATION].²¹¹ This system effectively ties New Charter's hands when it comes to foreclosure or degradation of specific Internet traffic. DISH's concern that New Charter might single out SlingTV's IP packets for detrimental treatment is thus misplaced.²¹²

New Charter will continue Charter's history of non-discriminatory interconnection and traffic management. Charter has invested heavily in its National Backbone over the six years since its deployment, and has gone from interconnecting with only the largest interconnection partners—Akamai Technologies, Google, and Level 3 Communications—to interconnecting with dozens of companies of different sizes on an open, inclusive, and non-discriminatory

²⁰⁸ See *Public Interest Statement* at 18-19.

²⁰⁹ See discussion *supra* Part II.A.

²¹⁰ Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 179-80 (Oct. 13, 2015).

²¹¹ Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 181 (Oct. 13, 2015).

²¹² DISH Petition to Deny at 55.

basis.²¹³ The design of Charter’s National Backbone enables us to guard against the conditions leading to degradation. It employs a resilient “mesh” architecture, and is administered by reliable, established third-party vendors such as Equinix.²¹⁴ It is also designed to accommodate rapid bandwidth upgrades as required by customer demand.²¹⁵ **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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Charter’s interconnection policy—which will cover the New Charter footprint upon approval of the Transaction—extends Charter’s practice of reliable settlement-free interconnection. And Charter has listened to concerns parties have raised regarding its interconnection policy, clarifying the policy to address these concerns.²¹⁷ Charter has no paid peering arrangements, and has never replaced a settlement-free arrangement with a paid peering or transit agreement.²¹⁸ No one in this proceeding suggests that Charter has ever failed to adhere to its interconnection compacts or ever impermissibly blocked, throttled, or degraded lawful

²¹³ See Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 185 (Oct. 13, 2015).

²¹⁴ See *id.* at 186.

²¹⁵ See *id.*

²¹⁶ OTI Comments at 5.

²¹⁷ See discussion *supra* Part II.A.

²¹⁸ See Response of Charter Communications, Inc., to Information and Data Requests Dated Sept. 21, 2015, at 190, 204 (Oct. 13, 2015).

Internet traffic. It is therefore clear that New Charter's interconnection policy, as clarified, will be good for OVDs and good for subscribers.

2. Proposed Wholesale Access and Unbundling Conditions Would Be Harmful.

A handful of parties propose to require wholesale access to Charter's plant, equipment, and managerial expertise.²¹⁹ But the Commission has repeatedly rejected this kind of forced unbundling, most recently in the AT&T-DirecTV transaction, the *Open Internet* proceeding, and the Comcast-NBCU transaction.²²⁰ As the Commission has rightly concluded, organic dynamism, not synthetic competition, will best serve the Communications Act's goals of promoting advanced deployment of broadband services.²²¹ No party presents any reason to change this policy, or explains why New Charter, alone among broadband providers, should be subject to an unbundling requirement.

With respect to standalone broadband, New Charter will continue to offer the service throughout its footprint with competitive pricing and consumer-friendly terms. The Commission did not impose a standalone broadband requirement outside the low-income context in *AT&T-DirecTV*, which we address separately below, and it should refrain from doing so here. To do otherwise would enmesh the Commission in the kinds of broadband price regulation that it has eschewed in the past.²²²

²¹⁹ See, e.g., Free Press Petition to Deny at 59.

²²⁰ *Comcast-NBCU Order*, 26 FCC Rcd at 4278 ¶ 101 n.224 (rejecting Earthlink's request for wholesale broadband access); *AT&T-DirecTV Order*, 30 FCC Rcd at 9209, 9278 ¶¶ 209 & n.587, 395 (describing DISH's request for a wholesale condition, but refraining from imposing one).

²²¹ *Open Internet Order*, 30 FCC Rcd at 5851-52 ¶ 514.

²²² See, e.g., *id.* at 5804 ¶ 433 (explaining that rate regulation is inconsistent with the Commission's approach to regulating broadband).

3. New Charter Will Not Harm Video Competitors Via Cross-Subsidization.

Free Press argues that New Charter will be able to harm MVPD and OVD competitors by cross-subsidizing its MVPD service with broadband profits.²²³ But as discussed at greater length above, the broadband market is highly competitive: New Charter will compete for broadband market share (as Charter does now) with telcos, mobile wireless providers, and insurgent fiber companies. Because the market is so competitive, New Charter will have every incentive to reinvest broadband profits in broadband innovation. Using broadband profits to cross-subsidize video, by contrast, would make New Charter a less vibrant broadband competitor.

Even if New Charter *could* use its broadband profits to cross-subsidize its MVPD services, moreover, such a strategy would be unlikely to succeed. The market for video services is fluid and diverse. Video service providers—which include telcos, new fiber entrants, satellite providers, and OVDs—offer a plethora of different services with a wide variety of pricing plans and business models. Consumers do not just choose the service that is cheapest; they weigh a variety of factors, including available programming lineups and device accessibility. New Charter therefore would have little comfort that cross-subsidization would actually increase its video market share or squeeze out other video providers—yet it would certainly reduce the amounts that New Charter can invest in broadband.

²²³ See Free Press Petition to Deny at 35-38; see also Public Knowledge Petition to Deny at 17.

4. New Charter’s Increased Scale as a Purchaser of Programming Will Not Harm the Public Interest.

a. New Charter’s Programming Cost Savings Will Not Harm Other Distributors of Content.

One of this Transaction’s benefits is its ability to generate immediate consumer savings by reducing New Charter’s video programming costs.²²⁴ Some of the Transaction’s opponents, however, argue that this is a bad thing. They contend that other programming distributors will not share these reductions or will pay even higher fees because programmers will seek to recoup their “losses” by charging more to smaller distributors.²²⁵ These arguments are unavailing.

To begin with, this argument must be judged against the current market for programming. As Chairman Wheeler has recognized, programming costs have “skyrocketed,” in recent years.²²⁶ Retransmission fees for broadcast channels alone increased nearly 8,600 percent—from \$28 million to \$2.4 *billion*—between 2005 and 2012, grew to \$3.3 billion in 2013, and are projected to grow to \$7.6 billion by 2019. This Transaction benefits current Charter customers by lowering their programming rates to those of Time Warner Cable and Bright House Networks

²²⁴ See discussion *supra* Part II.F.

²²⁵ See Public Knowledge Petition to Deny at 14-16; DISH Petition to Deny at 65; Cincinnati Bell Comments at 11-14; COMPTTEL Petition to Deny at 8-12. According to Public Knowledge, “the FCC must assure itself that any volume discounts the merged company is able to enjoy are not anticompetitive, and that any such discounts that would not raise costs on smaller rivals.” Public Knowledge Petition to Deny at 15. We agree. The “volume discounts” New Charter will obtain for the legacy Charter footprint are not anticompetitive since these will simply be the result of stepping into Time Warner Cable’s agreements, which no one has alleged are anticompetitive. And Dr. Katz explains why these costs reductions, which will benefit competition and consumers, will not raise costs on smaller rivals. Dr. Katz Decl. ¶¶ 69-73. See also Public Knowledge Petition to Deny at 14-16; DISH Petition to Deny at 65; Cincinnati Bell Comments at 11-14.

²²⁶ See Chairman Tom Wheeler, *Protecting Television Consumers By Protecting Competition*, Official FCC Blog (Mar. 6, 2014), <http://www.fcc.gov/blog/protecting-television-consumers-protecting-competition>.

(which buys programming through Time Warner Cable).²²⁷ But even assuming the economic chain of causation claimed by opponents (which we address below), this Transaction could have no meaningful impact on programmers or other programming distributors. Time Warner Cable already buys programming for Bright House Networks, and adding Charter's additional 4.2 million video subscribers only accounts for an accretion of approximately 4% of the video market nationwide. As Dr. Katz concludes, this modest growth will not have any meaningful impact beyond the parties to the Transaction and their customers.²²⁸

In any case, Opponents' economic arguments are misguided. INCOMPAS, for example, argues that (a) wireline providers must offer linear video services alongside broadband in order to remain competitive; (b) high programming costs are an impediment to those providers' investment in broadband infrastructure; and (c) New Charter's increased scale will enable it to negotiate better deals with programmers, and thus invest more heavily in broadband infrastructure.²²⁹ But lower programming fees will benefit New Charter's customers and make New Charter a better competitor. No economic theory supports the argument that some competitors' input prices should be kept artificially high to aid other would-be competitors.

Nor will a reduction in New Charter's programming costs cause other distributors to pay more. As Dr. Katz explains, programmers already engage in tailored negotiations with distributors and bargain for the highest fees they can obtain from smaller distributors.²³⁰ Indeed, it would be irrational for a profit-maximizing programmer to settle for a smaller fee from one

²²⁷ See discussion *supra* Part II.F.

²²⁸ *Id.* ¶ 86.

²²⁹ *Id.* ¶¶ 10-12.

²³⁰ See *AT&T-DirecTV Order*, 30 FCC Rcd at 9200 ¶ 182 (noting that “unaffiliated programmer[s] are] concerned with obtaining the highest prices [they] can for [their] programming”).

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MVPD because another MVPD has agreed to pay more—but that is an essential premise of the “recoupment” argument advanced by opponents. As the Commission found in *AT&T-DirectTV* when confronting a similar argument, there is no evidence that volume discounts given to one distributor cause programmers to bargain more zealously with others.²³¹ To the contrary, as Dr. Katz establishes, the evidence confirms that discounts do not have this effect.²³²

In any event, new entrants that require programming include such well-financed companies as Google and Apple. Google, for instance, has begun offering a 150+ channel lineup to its Google Fiber customers in its most developed cities,²³³ and Apple is soon to roll out an integrated, app-based system called Apple tvOS, which features linear streaming content alongside major OVDs like HBO Now, Netflix, and Hulu.²³⁴ Amazon, too, has been making overtures regarding a live streaming video service.²³⁵ Each of these market participants will be able to back up their roll-out efforts with significant cash on hand and EBITDA—resources that dwarf those of New Charter, and in fact all MVPDs.²³⁶

²³¹ See *AT&T-DirectTV Order*, 30 FCC Rcd at 9203 ¶¶ 190-192.

²³² See Dr. Katz Decl. ¶¶ 106-109.

²³³ See, e.g., Google Fiber, *TV Channels*, <https://fiber.google.com/cities/kansascity/channels/> (last visited Oct. 28, 2015).

²³⁴ See Apple, *TV*, <http://www.apple.com/tv/> (last visited Oct. 28, 2015).

²³⁵ See Adam Levy, *Amazon.com May Give You Another Reason to Cut the Cord*, The Motley Fool (Oct. 23, 2015), <http://www.fool.com/investing/general/2015/10/23/amazoncom-may-give-you-another-reason-to-cut-the-c.aspx>.

²³⁶ For example, Google’s cash on hand is \$69 billion and its EBITDA are \$23.3 billion. See Yahoo! Finance, *Alphabet, Inc.*, <http://finance.yahoo.com/q?s=GOOG> (last visited Oct. 30, 2015); cash on hand calculated based on Google, Inc., Quarterly Report (Form 10-Q) (July 23, 2015). Apple has \$78 billion in EBITDA and \$203 billion in cash on hand. See Yahoo! Finance, *Apple Inc.*, <http://finance.yahoo.com/q?s=AAPL> (last visited Oct. 30, 2015); cash on hand calculated based on Apple, Inc., Quarterly Report (Form 10-Q) (July 22, 2015). Netflix has EBITDA of \$372 million and \$2 billion in cash on hand. See Yahoo! Finance, *Netflix, Inc.*, <http://finance.yahoo.com/q?s=NFLX> (last visited Oct. 30, 2015); cash on hand calculated based on Netflix, Inc., Quarterly Report (Form 10-Q) (Oct. 16, 2015).

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Finally, even if this harm to programming distributors were real, this Transaction would not be the proper proceeding to address it. As the Commission stated just a few months ago in its *AT&T-DirectTV Order*: “To the extent there potentially is an industry-wide public interest harm associated with volume discounts as such,” the Commission reasoned, “it would be beyond the scope of this proceeding . . . as it is not transaction specific.”²³⁷

b. New Charter’s Programming Cost Savings Will Not Harm the Public Interest by Disadvantaging Programmers.

Nor will reductions in New Charter’s programming costs be harmful to programmers, including broadcasters and smaller independent programmers.²³⁸ Once again, to the extent that the Transaction leads to fee reductions for programmers, those reductions are public interest benefits. As the Commission has repeatedly held, its inquiry concerns the welfare of the public and of consumers—not of the suppliers of particular inputs to the communications services from which the public benefits.²³⁹

In any event, programmers sell their content into a competitive market. They are able to sell to a wide range of MVPDs and OVDs. And as the success of online-only programming—such as *Transparent*, *House of Cards*, and *Orange Is the New Black*—shows, programmers have new and expanding markets for their content.

Concerns about supposed harm to programmers, moreover, rest on a monopsony model of how programming buyers and sellers will behave. If this model were an accurate depiction of the market for programming content, a powerful programming buyer’s restrictions on content-

²³⁷ *AT&T-DirectTV Order*, 30 FCC Rcd at 9203 ¶ 191. Cincinnati Bell’s proposal to require the Applicants to produce all of their programming agreements to the Commission thus makes no sense in the context of this proceeding.

²³⁸ See NAB Petition at 17; Entravision Communications Corporation Petition to Deny at 9-12 (Oct. 13, 2015) (“Entravision Petition to Deny”); Public Knowledge Petition to Deny at 16.

²³⁹ See, e.g., *AT&T-DirectTV Order*, 30 FCC Rcd at 9221-22 ¶ 235.

purchasing would lead to below market prices and an inefficiently low production of programming.²⁴⁰ This model, however, does not accurately depict the robust programming market we see today. Because negotiations in the programming market are bilateral and largely confidential, a buyer's behavior in one negotiation will not affect its negotiations with other buyers and will not set a unified price.²⁴¹ Because of this, as explained in the *AT&T-DirectTV Order*, programming buyers lack incentives to exercise monopsony power by restricting purchasing.²⁴² Just as the Commission rejected theories of harm based on a monopsony model of the programming market in *AT&T-DirectTV*, it should do so here.²⁴³

More generally, any reduction in programming fees resulting from the Transaction will not harm investment in programming. As Dr. Katz explains, “although the cost savings [New Charter] will achieve will be significant from the perspective of New Charter's customers, the programming cost savings will not be of a magnitude expected to affect the quality or variety of programming that the content industry would be able to offer.”²⁴⁴ Programmers primarily rely on advertising revenues and affiliate fees to support their operations.²⁴⁵ Of those revenue streams, Dr. Katz calculates that the program-cost benefits seen by Charter's legacy footprint in 2016 will amount to **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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²⁴⁰ See Public Knowledge Petition to Deny at 15.

²⁴¹ Dr. Katz Decl. ¶¶ 71-73.

²⁴² *AT&T-DirectTV Order*, 30 FCC Rcd at 9222 ¶ 236.

²⁴³ Importantly, the fact that the Transaction will result in programming cost savings for New Charter does not mean that those savings will result from New Charter's exercise of monopsony power. These savings will result from New Charter's ability to step into the shoes of Time Warner Cable's more favorable agreements with programmers.

²⁴⁴ Dr. Katz Decl. ¶ 86.

²⁴⁵ See *id.* ¶ 87.

programmer revenue, based on 2012-2014 numbers.²⁴⁶ “Such a small change,” he explains, “is unlikely to materially change the incentives faced by programmers to create programming, particularly given that U.S.-based cable and broadcast networks are global in scope and also earn significant revenues from regions outside of the U.S.”²⁴⁷

The Transaction’s opponents do not provide any facts to the contrary. Entravision, for instance, argues that New Charter’s increased scale in DMAs with large Latino populations could threaten the viability of some programmers that offer content popular in Latino communities. But the Transaction leads to at most **[BEGIN HIGHLY CONFIDENTIAL INFORMATION**

[END HIGHLY CONFIDENTIAL INFORMATION] In any event, serving “15.5% of all MVPD subscribers in the top twenty Hispanic markets” does not suggest that New Charter will hold outsized leverage.²⁴⁹ Furthermore, there is no evidence that increased bargaining leverage on New Charter’s part could threaten any programmer’s viability in any case.²⁵⁰ Programmers can sell to a wide and growing range of MVPDs and OVDs, enabling them to take their product elsewhere if they are dissatisfied with any offered terms.²⁵¹

Entravision’s claim—that New Charter may be able to bargain for lower programming prices (a

²⁴⁶ *See id.* ¶ 88.

²⁴⁷ *Id.*

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²⁴⁹ Entravision Petition to Deny at 10. Comcast-Time Warner Cable, for instance, would have served over 30% of the Latino market. *See* Comments of Entravision, MB. Docket No. 14-57, at 2 (Feb. 18, 2015). *See also* Dr. Katz Decl. ¶¶ 94-104 (discussing the weaknesses of Entravision’s economic and demographic analysis).

²⁵⁰ For instance, Entravision provides no quantitative analysis of programmers’ margins, the scale they require to be viable, or the impact of any fee reductions likely to result from the merger.

²⁵¹ *See* Dr. Katz Decl. ¶¶ 75-85.

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clear *benefit* for New Charter’s customers)—thus does not show that “the transaction would decrease consumer welfare by reducing the output or quality of programming.”²⁵² Entravision’s position in this proceeding is incompatible with the view it took in the Comcast-Time Warner Cable transaction. While Entravision seeks outright denial of this Transaction, where the merger is smaller and New Charter will own no Latino programming, Entravision would have been satisfied in the proposed Comcast-Time Warner Cable transaction with a limited divestiture of cable systems in top Latino markets or a divestiture of Comcast’s Latino programming.²⁵³

Nor do the comments of Aspire Channel, LLC (“Aspire”), and UP Entertainment, LLC (“UP”), provide a basis to require New Charter to adhere to specific “conditions maintaining the programming diversity of independent channels, such as Aspire and UP.”²⁵⁴ Aspire and UP express concern that, because they currently are carried by Time Warner Cable and Bright House Networks but not by Charter, the Transaction will deprive them of a distribution platform. But New Charter will build on Charter’s strong record of carrying a diverse line-up of independent programming networks—from TV One to El Rey, and from Bounce TV to Fusion. Aspire and UP will receive full and fair consideration based on their demonstrated value as potential components of a strong programming line-up. The prospect that Aspire and UP might be left off of New Charter’s lineup does not warrant the imposition of carriage-related conditions; the role of the Commission’s merger review is not to guarantee particular programming-market competitors an outlet for their programming.

²⁵² *AT&T-DirectTV Order*, 30 FCC Rcd at 9221 ¶ 234. We agree with Public Knowledge that a decline in programming quality or output would not be in the public interest. *See* Public Knowledge Petition at 16. Fortunately, as Dr. Katz explains in detail, this will not be the case. Dr. Katz Decl. ¶¶ 74-105.

²⁵³ *See* Comments of Entravision, MB. Docket No. 14-57 (Feb. 18, 2015).

²⁵⁴ Aspire Channel, LLC, and UP Entertainment, LLC, Comments at 4 (Oct. 13, 2015).

c. *Concerns About Foreclosing Other MVPDs and OVDs Are Misplaced.*

Finally, allegations that New Charter will have the incentive and ability to force programmers to accept contractual provisions that restrict other MVPDs and OVDs from obtaining content are incorrect.²⁵⁵

As a threshold matter, such allegations are backward in describing the leverage between programmers and MVPDs in today’s marketplace: programmers are in the driver’s seat in the current environment.²⁵⁶ Armed with copyright control, distribution rights, or the ability to grant retransmission consent, programmers are amply able to negotiate for contract terms that maximize their profits. Moreover, their interests are the ones most served by Most-Favored Nation clauses (“MFNs”), windowing provisions, and Alternative Distribution Means clauses (“ADMs”). By using these provisions, programmers are able to create successive cycles of content-release. The DOJ has noted that these cycles enable price discovery and create incentives for content promotion.²⁵⁷ This model has been incredibly successful for programmers, enabling them to maximize the “long tail” of their content rights and generate multiple revenue streams for the same content. These incentives are outside the Applicants’ control, and are unaffected by this Transaction. To the extent Public Knowledge and others express concerns about the possibility of misuse of these provisions to disadvantage OVDs, there

²⁵⁵ See Public Knowledge Petition to Deny at 9-14; WGAW Petition to Deny at 17; DISH Petition to Deny at 64-65.

²⁵⁶ As we discuss *supra* Part III.D.4.a, the bargaining situation between programmers and distributors is heavily tilted in programmers’ favor. If the Commission is worried about anti-competitive contracting practices, then it should look to the practices of the programmers.

²⁵⁷ See United States Dep’t of Justice, Competitive Impact Statement at 35, *filed in United States v. Comcast Corp.*, No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011).

is no evidence that any applicant has engaged in this type of behavior and there is no basis for believing New Charter will.

As a general matter, MFNs can benefit the market in several ways. *First*, MFNs can promote contracting by assuring buyers that they are receiving market terms and conditions for programming.²⁵⁸ Without MFNs, a buyer would need to do significant, time consuming and potentially expensive research into what a “fair” set of terms is for a given program or channel. MFNs can solve this problem by allowing a buyer to efficiently be certain that it is receiving the best available terms for the programming, without expending a great deal of time and effort, thereby making the programming market work in a more efficient and timely manner.

Second, MFNs can further facilitate contracting, especially for new programs or channels, by allowing buyers to see how other buyers value unproven content. Because MFNs grant buyers the right to pay the lowest price a programmer has agreed to for its content, and because buyers are likely to value programs similarly to other buyers, MFNs can help buyers better estimate the true value of programming content.²⁵⁹ This can be beneficial because buyers are reluctant to commit to a transaction if they do not know whether they are paying a reasonable price for a given asset. “Otherwise,” Dr. Katz notes, a new network might “not be able to launch due to a chicken-and-egg problem whereby substantial numbers of potential distributors wait to see how the programmer fares and what price is established before those distributors are willing to enter carriage agreements.”²⁶⁰

Third, MFNs can help programming distributors protect their customers from the fallout of failed carriage negotiations. MFNs can reduce the risk of bargaining frictions and

²⁵⁸ Dr. Katz Decl. ¶ 112.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

economically inefficient contracting failures by enabling swift carriage negotiations. And swift negotiations help reduce the likelihood of carriage disruptions or the use of programmer “holdup” tactics during contract renegotiation periods.²⁶¹ Viewers who hate missing their must-see TV are thus served by MFNs.

Fourth, MFNs can ensure that subscribers will benefit from all distribution rights that programmers are willing to license, without the need for further negotiations. For instance, if a programmer is not yet willing to license its content for delivery over certain technologies, but changes its policy in the future, an MFN will ensure that Charter can deliver that programmer’s content to its customers in the most advanced form possible.²⁶² In this way, MFNs can facilitate the growth of experimental forms of online video distribution.

All these benefits make clear that MFNs can serve a variety of useful purposes without anti-competitive consequences. But even if the Commission were to think otherwise, New Charter’s increased scale still would not pose an anti-competitive threat in the programming market. The Commission held that AT&T-DirecTV would lack the incentive and ability to behave anti-competitively in the programming market.²⁶³ The same must be true of New Charter because, as Dr. Katz demonstrates, New Charter’s bargaining position vis-à-vis programmers will be weaker than that held by the combined AT&T-DirecTV because New

²⁶¹ *Id.*

²⁶² *See id.*

²⁶³ *See AT&T-DirecTV Order*, 30 FCC Rcd at 9201-02 ¶ 187 (rejecting “DISH’s generalized assertion that the combined entity would have an increased incentive and ability to force third-party programmers into withholding online video rights from rival MVPDs and OVDs”).

Charter will have fewer MVPD subscribers.²⁶⁴ Thus, WGAW’s contrary arguments are mistaken.²⁶⁵

Indeed, no one in this proceeding cites any history of anticompetitive contracting practices by any of the Applicants. DISH reports that, “Sling TV has frequently been informed that certain programmers’ agreements with certain cable operators prohibit them from, or restrict them in, granting [online distribution] rights.”²⁶⁶ But DISH provides no reason to conclude that the instant Transaction would harm the public interest.

The conditions that DISH and Cincinnati Bell propose are therefore inappropriate. In particular, there is no reason to restrict New Charter’s ability to enter into MFNs or windowing or holdback agreements—all of which, as Dr. Katz explains, have widely accepted legitimate business purposes, especially in fluid and rapidly-evolving markets like the one at issue here. More broadly, even if these concerns were real, they would involve every participant in the content market. As such, they would not be transaction-specific, and would be improper to resolve through this review. Nor is there any reason to require New Charter to disclose a plethora of competitively sensitive information about its programming agreements²⁶⁷ to give an unfair advantage to its competitors.

5. Opponents’ Attempts to Conjure the Threat of Duopoly Are Not Credible.

Recognizing that New Charter will have fewer broadband customers than Comcast, several opponents nevertheless suggest that New Charter’s increased size is a competitive threat

²⁶⁴ Dr. Katz Decl. ¶¶ 15-16 (explaining that “industry participants and financial analysts all have found that larger MVPDs generally pay lower programming fees per channel per subscriber than do smaller MVPDs”).

²⁶⁵ See WGAW Petition to Deny at 12-14.

²⁶⁶ DISH Petition to Deny at 64.

²⁶⁷ See *id.* at 68.

because of the likelihood that New Charter will coordinate with Comcast to act anti-competitively toward OVDs.²⁶⁸ This “duopoly” theory is mistaken.²⁶⁹

First, opponents provide no explanation why New Charter would collude with Comcast to harm OVDs—as New Charter has no incentive to harm OVDs in the first place. As explained above, it is in New Charter’s interest to promote OVDs, both because OVDs are the linchpin that will drive broadband subscription growth into the future and because blocking OVDs would be unprofitable.²⁷⁰ New Charter also will have no incentive to block OVDs because New Charter will lack any significant programming interests.²⁷¹ Thus, opponents’ collusion theory rests on conjecture, which is not a sufficient basis for regulatory action.²⁷²

²⁶⁸ See *id.* at 27-32; AT&T Comments at 2; Free Press Petition to Deny at 1-4; WGAW Petition to Deny at 22.

²⁶⁹ So, too, is the idea that the Commission sought to prevent a duopoly in the proposed Comcast-Time Warner Cable transaction. See Free Press Petition to Deny at 4.

²⁷⁰ See discussion *supra*, Parts II.B and III.D.1; see also Second Dr. Scott Morton Decl. ¶¶ 78-81, 120-126.

²⁷¹ Compare *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4263 ¶ 61 (2011) (finding that, “as a vertically integrated company, Comcast will have the incentive and ability to hinder competition from other OVDs, both traditional MVPDs and standalone OVDs”) (emphasis added); see also Second Dr. Scott Morton Decl. ¶ 170.

²⁷² Indeed, the D.C. Circuit thoroughly addressed virtually identical collusion arguments in 2001, when it rejected the Commission’s claims of collusion as “mere conjecture” in striking down the national 30% cable subscriber cap, see *Time Warner Entm’t Co., L.P. v. FCC*, 240 F.3d 1126, 1130-31 (D.C. Cir. 2001), and in 2009, vacating the cap again in the face of a stark lack of actual evidence that could support such a rule, see *Comcast Corp. v. FCC*, 579 F.3d 1, 6, 10 (D.C. Cir. 2009). In 2001, the court found that “the risk of collusion inadequately substantiated to support the 30% [subscriber cap].” *Time Warner Entm’t Co., L.P.*, 240 F.3d at 1134. Although the D.C. Circuit agreed that “collusion is a form of anti-competitive behavior that implicates an important government interest,” it found that “the FCC has not presented the ‘substantial evidence’ required . . . that such collusion has in fact occurred or is likely to occur.” *Id.* Therefore, the D.C. Circuit concluded that the bases of the Commission’s argument were wholly speculative. In fact, the D.C. Circuit stated that “[t]he only justification that the FCC offers in support of its collusion hypothesis is the economic commonplace that, all other things being equal, collusion is less likely when there are more firms.” *Id.* at 1132. In *Comcast*, the

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Second, because of conflicting technological platforms and business plans, New Charter has little ability to collude with Comcast and even less incentive to do so.²⁷³ As Dr. Scott Morton explains, “perhaps the most important[.]” factor differentiating the two firms is that Comcast is vertically integrated with the significant national programming content of NBCUniversal, whereas New Charter lacks significant national programming.²⁷⁴ Comcast owns 15 cable networks, including USA Network, Syfy, MSNBC, E!, CNBC, and Bravo (each having over 90 million subscribers), the NBC network and Telemundo.²⁷⁵ Approximately, 33% of Comcast’s revenue in 2014 (over \$22 billion) was generated by its cable networks, broadcast television, and filmed entertainment segments.²⁷⁶ The incentives of a company with such significant video programming interests are dramatically different than a company, like New Charter, which would have no significant national programming. New Charter will provide consumers with access to the online and cable programming they want without regard to whether it harms a particular producer of programming.

Moreover, unlike New Charter, we understand that Comcast operates according to a more CPE-centric delivery model, investing heavily in advanced set-top-boxes on its Xfinity platform,

D.C. Circuit again used reasoning similar to that of *Time Warner* when vacating the Commission’s cable subscriber cap, focusing again on the Commission’s lack of any evidence that collusion had or was likely to occur. The D.C. Circuit held that the cap was “arbitrary and capricious,” because the Commission “failed adequately to take account of the substantial competition cable operators face from non-cable video programming distributors.” *Comcast Corp.*, 579 F.3d at 10; *see also id.* at 6 (“A cable operator faces competition primarily from non-cable companies, such as those providing DBS service and, increasingly, telephone companies providing fiber optic service.”).

²⁷³ Second Dr. Scott Morton Decl. ¶ 166-167.

²⁷⁴ *Id.* ¶ 192.

²⁷⁵ Comcast Corp., Annual Report (Form 10-K) at 8-11 (2014).

²⁷⁶ *Id.* at 53, 61.

so that all OVD activity on the Comcast system has to route through their set-top box.²⁷⁷ By contrast, Charter’s new interface, Spectrum Guide, is cloud-based, and because it uses common programming language, it is relatively easy for entities, including OVDs to design applications for the Spectrum Guide.²⁷⁸ Because New Charter and Comcast employ different strategies when it comes to technology and consumer-contracting practices, Dr. Scott Morton concludes, it would be implausible for them to arrive at a collusion strategy that would benefit them both.²⁷⁹

Third, there is no plausible mechanism through which the two firms could collude even if they wanted to. Among other obstacles, New Charter and Comcast lack any realistic means of enforcing a collusive agreement.²⁸⁰ Because the two firms do not compete for the same customers, traditional methods of policing (such as a price war) would be unavailable, leaving only very visible (and very expensive) options for enforcement.²⁸¹

Finally, AT&T’s argument about “collusion” with various “exclusive” cable industry groups, such as CableLabs, has no merit.²⁸² These groups serve important functions, such as allowing cable operators to open an otherwise unavailable national vendor market for common technology to compete against nationwide operators such as AT&T. Nor are such industry groups unique to the cable industry; indeed, similar groups with analogous functions (*e.g.*, the United States Telecom Association) serve incumbent wireline telecommunications companies

²⁷⁷ Second Dr. Scott Morton Decl. ¶¶ 53-58, 166-167.

²⁷⁸ *Id.* ¶¶ 40, 43, 166-167. The difference between Charter’s cloud-based delivery method and Comcast’s hardware-based method are further indication of the difference between the two firms when it comes to OVDs, and make it wholly unrealistic that New Charter and Comcast could agree on any shared collusive strategy.

²⁷⁹ *Id.* ¶ 166-167. As Dr. Scott Morton explains, “when two firms have different profit-maximizing strategies, it is not plausible to imagine that they will voluntarily agree to take the same strategy [*i.e.*, collusion], as that would harm one of the two.” *Id.* ¶ 167.

²⁸⁰ *Id.* ¶¶ 164-196.

²⁸¹ *Id.* ¶¶ 195-196.

²⁸² AT&T Comments at 2.

like AT&T. Cable operators’ common efforts to promote WiFi (and ensure that LTE-unlicensed technology does not disrupt unlicensed operations) are pro-competitive activities aimed at challenging the incumbent wireless operators’ dominant position in the wireless market. Indeed, AT&T currently enjoys more than 120 million wireless subscribers, approximately \$74 billion in wireless service and equipment revenues, and a spectrum portfolio second only to Verizon’s.²⁸³ The Commission should welcome cable companies’ efforts to bring more competition to that market. In any case, the issues AT&T raises are not transaction-specific: Just as the Commission did not review every “closed membership” membership organization²⁸⁴ and technology-sharing system in approving the AT&T-DirecTV merger,²⁸⁵ there is no legitimate reason for AT&T to ask the Commission to do so here.²⁸⁶

6. New Charter’s Increased Scale Will Not Harm the Set-Top Box Business.

Nor will New Charter’s increased scale harm the set-top box business, despite the claims of some commenters. To the contrary, as part of our strategy to deliver video content via Internet Protocol (“IP”), we intend to make more of our programming available via the New Charter App and, ultimately, web portal, thus making it even easier to use third-party devices.

Charter’s Spectrum Guide App is now available on Roku devices, and we intend to place the App on other third-party devices that meet reasonable technical and security specifications. Spectrum Guide’s cloud-based system is also compatible with any digital set-top box, including

²⁸³ See AT&T Inc., Annual Report (Form 10-K) at 2 (Feb. 20, 2015); *id.*, Exhibit 12, at 4, 5.

²⁸⁴ AT&T Comments at 4.

²⁸⁵ See generally *AT&T-DirecTV Order*, 30 FCC Rcd 9131.

²⁸⁶ AT&T further urges the Commission to “resist calls by the cable industry . . . for asymmetrical regulation of Ethernet and other enterprise services.” AT&T Comments at 2. Whatever the merits of AT&T’s arguments, they are not specific to this Transaction, and AT&T acknowledges as much. See AT&T Comments at 5 (arguing against further regulation “regardless of whether this merger is approved”).

legacy boxes, and thus will enable video subscribers to use a wide range of set-top boxes to receive our video service.²⁸⁷

7. Zoom’s Allegations Regarding New Charter’s Modem Policies Are Unrelated to the Transaction and Without Merit.

Zoom’s allegations that Charter’s modem policies violate the Commission’s regulations are not transaction-specific and wrong on the merits.

a. Zoom’s Arguments Are Not Transaction-Specific.

Zoom contests Charter’s policy of not charging its broadband Internet customers for Charter-supplied modems and of requiring the testing and certification of modems intended for attachment to Charter’s network. Zoom attempts to tie its dispute over Charter’s modem policies to transaction-based harm by arguing that Charter’s policies will have a larger effect on Zoom once Charter grows larger. By that logic, however, any allegation of a preexisting harm would be transaction-specific, on the theory that the transaction would cause the “offender” to grow. The Commission rejected this argument in *AT&T-DirecTV*, ruling that any harm caused by violations of the Commission’s “navigation device” rules—the exact rules Zoom cites in its petition to deny—was not transaction specific.²⁸⁸ The Commission should take the same course here.

²⁸⁷ Additionally, none of the Applicants have any history of favoring affiliate equipment manufacturers and New Charter will of course be subject to the Commission’s rules regarding navigation devices. See 47 U.S.C. § 549; cf. *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816, 9859-61 ¶¶ 97-101 (2000) (“The rules adopted in the *Navigation Devices Order* address the commenters’ concerns that AT&T will exercise excessive market power in the purchase and provision of cable equipment.”).

²⁸⁸ In that proceeding, TiVo, which manufactures set-top boxes, “request[ed] that the Commission require the Applicants to comply with Section 629 of the Act and Sections 76.1201, 76.1203, and 76.1205 of the Commission’s rules,” *AT&T-DirecTV Order*, 30 FCC Rcd at 9228

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b. *Charter’s Modem Policies Comply with the Commission’s Rules and Are Pro-Consumer.*

Zoom argues that Charter’s practice of not charging its customers for Charter-supplied modems and its modem-certification requirements violate the Commission’s “navigation device” rules.²⁸⁹ These rules require an MVPD to permit consumers to connect third-party navigation devices to its video programming system. Zoom’s argument fails for several reasons.

First, Charter complies with the relevant navigation device rules.²⁹⁰ Zoom argues that Charter violates 47 C.F.R. §§ 1201-03 because Charter has “prevent[ed]” or “foreclos[ed]” the use of Zoom’s modems.²⁹¹ But Charter is permitted to prevent a customer from using a

¶ 250, which are the same provisions that Zoom invokes here. The Commission concluded that, “the transaction does not create a public interest harm ... Rather we find that commenters raise broader regulatory policy questions that are more appropriately addressed in the rulemaking context.” *Id.* at 9229 ¶ 253.

²⁸⁹ 47 C.F.R. § 76.1201 *et seq.*

²⁹⁰ To the extent Zoom argues that Charter is violating Section 629 itself—as distinct from the Commission’s implementing regulations—that argument fails because Section 629 merely directs the Commission to enact regulations. *See* 47 U.S.C. § 549(a) (directing the Commission to “adopt regulations”); *id.* § 1302(a) (directing the Commission to “encourage the deployment” of “advanced telecommunications capability”); *id.* § 1302(b) (directing the Commission to “initiate a notice of inquiry”). Thus, it does not carry independent legal force over and above the Commission’s regulations. *See Reynolds v. United States*, 132 S. Ct. 975, 978 (2012) (statute stating that “[t]he Attorney General shall have the authority to specify the applicability of” certain provisions that did not apply until the Attorney General promulgated a Rule (quotation marks omitted) (bracket in original)); *Sweet v. Sheahan*, 235 F.3d 80, 86-87 (2d Cir. 2000) (statute stated that “[n]ot later than 2 years after October 28, 1992, the Secretary [of HUD] and the Administrator of the [EPA] shall promulgate regulations under this section for the disclosure of lead-based paint hazards in target housing which is offered for sale or lease;” court held that statute did not impose obligation until regulations became effective (quotation marks omitted) (alterations original)).

²⁹¹ Zoom Telephonics, Inc., Petition to Deny, or in the Alternative, for Conditional Grant at 17-18 (Oct. 13, 2015) (“Zoom Petition”).

navigation device “where electronic and physical harm would be caused by the attachment or operation of such devices,” and Charter’s certification process determines exactly that.²⁹²

Zoom takes particular issue with Charter’s requirements related to wireless routers that are integrated with cable modems.²⁹³ But in such integrated devices, the modem and router almost always share the same processor, which means problems on the router can cause problems for the cable modem.²⁹⁴ For example, Charter has found that some integrated devices have insufficient memory, which locks up both the Internet service and the home networking functionality. Moreover, the router manages the address resolution protocol process, which maps MAC addresses to IP addresses. A router that performs this function improperly can cause problems communicating with the CMTS and, ultimately, cause the failure of the modem as well as a broader service outage. For these reasons, testing integrated wireless routers is necessary to avoid harm to Charter’s network.

Second, Zoom argues that Charter violates 47 C.F.R. § 76.1206 because it does not include a separate cable modem rental fee on its bills. But that regulation, by its terms, does not apply to cable modems. It states: “Multichannel video programming distributors offering *navigation devices subject to the provisions of § 76.923* for sale or lease directly to subscribers, shall . . . separately state the charges to consumers for such services and equipment.”²⁹⁵ As Zoom acknowledges, Charter’s cable modems are not “subject to the provisions of § 76.923”

²⁹² 47 C.F.R. §§ 76.1201, 76.1203; *Implementation of Section 304 of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 14,775, 14,786 ¶ 29 (1998).

²⁹³ Zoom Petition at 9-10. Zoom’s Petition is partially premised on a 2012 Charter web posting that even Zoom acknowledges is not in effect. Any objection to an historical posting that no longer exists and does not reflect current policy should be denied. Although Charter has always complied with FCC rules, the Commission should evaluate the transaction based on Charter’s current policies.

²⁹⁴ Charter does not test standalone routers because they do not share the modem processor.

²⁹⁵ 47 C.F.R. § 76.1206 (emphasis added).

(which pertains to equipment used to receive basic cable). Thus, § 76.1206 has no application here.

Nor do Sections 201, 202, and 706 of the Communications Act or the *Open Internet Order* give the Commission the authority to regulate cable modems. These sections do not themselves impose any particular requirements related to cable modems on Charter. Furthermore, neither the *Open Internet Order* nor any other FCC order or regulation has ever restricted a cable provider's use of a certification policy or banned cable providers from offering cable modems at no charge.

Zoom is also wrong that it is somehow illogical for the Commission to permit Charter to provide cable modems to its subscribers for no charge.²⁹⁶ It is perfectly reasonable for the Commission to permit a policy that saves subscribers money and gives them greater transparency about the services they are paying for, while simultaneously enabling third parties to compete at retail by offering equipment with different features. Indeed, this is precisely what occurs with remotes: cable providers are permitted to provide universal remotes for free with service, but third parties can sell other remotes at retail.

8. NAB's Complaints Fail to Point to Any Real Harms, and Are Not Transaction-Specific.

In an effort to air longstanding disagreements with the Commission, NAB contends that the Commission should not act on the pending applications until the Commission meets NAB's demands to relax certain broadcast ownership restrictions. NAB's concerns with ownership restrictions are not transaction-specific and its theory would require the Commission to delay

²⁹⁶ Zoom Petition at 19-20.

action on all transactions indefinitely whenever tangentially related rulemakings or reports are pending.

As to the merits, NAB's claim that the Transaction will "tilt the competitive playing field against local broadcast TV stations" is unfounded.²⁹⁷ The competitive playing field is already heavily tilted in favor of broadcasters, who are buoyed by a dated retransmission-consent regime that now enables them essentially to dictate the terms of carriage. In 1992, when that regime was enacted, cable operators held 98% of the market for video distribution, and Congress enacted the Cable Act to ensure broadcasters could survive.²⁹⁸ Today, cable operators compete with DBS, telco, and OVD services, and are struggling to retain subscribers.²⁹⁹ If we fail to carry the broadcasters' "must have" programming, we lose subscribers to our competitors. Broadcasters have used this dynamic to dramatically increase retransmission-consent fees and obtain significant non-cash compensation like forced carriage of unpopular affiliated channels. As we have argued elsewhere, the Commission should reform this regulatory regime so that we can prevent the never-ending price hikes for broadcast content and provide skinny bundles that consumers desire.³⁰⁰

This Transaction will do little to change that dynamic. It eliminates no MVPD competition in any geographic market, so we will continue to lose customers to our competitors

²⁹⁷ NAB Petition at i.

²⁹⁸ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (the "1992 Cable Act"); *see also* 138 Cong. Rec. 966, 982 (1992) (Sen. Daniel Inouye) ("Today . . . local stations are totally at the mercy of local cable operators. There presently are absolutely no assurances that any local stations will be carried on a cable system.").

²⁹⁹ *See, e.g.*, Daniel Frankel, *Moffett: Customers To Drop Cable TV Subscriptions at Even Faster Rate in Q2*, FierceCable (July 13, 2015), <http://www.fiercecable.com/story/moffett-customers-drop-cable-tv-subscriptions-even-faster-rate-q2/2015-07-13>.

³⁰⁰ *See, e.g.*, Comments of Cablevision Sys. Corp. & Charter Commc'ns, Inc., *In re Amendment of the Commission's Rules Related to Retransmission Consent*, MB Docket No. 10-71 (filed June 26, 2014).

if we fail to carry broadcasters' content. And the total number of subscribers served by New Charter will grow only by approximately 13 million video customers from what Time Warner Cable and Bright House Networks serve today. This amounts to only 17% of the nation's MVPD subscribers. Furthermore, as Dr. Katz notes, all of New Charter's total content expenditures "were less than eight percent of U.S. cable and broadcast networks' U.S. operating revenue during the 2012 to 2014 period" from 2012 to 2014.³⁰¹ Thus, as described above, the real benefit of the Transaction will accrue to subscribers through Charter's ability to extend Time Warner Cable's programming contracts across the entire New Charter footprint.³⁰² But the Transaction is "unlikely to materially change the incentives faced by programmers."³⁰³

NAB's other arguments fare no better. NAB's claim that New Charter's increased ability to compete in the advertising market will harm NAB's members is backwards: Increased competition in the advertising market is a public *benefit*. NAB is equally confused when it complains that the Transaction will increase the local and regional density of New Charter's footprint. That density will drive public interest benefits—in the form of efficiency gains, increased competitiveness in the advertising market, and increased competitiveness in the enterprise services market.³⁰⁴

9. Claims of Harm from the Loss of "Benchmark" Competition Are Misguided.

Contrary to some commenters' arguments,³⁰⁵ there is no meaningful loss of "benchmark" competition in this Transaction. The Applicants' footprints overlap very little, and they will

³⁰¹ Dr. Katz Decl. ¶ 88.

³⁰² See discussion *supra* Part II.F.

³⁰³ Dr. Katz Decl. ¶ 88.

³⁰⁴ *Public Interest Statement* at 33-40.

³⁰⁵ DISH Petition to Deny at 4, 32, 39, 62-63.

continue to face strenuous competition from telcos, DBS companies, wireless companies, and overbuilders after the Transaction is complete. While the Commission noted in passing in its *Adelphia-Time Warner-Comcast Order* that the reduction of three benchmarks in Los Angeles to one was a minor harm,³⁰⁶ this Transaction does not even alter the identity of the cable provider in any of the top 20 DMAs, let alone cause a significant reduction in the ability of consumers and regulators to gauge the competitiveness of any service prices. Indeed, its major effect on this front is to enable New Charter to serve as a prominent counterbalance to Comcast on the national stage—something Charter is already doing with regard to its Open Internet and interconnection policies.

E. OTHER CONCERNS RAISED BY PETITIONERS ARE UNWARRANTED, AND DO NOT IDENTIFY POTENTIAL PUBLIC INTEREST HARMS.

1. Other Unrelated Conditions and Concerns Are Misplaced.

The Maine Rural Telephone Companies (“MRTCs”), Hawaiian Telcom, and others advance arguments that boil down to a complaint that New Charter will be *too* effective a competitor.³⁰⁷ But the purpose of the Commission’s public interest review, of course, is “to protect efficient competition, not competitors.”³⁰⁸ As discussed above, increased competition is a public benefit, and the petitioners cannot properly seek to impose conditions simply because doing so would level the playing field.³⁰⁹

³⁰⁶ *Adelphia Order*, 21 FCC Rcd at 8243 ¶ 83.

³⁰⁷ See *Lincolnton Networks, Inc., Tidewater Telecom, Inc., and Unitel, Inc., Joint Petition to Deny* (Oct. 13, 2015) (“MRTC Petition to Deny”); *Hawaii Telcom Services Company, Inc., Comments* (Oct. 13, 2015) (“Hawaii Telcom Comments”).

³⁰⁸ See *Bell Atl. Mobile Sys. and NYNEX Mobile Commc’ns Co.*, Memorandum Opinion and Order, 12 FCC Rcd 22,280, 22,288 ¶ 16 (1997).

³⁰⁹ See *SBC Commc’ns Inc. v. FCC*, 56 F.3d 1484, 1492 (D.C. Cir. 1995) (upholding Commission decision not to condition merger as requested by competitor and noting that such

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Their complaints also lack any nexus to this Transaction. To the degree that the MRTCs believe that adjustments to universal service are necessary, the MRTCs may seek a rate adjustment or increased payment from the federal and/or state universal service fund.³¹⁰ Likewise, Hawaiian Telcom’s concerns regarding the competitive impact in Hawaii are misplaced, as neither Charter nor Bright House Networks operate in Hawaii, meaning the Transaction will cause zero competitive harm there. While Hawaiian Telcom’s list of programming-related conditions undoubtedly would give it a leg up in competing for video customers alongside New Charter, Hawaiian Telcom cannot explain why the Transaction presents any basis for the Commission to impose such conditions. As Hawaiian Telcom admits, it carries Time Warner Cable’s OCSports service (which is not an RSN) on fair terms and conditions *today*. The Transaction would not change that fact. While Hawaiian Telcom now seeks access to additional Time Warner Cable programming, Hawaiian Telcom also admits, as it must, that the Commission’s program access rules exist “to address MVPD access to RSNs and other ‘must have’ programming.”³¹¹ The Commission’s rules plainly do not compel New Charter to offer its programming at the uneconomic rates, terms, and conditions Hawaiian Telcom would prefer.

conditions “seem to be rooted in the mistaken belief that the Commission should protect competitors at the expense of consumers”).

³¹⁰ Notably, while the MRTCs opaquely reference a February 22, 2013 Order of the Maine Public Utilities Commission (“MPUC”), the MRTCs fail to note that the MPUC *rejected* the MRTCs’ request for the same condition that the MRTCs seek to impose here—suspension of LNP obligations with respect to interconnection by Time Warner Cable. *See Lincolnville Networks, Inc. Petition for Suspension or Modification of the Application of the Requirements of 47 U.S.C. § 251(b) and (c), Pursuant to 47 U.S.C. § 251(f)(2) regarding Time Warner Cable Info. Servs. (Maine), LLC’s Request*, Order, Docket No. 2012-00218 (Me. Pub. Utils. Comm’n Feb. 22, 2013), *aff’d* Order on Reconsideration (Me. Pub. Utils. Comm’n Apr. 12, 2013). The MPUC correctly found that suspension of the MRTCs’ LPN obligations “would not be consistent with the public interest, convenience, and necessity.” *Id.*

³¹¹ Hawaii Telcom Comments at 16.

The Commission should similarly decline the MRTCs' proposal that New Charter forgo its statutory right to local number portability as a condition of the Transaction. This condition would impose clear harm on *consumers*, and accordingly was squarely rejected by the MPUC. Similarly, the MRTCs' requests for "access to cable television transmissions received at [New Charter's] local head ends" on the same terms and at the same rates applicable to New Charter's cable affiliates, and to require New Charter to comply with ILEC-style unbundling requirements, complete with TELRIC pricing, have no basis in law or policy.

2. New Charter's Debt Leverage Is Not a Concern.

Claims that New Charter's debt will be too high for New Charter to be successful are incorrect.³¹² New Charter's debt is not "unfathomable," as explained below, since it will be lower than a number of peers' debt loads, and it is not created "for no good reason" since it is funding two mergers that will enhance competition, as even a number of the Transaction's opponents concede.³¹³ Post-Transaction, New Charter's leverage ratio is expected to remain at a comparable level to today—4.5x versus 4.3x.³¹⁴ Following the Transaction, New Charter is expected to deleverage at approximately 0.5x per year through both EBITDA and cash flow growth. The total debt amount, when considered in the context of New Charter's increased size, is therefore unremarkable and constructive. New Charter's pro forma balance sheet, moreover, is constructed with low cost and long-dated debt. Additionally, New Charter expects that, post-

³¹² See Public Knowledge Petition to Deny at 8; Stop the Cap Comments at 11-12 (Oct. 13, 2015); Free Press Petition to Deny at 18-19; WGAW Petition to Deny at 31-34.

³¹³ Free Press Petition at 2; see, e.g., MRTC Petition to Deny at 5 (noting the increased competitiveness of New Charter).

³¹⁴ These ratios are based on our expected debt load of \$61.5 billion. The debt-to-EBITDA ratios of different companies vary for a variety of reasons. Leverage ratios of other leading MVPDs, based on information from Bloomberg, at year-end 2014 were as follows: WOW! (7.1x), Suddenlink (5.8x), Cablevision (5.3x), Mediacom BB (5.3x), DISH (5.1x), Mediacom LLC (4.4x), DirecTV (2.5x), Comcast (2.1x).

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Transaction, its interest payments will be over 85% fixed, substantially eliminating the risk of a rising interest rate market through principal repayment. New Charter's debt levels will also be lower, on a per subscriber basis (\$2,492 per subscriber), than many of its competitors, such as Cablevision (\$2,720 per subscriber prior to the Altice acquisition), Wow! (\$3,722 per subscriber), and Suddenlink (\$3,324 per subscriber).³¹⁵

Charter's operating cash flow cushion will increase as well. Charter's current interest expense is **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY

CONFIDENTIAL INFORMATION] New Charter's pro forma interest expense will of course be larger—at \$3.3 billion per year—but it will be supported by **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL

INFORMATION] Over 90 percent of the new debt, moreover, has already been raised at historic low rates—rates that would not have been extended had there been concern among lenders that New Charter could not service its financing.³¹⁶ That belief was echoed by S&P and Moody's, which stated they are likely to upgrade their ratings on Charter credit upon the close of the Transaction.³¹⁷

³¹⁵ Based on analysis of Cablevision Systems Corp., Quarterly Report (Form 10-Q) (May 4, 2015); Wide Open West Finance, LLC (Form 10-Q) (May 8, 2015); Cequel Communications Holdings I LLC, Quarterly Report (Form 10-Q) (June 30, 2015).

³¹⁶ Free Press's reference to Charter's "history of bankruptcy" is misleading and beside the point, as Charter's 2009 restructuring arose from wholly different circumstances that do not bear on this Transaction. For the reasons discussed herein, New Charter's business plan is fully funded.

³¹⁷ See Charter Communications Inc. Ratings Remain on CreditWatch Positive on Its Definitive Agreement to Buy Time Warner Cable, *Standard & Poor's Ratings Services* (May 27, 2015);

3. Charter Is Committed to Promoting Diversity.

Greenlining’s challenges to Charter’s commitment to diversity are unwarranted. We recognize the importance of promoting diversity and inclusion. If the Transaction is approved, New Charter will incorporate and expand upon Time Warner Cable’s recognized best practices with respect to employees, suppliers, community partnerships and corporate governance.

- With respect to employment services, New Charter will develop and disseminate a comprehensive diversity and inclusion policy; hire a senior leader to oversee workplace diversity and inclusion initiatives; provide training to its leaders on the benefits of diversity; establish and support workplace affinity groups that reflect the diversity of the workforce and the communities New Charter serves; and engage in broad outreach to the communities in which it operates to attract, hire, train, and retain diverse talent.³¹⁸
- New Charter will actively collaborate with national and local supplier organizations and associations whose members consist of vendors that are owned by minorities, women, disabled persons, and veterans; and maintain profiles of such vendors for the purpose of tracking New Charter’s spend with all such vendors.³¹⁹
- In the communities it serves, New Charter will support organizations whose mission is to aid the underserved, minorities, women, disabled persons and veterans. And in its corporate governance, New Charter will consider diverse

Rating Action: Moody’s Places Charter’s Ba3 CFR on Review for Upgrade Following TWC Merger Announcement, *Moody’s Investor Service* (May 26, 2015).

³¹⁸ See *Public Interest Statement* at 40-42; Response of Charter Communications, Inc., to Information and Data Requests Dated September 21, 2015, at 288-289 (Oct. 13, 2015).

³¹⁹ See *id.*

slates of candidates as seats on its board of directors become available and will seek to increase the diversity of its board of directors.³²⁰

4. The Transaction Will Benefit Low-Income Households.

The concerns of some commenters that the Transaction could result in increased prices or decreased access to broadband for low-income consumers are unfounded. Charter has made an enforceable commitment to the Commission that it intends to expand Bright House Networks's program for low-income consumers by making a broadband offering available with higher speeds and expanded eligibility while continuing to offer the service at a significant discount.³²¹ New Charter will begin making the offer available within six months after the transaction closes, and will offer it across the New Charter footprint within three years of closing.³²²

³²⁰ *See id.*

³²¹ *See Public Interest Statement* at 20. The Greenlining Institute's concern that New Charter might not provide Lifeline telephone service in California and might cease Time Warner Cable's Lifeline offerings is misplaced. If the Transaction is approved, there will be no changes in retail voice services for customers in California. *See Joint Application of Charter Communications*, at 26, Proceeding No. A1507009 (Cal. Pub. Utils. Comm'n July 2, 2015).

³²² At least one petitioner claims that Charter has not provided sufficient information about the terms of Bright House Networks's program. *See Greenling Institute Petition to Deny* at 9. But information about the program is publicly available. *See, e.g.,* <http://everyoneon.org/about/c2c/> (describing the program, which provides qualified households with high-speed internet access for \$9.95 a month). Regarding OTI's request that New Charter deliver its service to all Lifeline-eligible households at the \$9.25 Lifeline price even before the Commission applies similar requirements to other broadband providers, *see Lifeline and Link Up Reform and Modernization, Telecommunications Carriers Eligible for Universal Service Support, and Connect America Fund*, Second Further Notice of Proposed Rulemaking, Order on Reconsideration, Second Report and Order, and Memorandum Opinion and Order, 30 FCC Rcd 7818 (2015), it seeks to turn the transaction-review process into a venue for asymmetric regulation. New Charter will continue Charter's support for Lifeline reform, *see Comments of Charter Communications, Inc.*, WC Docket Nos. 11-42, 09-197, 10-90 (Aug. 31, 2015), but the Commission should not use a party-specific transaction to test-drive an industry-wide rulemaking.

5. PEG Programming Claims Are Not Transaction-Specific, and Are Mistaken.

Charter meets all PEG programming commitments contained in its local and state franchise agreements. Charter also complies with the letter and the spirit of the Cable Act during franchise renewal negotiations with respect to designation of PEG channel capacity, equipment funding, and other community support. The Transaction presents no reason to interfere with the local franchising process and selectively or exclusively impose new PEG requirements solely on New Charter.

Charter is proud of its record supporting local programming efforts. We provide capacity and funding in thousands of communities throughout the United States and, over the past twelve months, have **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION]. Charter has strong relationships with the vast majority of its PEG providers and a history of working collaboratively with PEG organizations to meet its franchise commitments. Numerous PEG programmers in Charter communities across the country support Charter and the Transaction. For example:

- The Public Media Network (“PMN”), an intergovernmental consortium of LFAs that operate PEG channels in Kalamazoo County, Michigan describes its experience with Charter as “decidedly positive” and PMN has been “pleased with both the technical and administrative response from Charter management when dealing with a myriad of issues.”³²³

³²³ See Public Media Network Comments (July 29, 2015).

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- PEG programmer Loudon County Community Cable TV3 (“LCCC”) reports that “[w]e have had the pleasure of working with Charter Communications over the years, and believe the company’s pending merger with Time Warner Cable and Bright House Networks would only renew its commitment to regional interests and support for local programming.” LCCC also notes that “Charter has proven to be a great partner through quick responses and investments in areas like digital technology.”³²⁴
- The City of Kingsport, Tennessee states that “Charter has been a great partner with our efforts, and we are excited about the company’s pending merger with Time Warner Cable and Bright House Networks,” adding that “[w]e are confident that as New Charter the company would uphold its commitments to community involvement and improve services for customers.”³²⁵

New Charter will continue to foster positive relationships with PEG programmers after the Transaction.

³²⁴ See Loudon County Community Cable TV3 Comments (Oct. 13, 2015).

³²⁵ See City of Kingsport, Tennessee, Comments (Oct. 6, 2015). PEG organizations in Connecticut and other parts of Charter’s footprint also support the Transaction. See Northeastern Connecticut Cable Advisory Council Comments (Sept. 24, 2015) (stating that Charter has a “reputation as a reliable and responsive provider,” and describing Charter’s record of improvements). Similarly, last year the state sanctioned PEG organization in Vermont testified to the Vermont Public Service Board during the Comcast-Time Warner Cable transaction “[t]o be frank, Charter has a good reputation among all its [Access Management Organizations].” Vermont Access Network’s Motion to Intervene, at 4, *In re Joint Petition of Charter Communications, Inc. and Comcast Corporation*, Vermont Public Service Board Docket No. 8309 (Aug. 14, 2014).

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A few organizations complain that Charter has failed to fulfill certain PEG obligations,³²⁶ pay certain fees,³²⁷ properly position PEG channels on the channel line-up,³²⁸ or offer free services to the public.³²⁹ In addition to mischaracterizing the requirements or Charter's actions, these claims have nothing to do with the Transaction. PEG channels are not mandated by federal law. Instead, LFAs, based on an ascertainment of community needs, may request PEG channels during franchise renewal, and therefore PEG programming requirements are generally governed by state and local franchising laws and agreements. If petitioners believe Charter has not met its PEG obligations under those agreements, they have adequate recourse through local franchise

³²⁶ See Alliance for Community Media and the Alliance for Community Democracy Joint Petition to Deny at 14-17 (Oct. 13, 2015) (“ACM Petition to Deny”); American Community Television and Southeast Association of Telecommunications Officers Advisors Comments at 2-11 (Oct. 13, 2015) (“ACTSATO Comments”); Public Knowledge Petition to Deny at 19 (Oct. 13, 2015).

³²⁷ See ACM Petition to Deny at 17.

³²⁸ See *id.* at 14; ACTSATO Comments at 6-9; Public Knowledge Petition to Deny at 19. Channel locations change from time to time in the ordinary course of business in response to marketplace conditions and the addition or subtraction of channels to or from the channel line-up occur regularly. When Charter makes channel changes to the line-up, it implements comprehensive marketing plans to communicate these new changes, including changes to PEG programming, to its customers. Moreover, customers use a variety of easy-to-use means to locate their favorite channels, including electronic on-screen guides, genre-based content groupings, hard copies of the channel line-up cards, the Internet and their remotes programmed with their “favorites.” Charter tries to implement genre-based channel placements so that similar channels (*e.g.*, all sports channels or all PEG channels) are clustered together and these groupings greatly enhance our customers’ abilities in finding PEG programming. Complaints that specific PEG programs sometimes do not appear in electronic programming guides is a contractual matter, typically involving third-party providers, which can be typically resolved on a case-by-case basis.

³²⁹ See ACM Petition to Deny at 16. Federal limits on franchise fees limit Charter’s ability to provide free services to public institutions. See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Order on Reconsideration, 30 FCC Rcd 810, 814-16 ¶¶ 11-13 (Jan. 21, 2015).

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negotiations and enforcement of franchise agreements.³³⁰ Thus, imposing the requested conditions is highly inappropriate here.³³¹

CONCLUSION

For the foregoing reasons, the Transaction will deliver substantial public interest benefits and threaten no harms. The Commission should therefore expeditiously approve the Transaction.

Respectfully submitted,

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November 2, 2015

³³⁰ In particular, requests that the Commission establish a new “administrative process” under which the Commission would issue “opinions as to Charter’s actions” should be denied. *See* ACTSATO Comments at 12. Disputes related to PEG issues can and should be resolved by the terms of the state and local laws and franchise agreements which govern them.

³³¹ All the more so since the Commission has recently observed that there is no evidence PEG channels need the kind of protections that petitioners’ conditions would impose. *See Amendment to the Commission’s Rules Concerning Effective Competition Implementation of Section 111 of the STELA Reauthorization Act*, Report & Order, 30 FCC Rcd 6574, 6583-84 ¶ 12 (rel. June 3, 2015). And, of course, competitors such as DirecTV and DISH are not required to (and do not) carry any local PEG programming and contribute nothing to PEG efforts.

CERTIFICATE OF SERVICE

I, Mary E. Gulden, hereby certify that on November 2, 2015, I caused true and correct copies of the foregoing Opposition to Petitions to Deny and Response to Comments to be served on the following by U.S. First-Class Mail or electronically as noted below:

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