Before the
Federal Communications Commission
Washington, DC 20554

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

REPLY TO OPPOSITION TO PETITION TO DENY

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I. Introduction And Summary

Charter's replies to the various parties who have filed petitions against its proposed merger with Time Warner Cable contribute many pages but little substance to the record before the Commission. Many of its arguments are either besides the point, or depend on shaky assumptions about the structure and level of competition present in the broadband market. Due to the time constraints of this pleading cycle, in these replies, Public Knowledge will focus on the following issues.

First, despite its protests to the contrary, Charter would have ample incentive to take anticompetitive actions to benefit its MVPD business while harming online video. Charter claims that it lacks the incentive to do so, since that would reduce demand for its broadband. However, Charter's conclusion depends on overstating the true level of high-speed broadband competition. Because the video marketplace is more competitive than the broadband marketplace, Charter has the ability to use the tools at its disposal to benefit its video business, even if this reduces the utility of its broadband offering. Charter's broadband customers simply have nowhere else to go—and if Charter's practices reduce the quantity of video programming available online, switching providers would be fruitless in any event.

Second, Charter explicitly claims increased leverage over programmers as a benefit of its proposed merger. This undercuts its claim that it would lack the ability to restrict the availability of programming online.

Third, this merger takes place in the context of an already-concentrated cable marketplace. This magnifies the potential negative consequences of this merger. For instance, Charter would benefit from MVPD exclusivity and windowing contract provisions that Comcast has negotiated, and Comcast from provisions that Charter has negotiated—each without having to provide anything to programmers in exchange. At the same time, the company faces little incentive, and has not committed, to pass along any programming savings to consumers.

Finally, Charter's increased scale will give it an increased ability to influence the consumer equipment and set-top box market. Charter's participation in a nationwide standard for third-party devices could mean the difference between such a standard having sufficient scale to justify competitive investment, and the market for consumer equipment continuing to be fragmented between MVPDs. While Charter has committed to a more open model than most other major MVPDs, manufacturer-specific partnerships do not fully alleviate these competitive concerns. It would harm competition and the public interest if Charter merges with Time Warner Cable without committing to a model for set-top boxes that moves even further in an open direction.

II. Charter Has Incentive To Harm Online Video To Benefit Its MVPD Service.

When the Commission reviews mergers, it should assess markets not solely in static terms, but dynamically. Broadband is not a fixed product; it continues to evolve in response to market forces, technological change, and the new uses consumers find for it. This is why, in reviewing the proposed merger of Charter and Time Warner Cable, the Commission must not only consider the effects of this merger on *some* definition of the broadband market, but on the continued evolution of the market. As an expert agency charged with monitoring and regulating the changing communications marketplace, the Commission can use its expert judgment to promote both competition and the public interest by analyzing this merger against a market definition that is calibrated to protect consumers both today and in the future.

It is in these respects that Charter's proposed market definitions fall short. First, Charter proposes a backward-looking broadband speed metric of 10 Mbps. But, as Chairman Wheeler has explained, "a 25 Mbps connection is fast becoming 'table stakes' in 21st century communications."[1] As the Commission has explained, a 25 Mbps connection allows for such use cases as "Participate in an online class, download files, and stream a movie," "View 2 HD videos," and "Stream 1 4K TV service," while a 10 Mbps connection does not.[2] Assistant Attorney General Bill Baer, in a speech at a conference concerning the future of video competition and regulation, agreed with this analysis, stating that "One good example of smart policy prodding change is the FCC updating its benchmark for broadband download speeds to 25 Mbps. Higher speeds are necessary for consumers and businesses to take full advantage of all the things the internet can do."[3] FCC General Counsel Jonathan Sallet also noted that a market definition that took 25 Mbps downstream as the minimum speed threshold has played an important role in its analysis of recent mergers—along with the fact that "about 70% of American residential units have fewer than two choices for such broadband."[4] For these reasons, a market definition that only considers wireline broadband at 25 Mbps and up in this context better captures the true state of residential broadband today: dominated by cable, with overbuilders and fiber providing a second choice in a few markets.

With this understanding of the broadband market, it becomes clear that Charter faces little effective broadband competition. Nationwide, more than half of broadband users who have

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[1] Prepared Remarks of Chairman Tom Wheeler at 1776 Headquarters, *The Facts and Future of Broadband Competition*, 3 (Sept. 4, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-329161A1.pdf

[2] *See* 2015 Broadband Progress Report and Notice of Inquiry On Immediate Action to Accelerate Deployment, GN Docket No. 14-126, FCC 15-10, Table 1 (rel. Feb. 4, 2015) ("2015 Broadband Progress Report").

[3] Keynote Address of Assistant Attorney General Bill Behr at the Future of Video Competition and Regulation Conference, *Video Competition: Opportunities and Challenges* (Oct. 9, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-keynote-address-future-video-competition

[4] *See* Remarks of FCC General Counsel Jonathan Sallet at the Telecommunications Policy Research Conference, *The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews*, 8 (Sept. 25, 2015), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0925/DOC-335494A1.pdf.

access to 25 Mbps broadband in the first place, have no second alternative.[5] Fewer than 30% of households who can get 25 Mbps have a choice between two providers, while only 14% of households with access to 25 Mbps have the choice of three or more providers.[6] While commenters do not currently have a precise figure for the amount of 25 Mbps and up competition post-merger Charter broadband customers would enjoy, there is little reason to think the figures would differ from the nationwide sums in a way that would be relevant to this analysis.

By contrast, Charter does face competition in the video market. Even ignoring any potential overbuilder or telco alternatives, Charter customers can generally choose from two DBS MVPD services, which are a full substitute for its video offering, and from any number of online video services which offer partial MVPD substitutes. Charter therefore has to work harder to keep its video customers, which means it can afford to take exactly those steps that it claims in its reply it cannot do. In particular, it has both the incentive and ability to use its leverage as a video distributor to require that independent programmers window their programming or restrict it from online platforms, thus creating a reason for its video customers to avoid "cutting the cord." Charter claims that "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."[7] But broadband is such an essential service that even if Charter marginally makes its broadband offering less appealing, this is unlikely to have an effect on its broadband revenue that offsets gains on the video side. Very few people would be willing to do without

[5] 2015 Broadband Progress Report at Chart 2.
[6] Id.
[7] Applications' Opposition to Petitions to Deny and Response to Comments, *Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to the Transfer of Control of Licenses and Authorizations*, MB Docket No. 15-149, at 52 (Nov. 2, 2015) ("Applicants Opposition").

broadband or subscribe to a lower tier simply because OVDs are not as compelling as they might otherwise be, and even if significant numbers of Charter's customers were able to switch providers, switching would not remedy the problem at hand. At most, some Charter customers might subscribe to a lower speed tier than they otherwise would. Even then, Charter's market power in broadband would allow it to make up for any revenue shortcoming by simply charging more.

The fundamental issue is that Charter has more market power and less competition for broadband than for video, which creates a structural incentive for it to use its broadband product to subsidize its video product, or to generally take steps that benefit its video business even at the expense of the overall quality of its broadband offering. While Charter claims that its "network technology and … legal commitments"[8] would prevent it from acting according to its incentives, these points only address ways that Charter could leverage its broadband network in ways to disadvantage OVDs and not ways that Charter would have the incentive and ability to use its scale as a video distributor to keep programming off rival video platforms.[9] Charter later attempts to alleviate concerns about its leverage over some programmers by confusing the issue: Public Knowledge does not question that some major programmers have significant leverage even over large programming distributors. But it is not useful to pretend that an independent programming network has the same leverage against Charter as one of the "big six" content companies.

Charter then claims that no one has provided any "evidence" of anticompetitively restrictive contracts. But as Charter well knows, such contracts are highly confidential—it is one purpose of this proceeding to help determine the extent of such provisions. In any event, Charter's lengthy

[8] *See* Applicant's Opposition at 53.
[9] Id.

defense of provisions—such as most-favored nation and alternative distribution means clauses—is a good indication that it habitually enters into such agreements which, while not *per se* unlawful, merit close scrutiny.

Charter also attempts to gloss over the nationwide character of the broadband and video distribution markets by stating that the broadband "market is, of course, local because each consumer selects from options available at his or her location,"[10] and that "the relevant geographic market for providing MVPD video services to end user customers is local."[11] But while the state of competition in these markets is indeed relevant—particularly the reduced competition Charter would face in broadband as opposed to video—many of the harms that petitioners have identified relate to how Charter would be able to use its market power as a large-scale distributor of content to end users. A post-merger Charter would stand in between video programmers, Internet content producers, and other creators, giving them no choice but to negotiate with it, and perhaps accede to its terms to reach its many millions of customers. There are no alternatives, besides Charter, to reach Charter customers on Charter's networks, and a post-merger Charter would be of such size that very few content providers could afford to walk away from its customer base. It is that mechanism of harm—and not a loss of choice in local markets—that provides the basis for many objections to its proposed merger, and attempts to redirect attention exclusively to local markets is simply disingenuous.

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[10] Id. at 32.
[11] Id. at 42.

III. Charter's Increased Leverage Over Programmers Post-Transaction Could Allow It To Keep Programming Off Of Rival OVD Platforms.

Charter admits in its reply that it would enjoy substantially increased leverage over programmers. However, it provides no compelling reason to believe that this would be passed along to consumers as a public interest benefit. These cost savings themselves could have negative consequences on the quality of programming and the costs for rivals in some circumstances, but in addition, the very fact of these savings proves that they *would* have substantial leverage in the marketplace. This, coupled with its defense of MFNs and ADMs, shows that it would have the means to use that leverage in ways other than pure savings, e.g., ensuring exclusive access to programming in ways that could disadvantage OVDs.

Charter's claims of pass-through savings appear to be based on little more than conjecture. It commits only to "expected pass-through savings,"[12] citing the testimony of their economist. The cited testimony, meanwhile, *admits* that "it is difficult or impossible to determine a specific pass-through rate from Charter's recent pricing behavior."[13] Katz ultimately arrives at a rate of 50-60% as a rate of cost *increase* pass-through—and only does that by *assuming* that the "limited number of data points"[14] portray a strategic decision of Charter's to pass through the increases in its programming cost.[15] Katz then appears to assume that Charter will both (a) pass through cost savings at the same rate it passes through cost increases, and (b) that it will sustain the speculative 50-60% rate across New Charter's footprint. All of this is founded on the assumption that Charter's behavior reflects a unified pass-through strategy. In the end, Charter's logic seems to be circular; in order to assume that they will systematically pass through savings

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[12] Id. at 26.
[13] *See* Reply Declaration of Michael L. Katz, Exhibit B of Applicant's Opposition, at ¶51, *available at* http://apps.fcc.gov/ecfs/document/view?id=60001332668.
[14] Id.
[15] Id. at ¶52.

post-transaction, it asks us to assume that they have systematically passed through costs in the past.

Charter's reply also grossly oversimplifies the relative bargaining power of MVPDs and smaller programmers. Charter's analysis presumes, without apparent justification, that all parties come to the table with equal strength. In reality, the balance of strengths and weaknesses is complex. Not all programmers have the leverage of "must-have" offerings. Smaller programmers are the most vulnerable, as they lack the ability to walk away from the negotiating table. Their continued existence depends on reaching as many viewers as possible, which in turn requires negotiating with large MVPDs such as Charter. Offering their programming at a loss or subject to restrictive windowing and distribution clauses to large MVPDs is not an issue of choice, so much as one of survival. Similarly, the idea that "[s]imply put, programmers may not want MVPDs to offer competing OVD services"[16] is premised on this unrealistic and simplified portrayal of the various parties' bargaining power.

This is enough to demonstrate that Charter cannot rely on its increased leverage against programmers as a public interest benefit. But it also shows that this change can actually harm competition, to the extent that Charter would have both the incentive and the means to use it leverage in ways that disadvantage rival video platforms, particularly OVDs. Even if Charter lacks the ability to prevent all programmers from distributing content online, if it can incrementally raise the costs of OVDs or prevent them from obtaining some content at all, it can boost the attractiveness of its video offerings relative to those OVDs. The Commission must therefore examine the nature and effect of Charter's and Time Warner Cables' programming

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[16] *See* Reply Declaration of Dr. Fiona Scott Morton, Exhibit A of Applicant's Opposition, at ¶18, *available at* http://apps.fcc.gov/ecfs/document/view?id=60001332668.

contracts, particularly those with independent programmers, and determine whether this merger would increase Charter's ability to restrict OVD competition.

IV. Approval Of The Merger Increases The Risk Of Coordinated Effects In An Already-Concentrated MVPD Marketplace.

Charter would benefit if it coordinated its behavior—in particular, its negotiations with programmers—with other major national MVPDs such as Comcast. Such coordination need not take the form of an express agreement between the companies. Instead, Charter could plot a course of action that depends on actions it knows Comcast might take, and vice versa.

For its part, although Charter lays out a case against the possibility of explicit collusion, it does not address the more general risk of coordinated effects, and its arguments rest on several faulty premises. First, Katz's argument that MVPDs have no common goal is wrong; Comcast and Charter do share a common goal to disadvantage OVDs relative to MVPDs, as discussed above. Second, coordinated effects do not require an express mechanism or agreement in order to harm competition. The Department of Justice recognizes in its Horizontal Merger Guidelines the possibility of competitive harm even absent explicit agreement or enforcement mechanisms.[17] There is no need for a cartel-like enforcement mechanism in this context. Each MVPD might prefer the other to "share the burden" in taking steps to keep content away from OVD platforms, but its overall strategy would be the same on its own. Here, coordinated effects would simply magnify competitive harms that would exist regardless. At the same time, Charter and Comcast do have a close business relationship: Charter must negotiate with Comcast to carry Comcast's

[17] "Coordinated interaction also can involve a similar common understanding that is not explicitly negotiated but would be enforced by the detection and punishment of deviations that would undermine the coordinated interaction. Coordinated interaction alternatively can involve parallel accommodating conduct not pursuant to a prior understanding … in which each rival's response to competitive moves made by others is individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms." United States Department of Justice Horizontal Merger Guidelines, 24-25 (Aug. 19, 2010), *available at* http://www.justice.gov/sites/default/files/atr/legacy/2010/08/19/hmg-2010.pdf.

"must-have" NBCU programming. These frequent business contacts provide opportunity for those two companies to share information.[18]

MFN clauses themselves can help bring about coordinated effects. If, for example, Charter would benefit (via MFN) from terms that Comcast has negotiated for, and vice versa, then each MVPD could receive unbargained-for benefits from programmers. Knowing this, and using the same information-exchange mechanisms that MFNs themselves presume, each MVPD could calibrate its negotiations to receive maximum benefit for the least exchange. For example, one MVPD might not require certain kinds of access to programming expressly in negotiations, knowing that it would be able to later claim those rights via MFN. Such coordination, in fact, could occur based solely on the respective companies' public announcements and product offerings.

But even apart from MFNs, actions that one MVPD takes to keep content away from OVDs would benefit all MVPDs. There is no need for an MFN clause to effectuate this kind of coordination—merely the kind of general industry knowledge that sophisticated actors like Charter can be presumed to have.

The fear of coordination is not an empty one. John Malone was recently asked what he would do if "the Justice Department weren't looking over your shoulder." He responded:

> Well for instance if I put my Charter hat on, US cable operator, 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.[19]

[18] In fact, Comcast's programming relationships with all major MVPDs, as well as its licensing of the X1 platform to other MVPDs, could create a plausible conduit by which all MVPDs, Charter included, can exchange information about industry trends.

[19] Rich Greenfield, *John Malone "The Coordinator" of the Cable Industry — Will That Impact Charter Time Warner Cable Approval?*, BTIG Blog (Oct. 16, 2015), http://www.btigresearch.com/2015/10/16/john-malone-the-coordinator-of-the-cable-industry-will-that-impact-comcast-time-warner-cable-approval.

And when asked about his role in the various companies he invests in, including Charter, he responded that "I try to coordinate their behavior."[20]

The fact that one of Charter's owners is willing to speak so frankly about the benefits of coordination should underline why it is so important that the Commission closely examine ways that the ever-more concentrated cable marketplace can give occasion to coordination that could harm consumers and competition.

V. Charter's Scale Will Allow It To Harmfully Influence The Set-Top Box Market.

Charter claims that its increased scale would not harm the set-top box business. To the contrary, a single company that controls around 35% of cable subscribers would have an outsized influence on the set-top box market. Charter's support, or lack of support, for new set-top box standards could make the difference between those standards' success or failure. If third parties are to make devices that can access and interact with MVPD content by any means,[21] they need to ensure that they have sufficient scale. Even a very large technology company may not be able to create a specific, custom device for each MVPD in the country and hope to sell it at retail.

Charter has committed to creating an app that would allow its customers to access its video content for some major platforms.[22] While this is more than some other video providers have done, the Commission should not be persuaded that such a vague commitment either goes far enough to promote set-top box competition or the public interest. First, Charter subscribers should not have to rent a set-top box from Charter at all in order to access all their paid-for video programming. Second, Charter subscribers should be able to access their video programming on the device of their choice—not just on those devices that Charter has decided to make an app for.

[20] Id.
[21] *See generally* Final Report of the Downloadable Security Technology Advisory Committee (Aug. 28, 2015), *available at* https://transition.fcc.gov/dstac/dstac-report-final-08282015.pdf.
[22] *See* Applicants' Opposition at 72-73.

Third, Charter subscribers, even on third-party devices, should not have to view their video programming only via a Charter-designed or provided app or interface. A competitive device market that respects consumer choice would allow device makers to present video via differentiated user interfaces and offer unique features. This approach—where innovation happens among edge competitors instead of being controlled by the network operator—has led to low prices, innovation, and great consumer benefit in other areas, such as home broadband and smartphones. While Public Knowledge acknowledges that Charter's current approach may be better than, for example, exclusive support for a cable-controlled platform like Comcast's X1, it still falls short of the characteristics a truly open approach must possess.

The Commission is considering many of these issues in another docket,[23] and merger-related examination of set-top box issues should only complement, not replace, such activity. However, here, the Commission should consider the extent to which Charter's voluntary agreement to provide access to its video programming to third-party devices manufacturers in a standards-based way would benefit the public interest.

VI. Conclusion.

For the reasons set forth here and in Public Knowledge's original Petition to Deny, the Commission must reject this transaction as proposed.

Respectfully submitted,
/s Meredith Rose
Staff Attorney
PUBLIC KNOWLEDGE

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[23] Media Bureau Seeks Comment on DSTAC Report, Public Notice, MB Docket No. 15-64 (rel. Aug. 31, 2015), https://apps.fcc.gov/edocs_public/attachmatch/DA-15-982A1.pdf.

DECLARATION

I, Meredith Rose, declare under penalty of perjury that:

1. I have read the foregoing reply.

2. I am a Staff Attorney at Public Knowledge (PK), an advocacy organization with members, including Charter and Time Warner Cable subscribers, who, in my best knowledge and belief, will be adversely affected if the Commission approves the merger.

3. PK members subscribe to Charter and Time Warner Cable broadband, cable TV, and telephone services. They use these services to access online video and other edge services. PK and some of its members are also video content creators.

4. In my best knowledge and belief, PK and its members will be directly and adversely affected if the Commission allows the proposed merger of Charter and Time Warner Cable to proceed.

5. The allegations of fact contained in the reply to opposition are true to the best of my personal knowledge and belief.

/s Meredith Rose
Staff Attorney
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12 November 2015

CERTIFICATE OF SERVICE

I, Meredith Rose, certify that today, November 12, 2015, I have served copies of this reply on the following parties and staff via email:

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