MASSACHUSETTS
40 main st, suite 301
florence, ma 01062
tel 413.585.1533
fax 413.585.8904

WASHINGTON
1025 connecticut ave. nw, suite 1110
washington, dc 20036
tel 202.265.1490
fax 202.265.1489

freepress
www.freepress.net

REDACTED – FOR PUBLIC INSPECTION

November 12, 2015

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

Via Electronic Filing

Re: MB Docket 15-149*, In the Matter of Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advanced/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*

Dear Ms. Dortch:

Pursuant to the Protective Orders issued in the above-captioned docket, Free Press submits the attached Redacted – For Public Inspection version of our Reply to Opposition. This version has been redacted to reflect the inclusion of confidential and highly confidential information in this Reply to Opposition. The pagination in this redacted version remains the same as in the Highly Confidential Filing from which it derives.

If you have any questions regarding this submission, please do not hesitate to contact me.

Respectfully submitted,

__/s/ Matthew F. Wood_____

Policy Director
Free Press
202-265-1490
mwood@freepress.net

Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY TO OPPOSITION

S. Derek Turner, Research Director
Matthew F. Wood, Policy Director
Free Press
1025 Connecticut Avenue, N.W.
Suite 1110
Washington, D.C. 20036
202-265-1490

November 12, 2015

I. Introduction and Summary

Applicants have presented a case that hinges on two basic claims. They suggest that increased scale would lead more quickly to higher quality offerings in Time Warner Cable ("TWC") service areas not yet upgraded to all-digital. They claim too that these transactions would lead to no harmful unilateral or coordinated effects. The record fails to support either of their claims. And as we discuss below, Charter's own internal communications – which we have just begun to explore – provide ample evidence validating the concerns raised by Petitioners. In sum, all of Charter's claimed benefits are non-merger specific; while the costs of this merger to Charter's customers, and the coordinated harms resulting from the creation of a national advanced telecom and video service duopoly, far outweigh these transactions' supposed benefits.

When all of the evidence is considered, particularly when coupled with Charter's internal communications, the true motives for the proposed merger become clear. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION] These admissions, along with the plethora of evidence offered by Petitioners of likely transaction-specific harms, far outweigh the speculative and non-merger specific benefits that Applicants postulate. Applicants have the burden of demonstrating that any transaction would increase competition and promote the public interest. They have not met this burden. The Commission may not grant the Applications and should designate them for hearing.

II. Applicants Do Not Meet Their Burden to Demonstrate that These Transactions Would Enhance Competition and Serve The Public Interest

A. Applicants Fail to Demonstrate that These Transactions Would Not Enhance their Market Power in the Local Telecommunications and Multichannel Services Market. Instead, Petitioners Conclusively Demonstrated This Deal Would Create Substantial Incentive and Ability for Applicants to Abuse this Market Power -- Harming Competition, Customers and the Public Interest.

Pursuant to Section 309(e) of the Act, Applicants bear the burden of proof that these transactions would serve the public interest. To meet this burden, they must show, among other things, that the transaction would increase competition and create verifiable transaction-specific benefits that more than offset all likely harms. Numerous Petitioners detailed the harms this transaction likely would cause. In their Opposition, Applicants flippantly dismiss Petitioners' arguments, repeating the Applications' evidence-free assertion that the transaction would not harm competition or consumers. But in their effort to dismiss these legitimate concerns, Applicants inadvertently prove that the transaction is certain to harm the public interest.

Nowhere is this more apparent than in Applicants' arguments regarding the transactions' unprecedented creation of new debt.[1] Free Press demonstrated that this deal (and debt) would create incentives for Applicants to exercise their market power, which this merger would greatly enhance. As we explained in our Petition to Deny, according to information Charter provided to investors – and depending on how TWC shareholders finally choose to receive compensation – these two transactions would require Charter to take on up to $27 billion in new debt on top of the existing debt of the three firms. That debt ultimately could total $67 billion.[2]

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[1] *See, e.g.*, Opposition at 4.

[2] *See* "Charter to Merge with Time Warner Cable and Acquire Bright House Networks; Combinations Benefit Shareholders, Consumers and Cable Industry," Charter Communications, Time Warner Cable and Bright House Networks Investor Presentation, at 19 (May 26, 2015) ("May 2015 Investor Presentation").

Applicants do not deny that this debt load is massive. They attempt to dismiss concerns by citing the example of three substantially smaller cable operators that have comparable per-customer debt loads.[3] Yet they do so, ironically, without recognizing that those firms also operate in a near-monopoly market with ability to recover their debt by exercising market power.

This is what Applicants fail to grasp: Their transaction would create up to $27 billion in new debt that would not exist absent the transaction, and therefore would create a strong incentive to leverage the merged entity's market power to recover this new debt. If Applicants were to exercise this market power in any fashion, then the transaction would fail the public interest test review. And Applicants freely admit their desire to deleverage at approximately $1.725 billion *per year*,[4] "through both EBITDA and cash flow growth."[5] But this deleveraging target *already includes all expected synergies*, which are described by Charter as $500 million in the first year.[6] The transaction is expected to deliver a *total* of $1.6 billion in tax savings for New Charter, with the net present value of these benefits amounting to what appears to be $300 million annually. Put another way, Charter expects a total synergy and tax benefit of $800 million in the first year, which is nearly one billion dollars short of its debt deleveraging target.[7]

How then does Charter expect to grow cash flow by nearly a billion dollars? It is unlikely to be solely through organic growth (*i.e.*, with present trends continuing), as the components of the combined entity have a 5-year compound annual EBITDA growth rate of 4.9 percent, while

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[3] Opposition at 82.

[4] Calculated based on pro forma EBITDA of $13.8 billion, and pro forma debt of $61.5. But as noted elsewhere by Charter, total pro forma debt could be as high as $65.7 billion. *See* May 2015 Investor Presentation at 13, note 6 (describing *pro forma* adjusted EBITDA of $13.8 billion, and a leverage ratio of 4.5).

[5] Opposition at 81.

[6] *See* May 2015 Investor Presentation at 13, note 6.

[7] *Id.* at 13, note 3, describing "$800 million of annual run rate synergies and the net present value of tax benefits."

their deleveraging target implies a growth rate above 7 percent. In our Petition to Deny, we suggested that the "only way to make this calculus acceptable to New Charter's investors is substantial growth in future earnings from the combined company's exercise of market power. 'Higher revenue per customer' is what Charter promises, so the Commission should expect exactly that: higher prices."[8] As discussed below, Applicants' own statements to investors appear to confirm this.

Applicants attempt to deflect our concerns about the incentives these transactions would create for the merged entity to increase prices. They characterize this merely as a "concern that the increased debt would spur New Charter to more actively protect its video business via OVD foreclosure."[9] We do believe that the increased debt load, and the pressures on cash flow it would create (and which would continue long after the transaction's tax benefits are fully realized) would enhance Applicants' long term incentives to exercise market power to protect their important video segment revenues from OVD disruption. Yet this is not our primary concern. Our primary concern about the new debt, and the vastly higher total debt engendered by these transactions, is the incentive and ability Charter would have to recoup this debt load from its captive customers. We believe the new debt would cause immediate public interest harm, as it would lead to Charter exercising unilateral market power in the form of higher prices, imposed in markets where it would not face a bundled competitor in more than half of its service territory.[10]

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[8] Free Press Petition to Deny at 27.

[9] Opposition at Exhibit A, p. 10.

[10] *See, e.g.*, Chris Young and Kamran Asaf, "MSOs defend more of their footprints against telco overbuilds," *SNL Kagan*, Jan. 28, 2015 (noting as of the end of 2014, Time Warner Cable faced telco fiber competition at 41 percent of their passings, and Charter faced telco fiber competition at only 35 percent of their passings).

The concerns about foreclosure incentives exist separate from the debt incentives, and are primarily mid to long-term concerns, but there are immediate term harms from this debt as well.

As Applicants' hired expert concedes on this point, the debt would create "incentives to work on projects such as upselling customers to higher value packages and triple plays that generate immediate revenue."[11] And what's the easiest way for Charter to generate additional "immediate revenue" in a market in which customers are increasingly turning away from expensive TV/Internet bundles?[12] Increase prices on all services, but particularly on broadband. Broadband has an operating margin four-times higher than video and is the most price inelastic service Charter sells; so increasing the price of standalone data not only increases revenues, it more effectively increases cash flow while also driving users back into the video/data bundle.

That Charter is able to raise this much new debt from investors is predicated on the fact that the transaction would increase Charter's market power, as well as its ability to exercise this market power to slow the impact of the Internet's disintermediation and disruption of the video business. The investment community is increasingly concerned about the overall amount of corporate debt leverage, which increased from a net debt/EBITDA ratio of 1.0 in 2009 to a ratio of 1.6 in 2014 – a ratio one third the size of what New Charter's leverage would be.[13] Debt holders would not be willing to take on this additional risk from a company with a history of bankruptcy without the confidence that Charter would act to recoup the debt from its customers, who are trapped in a high-speed broadband monopoly with no option to switch to a less expensive alternative. Indeed, consider the comments of Julianne Bass, a San Antonio-based

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[11] Opposition at Exhibit A, p. 10.

[12] *See* Tony Lenoir, "Slump in standalone video subs outweighs gains in triple-play customers," *SNL Kagan*, Nov. 10, 2015.

[13] *See* Tracy Alloway, "Goldman Sachs Says Corporate America Has Quietly Re-levered," *Bloomberg Business*, Nov. 10, 2015.

money manager at USAA Investment Management Inc. who holds some of Charter's recently issued securities. Bass told Bloomberg that "the two companies really do have a lot of synergies, which will help them fight the industry's rapid changes."[14] But as noted above, the synergies (excluding tax benefits) amount to at best $500 million annually; thus it's clear the holders of New Charter's $62 to $67 billion in debt are counting on more than those supposed synergies to enhance the merged firm's ability to "fight the industry's rapid changes."

We believe it self-evident that New Charter would have incentives to unilaterally raise prices, in order to generate increased cash flow to cover the additional debt created by this transaction. Charter's public statements certainly make it clear that the company plans to generate additional cash flow so that its earnings-to-debt ratio is reduced immediately. That Charter makes no commitments to freeze either its or legacy Time Warner Cable's prices is certainly suggestive of coming price increases. That Charter's product line-up only contains a faster, yet far more expensive basic broadband service tier compared to what TWC currently offers, indicates that price increases are coming – even if Charter insists on branding such price hikes as increasing the "value" of the product. The only questions left are the extent to which Charter would increases prices, and whether prices would go up not only for the TWC customers it acquires but for existing Charter customers too.

In our Petition to Deny, we suggested that the math of these transactions simply doesn't work without price increases. However, there's no need to speculate about what Charter has planned for Time Warner Cable customers and its existing customers, as Charter's internal documents speak to this issue. **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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[14] Cordell Eddings, "Charter's Ambitions Leave It on Razor's Edge of Junk Market," *Bloomberg Business*, July 20, 2015.

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[16] **[END HIGHLY CONFIDENTIAL INFORMATION]**

Whatever final pricing strategy is implemented, it is clear that Applicants by their own public admission need to earn "higher revenue per customer"[17] in order to justify these transactions to their debt holders. And one method for achieving this, as stated by Applicants' outside expert, is by "upselling customers to higher value packages and triple plays."[18] But as we noted previously, while upselling into expensive video bundles may be Charter's goal, that is not

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[17] See Remarks of Chris Winfrey, Charter Communications, Inc., CFO, from Transcript of "Charter Announces Transactions with Time Warner Cable and Bright House Networks M&A Call," May 26, 2015 ("The plan here is to grow the pro forma business fast, and that means we'll invest in high quality products and service with our own employees, sell superior product at attractive prices and grow customer relationships with more sales and less churn, and higher revenue per customer and higher revenue per passing as a result.").

[18] Opposition at Exhibit A, p. 10.

how the market is trending. From the third quarter of 2014 to the third quarter of 2015, the percentage of Charter's customers *not* taking video increased from 26.9 to 30.8 percent.[19] During this time, the percentage of TWC non-video customers increased from 27.1 to 29.9 percent.[20]

This raises the question of what Charter will do if this trend continues, and the company is not able to upsell customers into the high-revenue/high-margin triple-play bundles. We believe that Charter would more aggressively cross-subsidize its video with broadband profits in order to make the bundle more attractive to those customers inclined to cut video or curtail the size of their channel packages. And while Applicants claim the merged firm could not and would not cross-subsidize video services (which are subject to more competition) with profits from their broadband services (which are subject to little or no competition), this defense is not supported by any evidence. Applicants merely opine that "[b]ecause 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." Applicants also assert that even if the merged entity could cross-subsidize they "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."[21]

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[19] *See* Lenoir, *supra* note 12. Charter stated in its Opposition that **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION] *See* Opposition at 29 n.102.

[20] *See* Lenoir, *supra* note 12.

[21] Opposition at 57.

However, there is already ample evidence of cross-subsidization, as we detailed in our Petition to Deny. MSO Video segment margins are declining while data margins are increasing,[22] as firms like Charter offer bundles of video and broadband for a price only slightly higher (and, in some cases, lower) than the price of standalone broadband.[23] According to SNL Kagan, from third quarter 2014 to third quarter 2015, Charter's monthly operational costs for its video products increased by $4.87 per subscriber while its monthly revenues per video subscriber increased by only $2.75. During this same period Charter's monthly operational costs per data customer declined by $0.22, while its monthly revenue per data customer increased by $3.42.[24] Thus, we see that Charter is already making up for its increasing video costs not through its video revenues, but through its data revenues – even as its own costs for providing broadband decline. Furthermore, Charter's assertions about how cross-subsidization would impact its investment in broadband are strange considering the extremely low costs it faces when upgrading its systems, and the additional revenue opportunities these upgrades produce. In sum, the evidence shows that Charter is already cross-subsidizing, even as it completed its all-digital upgrade. There's no credible reason to expect that Charter would do otherwise following consummation of these transactions, and every reason to expect Charter would expand its practice of cross-subsidizing as it tries to push customers into higher-revenue video/data bundles.

In pursuit of the additional cash flow needed to justify the price of this deal, Charter likely would seek to push as many legacy TWC subscribers on lower-priced plans onto the higher-priced Charter speed tiers. As Charter explained in **[BEGIN HIGHLY**

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[22] Free Press Petition to Deny at 32-33.

[23] *Id.* at 35-36.

[24] *See* Tony Lenoir, "Cable video margins slump to all-time low in Q3," *SNL Kagan*, November 2, 2015.

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Charter argues that it has no market power because it faces the "vigorous competition of telco, DSL, and wireless companies who aggressively compete for subscribers."[26] This is the same dismissive and unsound thinking espoused in Comcast's arguments for its failed bid to acquire TWC, and it is a view of market competition rightly rejected by regulators.[27] As we detailed in our Petition to Deny Comcast's acquisition of TWC, "under the so-called 'hypothetical monopolist test' used to determine the appropriate market boundaries for antitrust analysis, cable modem is in a separate 'advanced broadband services' market from ADSL, satellite and other wireless high-speed Internet services."[28] We explained data showing that for first generation DSL (*i.e.*, DSL without fiber-to-the-node, curb or home), the share of the market continued to plummet as consumers permanently switched to higher priced and higher quality cable modem and fiber optic services.[29] We also presented evidence demonstrating what

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[26] Opposition at 34.

[27] *See, e.g.*, "Video Competition: Opportunities and Challenges," Assistant Attorney General Bill Baer, Keynote Address at the Future of Video Competition and Regulation Conference, Washington, DC, Oct. 9, 2015.

[28] Free Press Petition to Deny, *In the Matter of Applications of Comcast Corp. and Time Warner Cable Inc. For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-57, at 3 (filed Aug. 25, 2014).

[29] *Id.* at 29-40.

policymakers already know well: that mobile wireless, fixed LTE and satellite data services are not in the same product market as cable modem and fiber optic broadband services.[30]

The evidence is irrefutable: Charter's services are not in the same product market as first generation DSL or wireless broadband services. The company's only direct competition is from carriers whose networks have the capability to offer truly high-speed data and video services. As we noted in our Petition to Deny the instant transactions, this does not require a market boundary of 25 Mbps downstream, but simply a product market definition that includes cable incumbents, telco fiber-to-the-node (*e.g.*, AT&T's U-Verse), telco fiber to-the-home (*e.g.*, Verizon FiOS or Google fiber), and cable overbuilders (*e.g.*, RCN). Based on its internal discussions, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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[30] *Id. at* 23-29.

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[END HIGHLY CONFIDENTIAL INFORMATION] These views are hard to square with Charter's statements in its Opposition concerning its views of the allegedly vigorous competition it faces.

In sum, this transaction would create up to $27 billion in brand new debt. That is money that would not be paid to improve competition or lower prices, but simply serve as a merger premium paid to existing TWC shareholders. Charter, by its own admission, would need to recover this additional debt through increased cash flow, which would necessitate increased prices according to our analysis and according to the record evidence here. That means this debt belongs on the "minus" side of the Commission's public interest ledger.[34] The transactions' minuscule synergies do not even come close to offsetting this debt. Neither does any of Charter's vague promises about future competition, especially since none of those promises contain a commitment to lower prices or offer wholesale access to its monopoly network.

B. Transactions Such as These Have a Long-Recognized Impact on the National Broadband Product Market for Online Content Delivery. Applicants Have Failed to Demonstrate that these Transactions Would Not Cause Unilateral and Coordinated Harms in this Product Market.

Applicants incorrectly dispute the fact that "there exists a national market for OVD 'access' to a critical mass of end users . . . ."[35] However, in past MVPD merger reviews, the Commission and the Justice Department recognized the existence of this market, and identified it

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[34] The transactions' tax savings, which accrue to Charter, belong on the negative side of the public interest ledger as well, since the American public has to shoulder that burden.

[35] Opposition at 33.

as a market of concern. For example, in reviewing AT&T's acquisition of MediaOne, DOJ noted that a "relevant product market affected by this transaction is the market for aggregation, promotion, and distribution of broadband content and services" and found for this product market that the "relevant geographic market . . . is the United States."[36]

It's clear from MSOs' actions in the market, and from comments by analysts, that MSOs fear one thing more than any other: becoming a "dumb pipe." Online Video and over the top voice have the potential to make them exactly that. When consumers use their broadband services to replace incumbents' video and voice services, this reduces the main source of MSO revenues, as they still make the bulk of their revenues from pay-TV. This also exposes their remaining monopoly in broadband to more regulatory scrutiny, as these carriers attempt to exercise market power so as to recover economic rents lost to the online services. Charter **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** [37]

[36] *United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176 (RCL), Amended Complaint, ¶ 25-28 (filed May 26, 2000).

[37] **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** *See* CHTR-DOJ-000141551.ppt. **[END HIGHLY CONFIDENTIAL INFORMATION]**

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This again stands in stark contrast to Applicants' presentation in their Opposition. And while Applicants wave in the air their extremely short-term commitments that are supposed to mitigate some of the foreclosure concerns (such as a commitment to not impose data caps for 3 years), the Commission must understand Charter's motivations leading to these transactions, and must realize that these anticompetitive incentives will continue well beyond the 3-year window for conditions. For example, **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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Applicants brush off all of these concerns about their incentives and ability to harm online video competition by offering a laughably flawed foreclosure analysis that wrongly assumes every online video customer can and would switch to another broadband carrier. Not

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only does this analysis ignore the fact that Charter faces no meaningful competition in most of its service territory, it ignores the barriers from switching costs and the impact of Charter's ability to undercut its online video competitors by cross-subsidizing. But the biggest problem with Charter's argument against foreclosure concerns is that it ignores the fact that these transactions substantially increase concentration in the national broadband market, and thus would increase the likelihood of coordination among ISPs.[40]

This concern about coordinated effects is real. Charter attempts to dismiss it by arguing that "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."[41] But Applicants' cavalier dismissal here is belied by public comments from its own officers and major shareholders. For example, Liberty Global's Chief Technology Officer told attendees of a recent conference that in order to know what his company would do next, they need simply look at what Comcast is planning and expect Liberty to follow suit.[42] More blatant however are recent comments from John Malone, the key force behind Charter's consolidation efforts. In October, Malone said "I'm an investor, I don't control these things, I invest in them. I try to coordinate their behavior, OK, if I can, you know. But, the reality is it's all about scale." Malone went on to

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[40] Applicants are wrong when they claim "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." While we did not offer a specific HHI increase, the market share estimates provided in Figure 1 of our Petition indicate that in the 25 Mbps downstream tier (which, while not a rigid market boundary, is more reflective of the market shares in the non-ADSL, triple-play capable broadband market), the transaction would increase the HHI of the national broadband market from approximately 2,100 to 2,500. That large an increase would in fact constitute a textbook violation of the Horizontal Merger Guidelines. *See* Opposition at 52 n.198; *see also* Free Press Petition to Deny at 13, Figure 1.

[41] Opposition at 69.

[42] *See* Mari Silbey, "Cable's Chance to Get Mobile Right," *Light Reading*, Oct. 26, 2015 (quoting Liberty Global's Balan Nair as saying "whatever you see Tony [Werner, Comcast CTO] build, I'm going to copy it.").

say "if I put my Charter hat on . . . I would say 'Why don't we get together with Comcast and have a common random-access platform that includes all of our cable stuff, and HBO, and Starz, and Showtime, and all the broadcasters, and let's do it off of one technical platform and let's offer that to all the other guys, all of our brethren in the cable industry."[43]

That one of the largest shareholders behind this transaction openly talks about future coordination instead of competition should raise a major red flag.[44] This admission, along with the previously-mentioned internal Charter documents revealing **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[END HIGHLY CONFIDENTIAL INFORMATION] is ample evidence that Charter's short-term commitments are meaningless. Indeed, if the deal were approved, Charter would be free to implement caps and overage fees in 2019. It is a curious coincidence then that Comcast plans to have caps and overages in place across its entire national footprint by 2019.[45] Three years from now there would be immense pressure for Charter to impose draconian and unreasonable caps

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[43] *See* Richard Greenfield, "John Malone 'The Coordinator' of the Cable Industry — Will That Impact Charter Time Warner Cable Approval?," BTIG, Oct. 16, 2015.

[44] On the subject of the incentives created by John Malone's vast content ownership, Applicant's state that "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; and New Charter's governance and FCC rules will prevent any undue influence in carriage decisions." But the issue with Malone's vertical integration is not primarily that Charter would foreclose other distributors from that programming; but that adding this to the TWC business would enhance Charter's incentives to thwart the OTT model generally, in order to favor the existing high-revenue cable triple-play model.

[45] *See* Comments of David Cohen, Comcast Corporation Executive Vice President, at the Moffet Nathanson Media & Communications Summit, May 14, 2014 ("[I]n 5 years Comcast at least would have a usage-based billing model rolled out across its footprint.").

and fees, and nothing in the form of competition that would stop it from doing so (particularly if cable industry consolidation continues in the interim).

Just as concerning as the negative impacts of such coordination on existing, nascent OVD competition are the concerns about the innovation that such cable coordination would deter. The Commission must ask what new services might not arise if an increasingly consolidated market were subject to such increased coordination? Today, we see MSOs taking a different (albeit tepid) approach to offering their own online video services. While no pay-TV provider other than DISH has offered a true over the top MVPD service to customers of all other broadband carriers, there have been differences in how each MSO responds to the stagnation in their traditional multichannel video subscriber base. For example, Verizon has offered so-called "skinny bundles." Time Warner Cable was the first to test a lower-cost multichannel offering for which its customers do not need a cable box, but just a Roku box and a password, with TWC touting the ease of use for such offerings. Charter has publicly expressed concern about password sharing, but that's a worry that Time Warner Cable apparently does not share.[46] Comcast, Verizon and Cox have each launched out-of-market video portals, which are in no way an

[46] *See* Comments of Tom Rutledge, Charter Communications, Inc., President & CEO, Transcript of Third Quarter 2015 Earnings Call, October 29, 2015. ("So, there's also a theft of service issue, essentially, in that a lot of the TV Everywhere product and other product available online is not secured well. You have people joking about sharing passwords and authentication on Emmy awards shows; that's a real issue, and so that affects elasticity of demand, as does the overall income level of the population."). Contrast those remarks with Comments of Rob Marcus, Time Warner Cable Inc., Chairman & CEO, Transcript of Third Quarter 2015 Earnings Call, October 29, 2015. ("So we're going to increase the resolution on those pictures to just deliver a better video experience. And then over time, you'll see us add additional features to the TWC TV app until it is, from an experience perspective, indistinguishable from the traditional video product, but with the added benefits of no need to rent a set-top box and a much, much more streamlined provisioning process, no necessity for a truck roll, you can simply type in your username and password and you have video. So that's what we're trying to accomplish with the beta.").

adequate substitute for multichannel video but are an indication of increasing willingness to take baby steps towards a full out-of-market OTT MVPD offering.[47]

The Commission's public interest analysis must consider what would happen in the "but for world." That is, what market outcomes would likely occur if the merger were not consummated. These companies exist to make money for shareholders. They are not simply going to stagnate. We believe that in the absence of this transaction, both Charter and Time Warner Cable would look elsewhere for cash flow growth. They would be more likely to compete aggressively in the enterprise market. They would be more likely to attempt to gain share from telco TV and satellite providers, perhaps by offering lower-priced video bundles that are far less bloated than those marketed today. They would be more likely to offer virtual MVPD services outside of their physical footprint.[48] They would be more likely to enter the wireless market. And they would be more likely to overbuild in certain markets, following the lead of companies like Google Fiber, Ting, and numerous municipal carriers. In sum, rejection of this merger in an environment in which Charter and TWC continue to have access to capital at historically low rates would incentive the companies to borrow and build, not borrow to buy.

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[47] Comcast has a video portal service branded as "Watchable." Verizon offers its own portal called "Go90." And Cox just launched FlareMeTV, an ad-supported video portal available to any Internet user.

[48] *See, e.g.*, David Lazarus, "Time Warner Cable takes baby step toward more affordable pay-TV service," *Los Angeles Times*, Nov. 3, 2015 ("For the time being, Time Warner will limit the new technology to its own Internet customers – that is, you couldn't access Time Warner's services using, say, a Verizon Internet connection. But the company says this could change.").

C. Applicants' Claimed Benefits Are Wildly Overstated, Non-Transaction Specific, and Inadequate to Mitigate the Substantial Unilateral and Coordinated Harms.

Based on their recently reported financial results, it is clear that Charter and Time Warner Cable are thriving as standalone companies.[49] Both firms are continuing to improve financially and operationally, and both are poised to create additional competition in the online video space. As we've seen after past merger rejections, firms will look for other opportunities to improve cash flow if the "easy" option of consolidation is closed to them. That Charter is willing to take on up to $27 billion in new debt suggests it is willing to spend money to make money. If the Commission intends to carry out its statutory duty to promote competition, then rejection of this merger is the best way to accomplish that. While Charter may not go out and borrow $27 billion to overbuild new network facilities, it is likely to explore that in some markets, particularly in the high-revenue enterprise sector; and it is likely to explore ways of leveraging its existing relationships with programmers to expand into the OTT market.

Applicants of course do not share this rosy view, at least for purposes of selling their merger. They see nothing but positives resulting from this staggeringly expensive transaction. But when examined, each of these benefits is revealed to be non-transaction specific and overstated. In sum, any tangible benefits would not come close to offsetting the harms of the merger, let alone arise solely as a result of the deal.

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[49] *See, e.g.*, Richard Greenfield, "Are We Too Optimistic on Charter Time Warner Cable Regulatory Approval, Given Strength of Q3 Results?," BTIG, Nov. 2, 2015 ("Q3 press releases and earnings call comments repeatedly cite strong subscriber trends, accelerating roll out of new, advanced technology products such as Spectrum Guide and TWC MAXX, along with higher speeds within each company's base broadband packages. Q3 2015 results from both Charter and Time Warner Cable appear to contradict the notion that a merger between Charter and Time Warner Cable is necessary to effect the public interest benefits cited by both companies."); *see also* Daniel B. Kline, "Charter Communications Inc. Defies Cord Cutting – Adds Video, Internet, and Phone Subscribers," *The Motley Fool*, Nov. 2, 2015 ("Charter Communications [ ] not only beat analyst estimates for earnings in the third quarter, it also reported subscriber numbers which suggest that fears of cord cutting may be overblown.").

For example, Applicants claim that the merger would lead to increased availability of all-digital services in TWC's footprint. But there's no reason to expect that this outcome would not occur absent the transaction. Applicants state that TWC will be all digital in 75 percent of its service area by the end of 2016, with **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** that.[50] However, given the existing market trajectory and declining costs coupled with higher-revenue opportunities, it is highly likely TWC would upgrade its remaining systems soon thereafter.

Similarly, Charter claims that the merger would enable it to "deliver more advanced enterprise services across a wider territory."[51] But Charter's own **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** shows there's no requirement for additional scale before delivering such services, and therefore this is not a cognizable transaction-specific benefit.[52] Charter's confidential responses also make the case for scale, suggesting that it makes **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

[53] **[END HIGHLY CONFIDENTIAL INFORMATION]** does not equate to a transaction-specific benefit; it simply translates into "more profitable," and does not indicate what the firm would do in the absence of the transaction.

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[50] Public Interest Statement at 24, n.62.

[51] Public Interest Statement at 38.

[52] **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]**

[53] Public Interest Statement at 20.

And while the Applicants themselves refused to commit to passing through any of the meager savings created by transaction synergies, they now submit analysis from hired consultants that indicate a potential pass-through of programming savings of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION] [END HIGHLY CONFIDENTIAL INFORMATION]** per month per video subscriber.[54] They also cite Commission approval of the AT&T-DTV merger in support of the notion that these scale-related savings would indeed be passed along to customers. However, real-world evidence trumps theory, and shows that the lack of competition in the overall bundled services market, and in the MVPD market generally, reduces the likelihood that any savings will be returned to customers. This concern is particularly acute when the firm has massive new debt to service, debt that nearly consumes the entirety of the merged firm's cash flow. AT&T's promises aside, we note that it immediately took steps to increase profitability by raising prices, even at the expense of losing customers, following the DTV merger.[55]

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[54] Opposition, Exhibit A, ¶ 102.

[55] *See, e.g.*, Phillip Dampier, "AT&T Leveraging Its DirecTV Acquisition to Cut Customer Promotions, Raise Prices," *Stop the Cap!*, Oct. 27, 2015 ("AT&T's original argument for acquiring DirecTV was to negotiate cost savings from cable programmers by qualifying for greater volume discounts available from combining 5.7 million U-verse TV customers with DirecTV's roughly 20.3 million U.S. subscribers. But AT&T has now made it clear it is keeping those savings for itself. 'We have our target to get to $2.5 billion or more in savings,' said John J. Stephens, AT&T's chief financial officer, in a conference call with investors. 'We already are realizing some of that in our content and supplier relationships. We really like our momentum here, and we are confident we can continue to expand margins and cut costs, even with pressure from our international operations.' At the same time AT&T is enjoying billions in savings, in recognition of the fact its customers now have fewer competitors with whom they can do business, the time is right to cut back on money-saving promotional plans, effectively raising prices for customers. 'Because of our focus on profitability, we really got away from promotional pricing, and those customers who were cost-sensitive just had a propensity to churn,' Stephens said, referring to an industry term that means customers canceled service either because it got too expensive or they found a better deal elsewhere. Stephens told investors its new pricing strategy, as expected, brought reductions in the number of U-verse video subscribers during the latest quarter. The company is also pushing more customers towards DirecTV and

Finally, Applicant's vague promise to expand Bright House Network's Connect2Compete program is in no way a suitable replacement for TWC's flat-rate, non-promotional $14.99 broadband offering. Indeed, not only is Bright House's plan severely restricted in terms of who qualifies, but BHN appears to artificially limit enrollment windows to just one month a year, and only signs up customers by phone.[56] A program that offers lower-cost (but still profitable for the carrier) broadband to a tiny subset of low-income consumers is not enough to offset the harms of consolidation that would be visited upon all other low-income and middle class consumers.

In sum, the Commission must understand that the source for most of Applicants' claimed benefits is the promise of an all-digital network architecture. But this is not a merger-specific benefit because there is every reason to expect TWC would continue to make its network upgrades, as it is beneficial to the firm in the short, medium and long term. These upgrades bring numerous benefits such as the opportunity for higher average revenues per user, higher cash flow, reduced churn, new products, more targeted advertising, operating expense savings, reduced capital spending on customer premise equipment, lower network operating costs, and the ability to better compete against over the top providers. That Charter undertook this effort at a more brisk pace than TWC is simply a reflection of the nimbleness afforded by Charter's smaller size, and the fact that TWC had strong incentives to avoid the necessary short-term increases in capital spending as long as possible in order to make itself an attractive acquisition target.

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away from U-verse because programming costs are lower on the satellite platform. The new focus on profits means fewer customers are choosing AT&T and many existing DSL customers are resisting efforts to force them on to the U-verse platform.").

[56] *See* Phillip Dampier, "Stop the Cap!'s Formal Testimony to N.Y. PSC Opposing Charter/Time Warner Cable Merger," *Stop the Cap!*, Sept. 30, 2015.

III. Conclusion

This merger's concentration of so much market power in the hands of two dominant vertically integrated multiple system operators would reduce competition, reduce innovation, raise prices, and kill any hopes of video market disintermediation. The prospects for competitive entry or competitive responses are non-existent, and the claimed benefits are speculative and non-merger specific. Applicants have failed to demonstrate that the transactions would enhance competition, and they certainly cannot demonstrate that the deal would not harm the public interest in the form of higher prices needed to recoup the massive and wasteful new debt created to consummate this corporate marriage. The Commission must not grant the Application, and should designate it for hearing instead.

Respectfully submitted,

_____/s/_____

S. Derek Turner
Matthew F. Wood
Free Press
1025 Connecticut Avenue N.W., Suite 1110
Washington, D.C. 20036
202-265-1490

CERTIFICATE OF SERVICE

I, Matthew F. Wood, hereby certify that on this 12th day of November, 2015, I caused true and correct copies of the foregoing Reply to Opposition to be served by hand and/or by electronic mail on the following:

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

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

Steven J. Horvitz
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, NW Suite 800
Washington, DC 20006
stevehorvitz@dwt.com
Counsel for Advance/Newhouse Partnership

Vanessa Lemmé
Federal Communications Commission
Media Bureau
445 12th Street, SW
Washington, DC 20554
Vanessa.Lemme@fcc.gov

Ty Bream
Federal Communications Commission
Media Bureau
445 12th Street, SW
Washington, DC 20554
Ty.Bream@fcc.gov,

Andrew Jay Schwartzman
600 New Jersey Avenue, NW
Room 312
Washington, DC 20001
AndySchwartzman@gmail.com
Counsel to Zoom Telephonics, Inc.

Joel Rabinovitz
Federal Communications Commission
Office of General Counsel
445 12th Street, SW
Washington, DC 20554
joel.rabinovitz@fcc.gov

Neil Dellar
Federal Communications Commission
Office of General Counsel
445 12th Street, SW
Washington, DC 20554
neil.dellar@fcc.gov

Elizabeth McIntyre
Federal Communications Commission
Wireline Competition Bureau
445 12th Street, SW
Washington, DC 20554
Elizabeth.McIntyre@fcc.gov

Adam Copeland
Federal Communications Commission
Wireline Competition Bureau
445 12th Street, SW
Washington, DC 20554
Adam.Copeland@fcc.gov

Jim Bird
Federal Communications Commission
Office of General Counsel
445 12th Street, SW
Washington, DC 20554
TransactionTeam@fcc.gov

Ellen Stutzman, Senior Director of Research & Public Policy
EStutzman@wga.org
Laura-Blum Smith, Research Analyst
7000 West Third Street
Los Angeles, CA 90048
Counsel to Writers Guild of America, West

Rick Kaplan
RKaplan@nab.org
Jerianne Timmerman
Theresa Otina
1717 N Street, NW
Washington, DC 20036
Counsel to National Association of Broadcasters

James N. Horwood
james.horwood@spiegelmcd.com
Tillman L. Lay
tim.lay@spiegelmcd.com
Spiegel & McDiarmid LLP
1875 Eye Street, NW Suite 700
Washington, DC 20006
Counsel to Alliance for Community Media, Alliance for Communications Democracy

John Bergmayer
Senior Staff Attorney
1818 N Street NW, Suite 410
Washington, DC 20036
john@publicknowledge.org
Counsel to Public Knowledge, Common Cause, Consumers Union, and Open Mic

Joseph G. Donahue, Esq.
Preti Flaherty Beliveau & Pachios LLP
45 Memorial Circle
Augusta, Maine 04332-1058
jdonahue@preti.com
Counsel to Lincolnville Networks, Inc., Tidewater Telecom, Inc., and UniTel, Inc. (Maine Rural Telephone Companies)

Markham C. Erickson
merickson@steptoe.com
Andrew W. Guhr
aguhr@steptoe.com
Andrew Golodny
agolodny@steptoe.com
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Counsel to Comptel

Barry A. Friedman
Barry.Friedman@ThompsonHine.com
Daniel Ferrel McInnis
Dan.McInnis@ThompsonHine.com
Thompson Hine LLP
1919 M Street, NW,
Suite 700
Washington, DC 20015
Counsel to Entravision Communications

Pantelis Michalapoulos
pmichalopoulos@steptoe.com
Stephanie A. Roy
sroy@steptoe.com
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
Counsel to Dish Network Corporation

Paul Goodman
Senior Legal Counsel
The Greenlining Institute
1918 University Avenue, 2nd Floor
Berkeley, CA 94704
paulg@greenlining.org

_/s/ Matthew F. Wood

Policy Director
Free Press
202-265-1490
mwood@freepress.net