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November 12, 2015

By ECFS

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

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

Dear Ms. Dortch:

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

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

Marlene H. Dortch
November 12, 2015
Page 2



Please contact me with any questions.

Respectfully submitted,

A handwritten signature in black ink that reads "Stephanie A. Roy".

Stephanie A. Roy
Counsel for DISH Network Corp.

Enclosure

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

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

REPLY OF DISH NETWORK CORPORATION

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November 12, 2015

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Table of Contents

INTRODUCTION AND SUMMARY.....	1
I. APPLICANTS CONTINUE TO IGNORE MARKET REALITIES	5
II. NEW CHARTER WILL HAVE AN INCREASED INCENTIVE AND ABILITY TO HARM OVDS.....	8
III. NEW CHARTER IS LIKELY TO INCREASE BROADBAND PRICES, FURTHER PREJUDICING RIVAL OVDS.....	13
A. Outright Price Increases Are Possible.....	13
B. Price Increases Under the Pretext of Speed Upgrades Seem Likely	14
C. Usage-based Pricing Is in the Cards	15
IV. THE MERGER WILL CREATE A DOMINANT DUOPOLY WITH THE INCENTIVE TO ENGAGE IN ANTI-COMPETITIVE PARALLEL CONDUCT	17
V. THE MERGER “BENEFITS” ARE NOTHING MORE THAN REPACKAGED PLANS AND CONJECTURE	24
A. The Applicants’ Own Documents Show That Charter’s Infrastructure Plans Do Not Depend on the Merger	24
B. Charter’s Promise to Expand BHN’s Low Income Access Plan is Confounding	29
C. The Few Low-Paying Jobs that Charter “On-Shores” Will Be Offset by Regional Job Losses	30
D. Charter Has Failed to Show That Any Cost Savings or Innovation Will Inure to the Public’s Benefit.....	31
VI. CONCLUSION.....	32

REDACTED – FOR PUBLIC INSPECTION

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REPLY OF DISH NETWORK CORPORATION

INTRODUCTION AND SUMMARY

DISH Network Corporation (“DISH”) respectfully replies to the Opposition to Petitions to Deny and Response to Comments (“Opposition”)¹ submitted by Charter Communications, Inc. (“Charter”), Time Warner Cable Inc. (“TWC”), and Bright House Networks (“BHN”) (collectively, the “Applicants”) in the above-referenced proceeding.² Despite the length of the Opposition and related filings,³ the Applicants have not come close to providing evidence sufficient to demonstrate that this proposed merger is in the public interest. Fundamental

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

² See Public Notice, Commission Seeks Comment on 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, DA 15-1010 (Sept. 11, 2015).

³ See Opposition; Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, Applications and Public Interest Statement, MB Docket No. 15-149 (June 25, 2015) (“Application”).

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deficiencies persist in the showing that they need to make for the Commission to grant them merger authority. Among other things, these deficiencies include:

- Failing to properly define, and recognize New Charter’s own role in, the relevant market;
- Refusing to acknowledge the competitive stance of online video distributors (“OVDs”) in relation to Charter’s video offerings;
- Insisting that New Charter would lack an incentive to foreclose or degrade competitive OVD offerings, despite substantial evidence to the contrary;
- Talking around the means at New Charter’s disposal to act on this incentive;
- Ignoring the effect of New Charter’s plans on low-income consumers;
- Repackaging existing infrastructure plans as merger-specific benefits;
- Refraining from definitive commitments to pass on any cost savings to consumers;
- Providing inadequate documentation of projected operational efficiencies; and
- Obscuring the loss of high-paying jobs by focusing instead on the return of a minimal number of low-paying jobs to the U.S.

Indeed, despite the very small fraction of Highly Confidential documents that DISH’s counsel has been afforded the opportunity to read to date, the facts that have emerged through the Applicants’ relevant submissions are every bit as troubling as those that doomed the proposals of the Comcast/TWC merger.

Here, the Applicants continue to protest that New Charter would not have the incentive to hurt OVDs, as such action would only make New Charter’s broadband service less attractive to consumers. But their documents tell a different story—they confirm that each Applicant views OVDs as a threat to its video business, not as a boon to its broadband business. The reason is simple: the Applicants face little or no competition from other high-speed broadband providers in most of their footprints. Indeed, almost two-thirds of customers in the New Charter footprint

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will not have access to at least one alternative high-speed (25 Mbps) broadband provider.⁴ This means that New Charter can have its cake and eat it, too—degrade competing OVDs to protect its linear video business without losing many, if any, broadband subscribers. The complex churn data recently produced by the Applicants appear to confirm, and certainly do not rebut, this fact.

New Charter is likely to prejudice the success of OVDs in another way, too. It is likely to raise broadband prices, either outright or indirectly, either during the Applicants’ short-term commitment to not engage in usage-based pricing (“UBP”) or—especially—after that commitment expires. Highly Confidential documents confirm that fear, suggesting that

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In addition, internal documents reveal that, **{{BEGIN HCI**

END HCI}}.6 This will be bad for all broadband

customers. It will also be bad for OVDs and their customers. A Sling TV subscriber, for example, who now pays \$20.00 per month for her Sling TV service, but a hefty \$40.00 or \$65.00 to one of the Applicants for broadband, may be confronted with a prohibitively expensive proposition if she has to fork over another \$20 to New Charter.⁷ In this way, too, New Charter

⁴ See Application at 60. According to the Applicants, “more than one in three households in the New Charter footprint already had access to at least one wireline alternative (in addition to the merging firms) offering download speeds of 25 Mbps or faster,” meaning that almost two in three do not have an alternative. *Id.*

⁵ **{{BEGIN HCI** **END HCI}}.**

⁶ **{{BEGIN HCI** **END HCI}}.**

⁷ See *Sling Television Pricing*, SLING, <https://www.sling.com/package> (last visited Nov. 11, 2015); *Additional Offers*, CHARTER, <https://www.charter.com/browse/content/packages> (last visited Nov. 11, 2015); *High-Speed Internet Plans and Packages*, TIME WARNER CABLE,

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will be able to make its broadband business even more profitable while also protecting its video business. As for the devastating implications of the Comcast-New Charter duopoly the merger will create, the Applicants do not dispute that, between them, Comcast and New Charter will control as many as 90 percent of the nation’s high-speed households.⁸ They counter only that New Charter will control under 30 percent by itself.⁹ That hardly provides comfort given Dr. Malone’s words when asked what he would do if the Justice Department were not looking over his shoulder: “I would say, why don’t we get together with Comcast and have a common [] access platform that includes all of our cable stuff, and HBO, and Starz, and Showtime, and all the broadcasters . . . and let’s offer that to all the other guys, all of our brethren in the cable industry.”¹⁰

Even if the Applicants’ purported public interest commitments were sufficient to counterbalance this anticompetitive result (which they are not), the Applicants have failed to show that the touted benefits of the transaction are anything more than repackaged (i.e., pre-merger) business plans and conjecture. As DISH explained in its Petition to Deny, the Applicants have not provided evidence sufficient to conclude that any of the transaction’s purported benefits will actually serve the public interest.¹¹

<http://www.timewarnercable.com/en/plans-packages/internet/internet-service-plans.html> (last visited Nov. 11, 2015).

⁸ See DISH Network Corp., Petition to Deny, MB Docket No. 15-149, at 27-28 (Oct. 13, 2015) (“DISH Petition”).

⁹ See Opposition at 39-40.

¹⁰ Vanity Fair, *Chairmen of Discovery and Liberty Media Stay Tuned on Television*, YOUTUBE, at 00:21:40 – 00:22:40 (Oct. 8, 2015), <https://www.youtube.com/watch?v=Hsbfnu8KUVg>.

¹¹ See DISH Petition at 32-40.

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DISH observes that the Applicants have been submitting their responses to the Commission’s Requests for Information on a rolling basis. DISH has been working diligently to review relevant narrative materials and to process the document submissions and load them to searchable databases in a timely manner, but this undertaking is ongoing. To date, the Applicants have produced at least 5 terabytes of data in response to the Commission’s document requests. These data must be uploaded, organized, and analyzed, and this work began only after parties submitted initial petitions or comments in this proceeding. As a result, though the pleading cycle is ostensibly complete with the reply due date at hand, interested parties are just beginning the task of evaluating the Applicants’ evidence. DISH therefore reserves its rights to review, assess, and comment on these materials going forward in this proceeding.

The Applicants bear the burden of proving that this proposed transaction will serve the public interest. To date, they have wholly failed to make that showing. The purported public interest benefits of this merger do not outweigh its many harms. Thus, the Commission should deny its authority for this merger as presented by the Applicants.

I. APPLICANTS CONTINUE TO IGNORE MARKET REALITIES

The Applicants maintain in their Opposition that there is no “national market for OVD ‘access’ to a critical mass of end users.”¹² The Applicants further attempt to argue that 25 Mbps is not the relevant threshold for high speed broadband, suggesting that such speeds may be the standard in the future but do not reflect the broadband speeds that consumers consider substitutes

¹² Opposition at 33.

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today.¹³ These arguments are just as faulty as when Comcast and TWC tried to use them in their merger to deny the existence of a national geographic market for OVD access to consumers.

Moreover, since the Comcast/TWC merger was abandoned, both the FCC General Counsel and the Department of Justice (“DOJ”) have communicated their view that a national market exists for OVD access to high speed broadband consumers. FCC General Counsel Jonathan Sallet explained recently that while Comcast and TWC “did not compete directly in the distribution of programming to consumers in local markets, OVDs do seek to distribute programming throughout the U.S., and negotiate for nationwide distribution rights.”¹⁴ And as Nancy Rose, Chief Economist of the DOJ Antitrust Division, recently stated regarding Comcast’s theory of “no overlap, no problem”: “The fallacy is thinking about the end user customer and not seeing what the market is We [at DOJ] thought about there being two natural markets for content distribution. One through traditional MVPD video . . . and the other being broadband distribution.”¹⁵

As the FCC and the DOJ agree, the relevant product market is high-speed broadband access suitable for the long-form HD video streams consumed by a typical household with multiple members. The Applicants suggest that broadband speeds as low as 3 Mbps should be

¹³ *Id.* (“The Commission’s competitive analysis must encompass speeds broadband consumers today actually consider and choose for Internet service” and the 25 Mbps standard “does not constitute an assessment of a ‘relevant market’ for microeconomic analysis.”)

¹⁴ Jonathan Sallet, FCC, Remarks at the Telecommunications Policy Research Conference: The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews, p. 12-13 (Sept. 25, 2015), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0925/DOC-335494A1.pdf.

¹⁵ Audio tape: Nancy Rose, Deputy AAG for Economic Analysis, Speaking on Bargaining Leverage and Competitive Effects, sponsored by the A.B.A. Section of Antitrust Law, at 25:50-26:25 (June 25, 2015), http://www.americanbar.org/tools/digitalassetabstract.html/content/dam/aba/multimedia/antitrust_law/20150625_at150625_mo.mp3 (membership required).

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defined as high speed broadband.¹⁶ This view, of course, enables the Applicants to claim they face competition from wireless and telco offerings and distracts from the stark reality that almost two-thirds of customers in the New Charter footprint will not have access to at least one alternative high-speed (25 Mbps) broadband provider. This is a key point, because 4 Mbps and even 10 Mbps speeds are inadequate to support the viewing habits of American households both today and in the future.¹⁷ As DISH demonstrated previously, even if a speed of 10 Mbps were adequate today, in two years' time consumers' viewing habits are likely to overwhelm it. This is because data-intensive new video formats such as 4K (Ultra HD) are increasing in popularity among American households.¹⁸

OVDs today rely upon a high speed broadband connection in order to deliver their product to the consumer. While Charter and TWC operate in different geographic areas, their

¹⁶ See Opposition at 34 (“Even cutting edge, data-intensive applications like HD video streaming do not require more than 5 to 8 Mbps. Indeed, Hulu and Amazon advertise HD speed requirements of 3 and 3.5 Mbps, respectively.”)

¹⁷ See DISH Network Corp., Petition to Deny, MB Docket No. 14-57, at 27-30 (Aug. 25, 2014) (“[A] typical household relying on the Internet to deliver all video therefore should optimally have no less than 25 Mbps in broadband connectivity. This means that 25 Mbps would be the minimum actual (as opposed to advertised) experienced speed provided to the residence in order to sustain, for example, a robust OTT video product capable of supplanting today’s traditional linear pay-TV service.”); Netflix, Inc. Petition to Deny, MB Docket No. 14-57, at 16 (Aug. 25, 2014) (“In the near term, that market is likely defined as connections capable of sustaining at least 10 Mbps for individuals and at least 25 Mbps for households.”); Public Knowledge and Open Technology Institute, Petition to Deny, MB Docket No. 14-57, at 8 (Aug. 25, 2014) (“A 25 Mbps threshold ensures that viewers can . . . watch television while still having sufficient leftover capacity for mobile devices, online backup services, and other applications. The Commission has already founds that speeds in excess of 15 Mbps are necessary for ‘[b]asic functions plus more than one high demand application running at the same time’—25 Mbps for three high-demand applications plus basic functions is a reasonable extrapolation of this metric.”) (*quoting* Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, *Tenth Broadband Progress Notice of Inquiry*, 29 FCC Rcd. 9747, 9753, Table 1 (Aug. 5, 2014)).

¹⁸ See DISH Network Corp., Reply to Opposition, MB Docket No. 14-57, at 54-56 (Dec. 22, 2014).

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broadband offerings are alternatives for one another in an OVD’s attempt to assemble a mix of broadband ISPs sufficient to reach a critical mass of high-speed broadband subscribers. The share of nationwide broadband subscribers that an ISP serves is an informative proxy for the leverage that an ISP can exercise in its interactions with OVDs. Consequently, these national shares are important to consider in assessing the extent to which the proposed merger of Charter and TWC could harm OVDs (and thereby stifle industry innovation and harm consumers of over-the-top (“OTT”) services) by removing one of the options that a national OVD now has on its path to viability. For this reason, the Commission must evaluate how the merger affects the national market for OVD access to end users.

The Opposition fails to demonstrate any basis for the Commission to ignore how the proposed merger would harm a competing OVD’s ability to access a critical mass of consumers with access to broadband services of sufficient quality and speed to enjoy the OVD’s services.

II. NEW CHARTER WILL HAVE AN INCREASED INCENTIVE AND ABILITY TO HARM OVDS

The Applicants attempt to hide New Charter’s natural incentive to harm OTT services by emphasizing the better margins that New Charter obtains for its broadband service, compared to its video service. They contend that OVDs stimulate consumer demand for their high-margin, high-speed broadband services, and that any attempt to suppress OVD competition would necessarily result in significant harm to its higher-margin broadband business. Thus, according to the Applicants’ economist, “all else equal, to the extent that OVDs increase the demand for

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broadband services, New Charter will have an incentive to encourage and support OVDs.”¹⁹ In essence, they argue that New Charter will protect *either* broadband revenue *or* video revenue.

The reality is that no choice is necessary. New Charter will be able to act in a way that enhances or protects both revenue streams.

First of all, video remains very valuable to all of the Applicants. According to their own figures, video accounts for some **{{BEGIN HCI END HCI}}** billion in aggregate revenue, and **{{BEGIN HCI END HCI}}** billion in aggregate gross profit for the Applicants.²⁰ Post-transaction, that aggregate profit is likely to increase substantially due to significant savings as a result of New Charter’s newfound scale. By comparison, broadband accounts for some **{{BEGIN HCI END HCI}}** billion in aggregate revenue, and **{{BEGIN HCI END HCI}}** billion in aggregate gross profit for the Applicants.²¹

Given the importance of video revenue, Charter is not seeking to exit the video business. Rather, Charter is **{{BEGIN HCI END HCI}}**.²² In fact, Charter sees video and broadband services as **{{BEGIN HCI END HCI}}**. Thus, New Charter’s key goal is to **{{BEGIN HCI END HCI}}**.²³

¹⁹ Statement of Dr. Fiona Scott Morton re the Merger of Charter, TWC, and BHN, MB Docket No. 15-149, ¶ 101 (Nov. 2, 2015) (“Morton Reply Declaration”) (attached as Exhibit A to Opposition).

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END HCI}}.²⁶ Nor would we expect a Charter executive to
say that it is {{BEGIN HCI
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HCI}}.²⁷ As one of Charter’s Vice Presidents summed up the problem: {{BEGIN HCI

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In addition to protecting New Charter’s video business, degradation of OVDs would help
New Charter in another way—lessen the need for additional broadband investment. As a TWC
executive, Peter Stern, explained to DOJ:

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In fact, Charter already appears to be pursuing a goal pernicious to OVDs—that of
relegating them to a purely complementary role. As Charter put it internally, the objective is to
become the {{BEGIN HCI

END HCI}}.³⁰ This way, instead of using its broadband offering to free
consumers to choose from video content from any source, Charter can {{BEGIN HCI

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END HCI}}.³¹ In other words, Charter is trying to turn OVDs into just another cable channel rather than a full-fledged substitute for linear video. Of course, subscription-based OTT services such as Sling TV are directly in conflict with that vision, and New Charter can safely be expected to try to take any available steps to harm them. Internal Charter documents suggest that the company is simply biding its time, waiting to see whether Sling TV **{{BEGIN HCI**
HCI **END HCI}}** and formulating strategies aimed at undermining its viability, including by **{{BEGIN HCI**

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The goal of this “complementary” strategy seems clear: to forestall cord-cutting. OTT video is several years old, and yet a relatively small number of consumers have cut the cord today.³⁴ Charter would like to keep it that way, and prevent OTT services from becoming direct competitors to traditional MVPD services.³⁵ Analysts have described the second quarter of 2015 as “the beginning of the rise of OTT video . . . and the long-awaited beginning of the end for the traditional Pay TV model.”³⁶ Charter obviously views the “OTT-as-a-complement” strategy as

³¹ **{{BEGIN HCI** **END HCI}}**.

³² **{{BEGIN HCI** **END HCI}}**.

³³ **{{BEGIN HCI** **END HCI}}**.

³⁴ Tim Mullaney, *Cord-cutters: Why It's Apple's New Key Demographic*, CNBC (Mar. 17, 2015), <http://www.cnbc.com/2015/03/17/why-apples-newest-key-market-is-cord-cutters.html> (reporting that only 7.3% of households have cut the pay-TV cord).

³⁵ *See infra* Section III.

³⁶ Moffett Nathanson, U.S. Cable & Satellite: Usage Based Pricing . . . Maybe Not Dead Yet After All?, at 6 (Oct. 13, 2015) (“Moffett Nathanson”).

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an “insurance policy” against that rise.³⁷ In light of this vision, New Charter would have a particularly heightened incentive to discriminate against competing OVD services, especially live streaming services like Sling TV—which is a total substitute for linear pay television.

In addition, Charter’s Spectrum Guide electronic programming guide (“EPG”)³⁸ will give New Charter yet another tool to sabotage competing OVDs. New Charter claims that its EPG will help facilitate the growth of OVD services when it is expanded across the entire New Charter footprint.³⁹ In reality, the Spectrum Guide will actually give New Charter extraordinary power over the content available to its consumers. New Charter will be able to force competing OVDs to submit to the combined company’s terms in order to gain entry to the marketplace via the Spectrum Guide. New Charter could also effectively ensure that consumers cannot access the apps of competitors by, among other methods, relegating competing OVD apps to unfavorable placement on its EPG while promoting its own services more favorably. Or, worse, New Charter could deny an app entry onto its EPG entirely.

III. NEW CHARTER IS LIKELY TO INCREASE BROADBAND PRICES, FURTHER PREJUDICING RIVAL OVDS

New Charter will be able to deploy another win-win strategy to make its broadband business more profitable, while still protecting its linear video business: raise the price of broadband access either directly or indirectly.

A. Outright Price Increases Are Possible

New Charter will be better able to increase broadband prices outright. As explained more fully below, the merger will create a formidable duopoly of Comcast and New Charter, making

³⁷ *Id.* at 2.

³⁸ *See* Opposition at 19-20.

³⁹ *Id.*

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consciously parallel pricing action between the two giants both easier and more effective.

Moreover, the merger will dramatically reduce benchmarking opportunities between the current Charter and TWC franchise areas, which neighbor or abut one another to a much greater extent than those of Comcast and TWC. This, too, will usher in greater flexibility to raise prices.

B. Price Increases Under the Pretext of Speed Upgrades Seem Likely

Within a year of the transaction's close, Charter offers to bring "base speed tiers [in the digital footprint]. . . to Charter's current standard minimum of 60 or 100 Mbps,"⁴⁰ and make 60 Mbps the minimum tier "almost everywhere within 30 months."⁴¹ Charter promises a "uniform price" for this base tier, but the company fails to tell the Commission what this price is. As DISH explained in its Petition,⁴² access to the same pricing as your neighbor is not a consumer benefit unless that neighbor's price is lower than the one you pay now for the same service. But that is not all.

The price of New Charter's new minimum speed is clearly likely to be *higher* than the price of the old minimum speed. This price increase harms consumers in several ways. First, subscribers to lower tiers of service will be forced to upgrade to the new minimum. Consumers are unlikely to switch providers in the face of these speed and price increases, either because they may not understand they do not need such a fast service, or because they do not have a broadband alternative, or yet because the costs and hardships of switching are too high.

Second, subscribers who cannot afford the new minimum tier will be denied access to New Charter's broadband at any speed. Today, TWC offers the "Everyday Low Price (ELP)"

⁴⁰ Application at 21.

⁴¹ Opposition at 7.

⁴² DISH Petition at 35.

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broadband Internet access service tier to nearly its entire footprint at \$14.99 per month for 2x1 Mbps service.⁴³ In addition, in some TWC areas, consumers can purchase standalone Internet at 50 Mbps downstream for \$34.99/month, 10 Mbps downstream for \$29.00/month, and 3 Mbps downstream for \$14.99/month.⁴⁴ Post transaction, these affordable broadband options will be eliminated. A price increase may affect ELP subscribers particularly hard, putting in jeopardy more than {{BEGIN HCI END HCI}} Internet connections for low-income homes.⁴⁵ Depriving customers of affordable broadband access is not in the public interest.

C. Usage-based Pricing Is in the Cards

It is true that the Applicants have made a commitment that New Charter will not employ UBP in their statements to the Commission. But the Commission should treat that commitment skeptically, as it cuts against the grade of both Applicants’ preferences.

TWC was the first ISP to introduce UBP,⁴⁶ starting in Port Arthur, Texas in 2008 and expanding to three additional markets in 2009—San Antonio, Texas, Austin, Texas, and Rochester, New York.⁴⁷ While TWC was forced to drop these pricing plays only after public

⁴³ TWC Responses at 140.

⁴⁴ *See High-Speed Internet Plans and Packages*, TIME WARNER CABLE, <http://www.timewarnercable.com/en/plans-packages/internet/internet-service-plans.html> (last visited Nov. 10, 2015) (outlining available plans and their costs); *Faster. Clearer. Reliable*, TIME WARNER CABLE, <http://www.timewarnercable.com/en/enjoy/better-twc/internet.html> (last visited Nov. 10, 2015) (detailing how Internet plans will be upgraded under the TWC Maxx program at “no additional charge”).

⁴⁵ {{BEGIN HCI END HCI}}

⁴⁶ Moffett Nathanson at 18.

⁴⁷ *Id.*

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backlash,⁴⁸ it re-introduced UBP in some parts of Texas in 2012, albeit only for customers that wanted to opt in to it.⁴⁹

As for Charter, its internal documents show that Charter plans to be more aggressive with regard to UBP than TWC. The documents reveal that, **{{BEGIN HCI**

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In another example, Charter admits that it regards UBP as **{{BEGIN HCI**

END HCI}}.⁵¹ The document makes clear that

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⁴⁸ *Id.*; see also Tom Lowry, *Time Warner Cable Expands Internet Usage Pricing*, BLOOMBERG BUSINESS (Mar. 31, 2009), http://www.bloomberg.com/bw/technology/content/mar2009/tc20090331_726397.htm.

⁴⁹ Eric Bangeman, *Time Warner Learns from Mistakes, Reintroduced Optional Usage-Based Billing*, ARSTECHNICA (Feb. 29, 2012), <http://arstechnica.com/tech-policy/2012/02/time-warner-learns-from-mistakes-reintroduces-optional-usage-based-billing/>.

⁵⁰ **{{BEGIN HCI** **END HCI}}**.

⁵¹ **{{BEGIN HCI** **END HCI}}**.

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And, in the same vein, a Charter official states that {{BEGIN HCI

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It seems very likely, therefore, that New Charter would impose UBP the minute after the expiration of any condition prohibiting it from doing so. In light of Charter’s proclivities towards UBP, the three-year term of its proposed commitment is woefully inadequate.

Price increases, no matter how effected, will harm OVD competition without presenting any downside for New Charter. Raising the cost of broadband makes the price of cord-cutting—broadband subscription plus OTT subscription—too high. By driving consumers back to the video bundle, New Charter not only protects its video business but also suppresses demand for competing OTT services. While consumers can still access OTT content through their New Charter video-broadband bundle, customers susceptible enough to the increased price of cord cutting are unlikely to splurge on both MVPD video and OTT content. OTT providers of linear content like Sling TV are the hardest hit by this tactic: a consumer tied to her MVPD’s Internet-video bundle is unlikely to subscribe to the same package of channels delivered by a different provider.

IV. THE MERGER WILL CREATE A DOMINANT DUOPOLY WITH THE INCENTIVE TO ENGAGE IN ANTI-COMPETITIVE PARALLEL CONDUCT

As DISH explained in its Petition to Deny, this transaction will create a broadband duopoly, with Comcast and New Charter controlling about 90 percent of the high-speed

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⁵³ {{BEGIN HCI

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broadband homes in the country. Parallel action, with one of the two following the other, will be enough to foreclose an OVD from almost all high-speed homes in the country. The Applicants deny that they will engage in collusive tactics, but as shown below, active collusion is not necessary for duopolists to harm the market. As discussed more fully below, the duopoly created by this proposed merger will give New Charter the incentive and ability to harm the OVD market.

A true assessment of the risk of duopolistic behavior starts with the remarks that Dr. John Malone, indirect owner of a significant stake in Charter, made just last month at Vanity Fair’s “The New Establishment” forum. When asked about his objectives for his various roles in today’s U.S. media industry, Dr. Malone responded that, although he’s merely an “investor” with no “control” over his interests today, “I try to coordinate their behavior.”⁵⁴ Later on, when asked by panel moderator Walter Isaacson to “imagine [that] the Justice Department weren’t looking over your shoulder, and you could call others in the industry . . . What would you say to them if you didn’t have to worry about that?” Dr. Malone responded, “I would say, why don’t we get together with Comcast and have a common [] access platform that includes all of our cable stuff, and HBO, and Starz, and Showtime, and all the broadcasters . . . and let’s offer that to all the other guys, all of our brethren in the cable industry.”⁵⁵ Duopoly takes two, of course, and Dr. Malone is not alone in entertaining such a sentiment. In comments made to Vanity Fair in 1997, the President of Comcast used remarkably similar language about the inconvenience of the U.S. government looking over cable operators’ shoulders: “We don’t like to use the words ‘corner the

⁵⁴ Vanity Fair, *Chairmen of Discovery and Liberty Media Stay Tuned on Television*, YOUTUBE, at 00:06:25 – 00:07:00; 00:21:40 – 00:22:40 (Oct. 8, 2015), <https://www.youtube.com/watch?v=Hsbfnu8KUVg>.

⁵⁵ *Id.*

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market,’ because the government watches our behavior.’⁵⁶ And, in the 1990s, TCI, then the nation’s largest cable operator and controlled by Dr. Malone, and Comcast overcame any hesitations associated with government oversight. The two operators proceeded to collude as part of the Primestar consortium in an effort to prevent DBS from becoming a competitive alternative to cable television.⁵⁷

The Department of Justice had to sue to check the collusion among cable operators in the Primestar case. In this case, however, the duopoly to be created by the proposed merger would result in anticompetitive harm without any need for overt collusion. The reason is simple: conscious parallelism, where one duopolist takes immediate cues from the other’s conduct.

Merger law “rests on the theory that, where rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding in order to restrict output and achieve profits above competitive levels.”⁵⁸ The theory follows that a merger that results in a high level of concentration raises the likelihood of “interdependent anticompetitive conduct.”⁵⁹ High market concentration makes it easier for companies in the market to “collude,

⁵⁶ The New Establishment: Brian Roberts, *Vanity Fair*, 166 (Oct. 1997).

⁵⁷ The Justice Department sued to stop the Primestar consortium of cable operators seeking to control spectrum and orbital slots necessary for what was then new competition from DBS providers. See Complaint, *United States v. Primestar, Inc.*, 1:98-cv-01193 (D.D.C. May 12, 1998). Primestar abandoned the transaction five months later. See Statement Regarding Primestar Abandoning Deal to Acquire News Corp/MCI’s Direct Broadcast Satellite Assets, Department of Justice (1998), available at http://www.justice.gov/atr/public/press_releases/1998/1988.htm.

⁵⁸ *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001).

⁵⁹ *F.T.C. v. PPG Industries, Inc.*, 798 F.2d 1500, 1503 (D.C. Cir. 1986) (“[W]here rivals are few, firms will be able to coordinate their behavior, either by overt collusion or implicit understanding”); see also *U.S. v. General Dynamics*, 415 U.S. 486, 497 (1974); *U.S. v. Philadelphia Nat. Bank*, 374 U.S. 321, 363 (1963) (“[W]e think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition

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expressly or tacitly.”⁶⁰ As a result, reviewing authorities will evaluate the potential for even conscious parallelism as a result of a proposed transaction, and may deny a merger based on a finding that the risk of such behavior is too high.⁶¹ The Commission, too, considers whether coordinated behavior risks undermining a market’s integrity as a result of a merger. Indeed, the prospect of coordinated behavior is one of the reasons the Commission articulated underlying its propensity to reject the AT&T/T-Mobile merger.

The Applicants cannot—and do not—rebut the formidable displacement of the duopoly that the merger would usher in: New Charter and Comcast would control nearly 90 percent of the nation’s high-speed broadband homes.⁶² Rather, they argue primarily that: (1) New Charter would not have an incentive to harm OVDs;⁶³ (2) New Charter and Comcast would have little ability to collude because of conflicting technological platforms and business plans;⁶⁴ and (3) there is no mechanism for collusion or means of enforcing a collusive agreement between New Charter and Comcast.⁶⁵ Each of these arguments is irrelevant or just plain incorrect.

The Applicants’ first argument is contradicted by internal documents, as demonstrated above. In addition, there is evidence that at least one of the Applicants and Comcast have shared the incentive to engage in parallel conduct—they have already engaged in such conduct in the

substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”).

⁶⁰ *U.S. v. Baker Hughes Inc.*, 908 F.2d 981, 990-91 & n.12 (quoting *Hospital Corp. of America v. F.T.C.*, 807 F.2d 1381, 1386 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987)).

⁶¹ See *Horizontal Merger Guidelines* § 7.1

⁶² Declaration of Roger J. Lynch, MB Docket No. 15-149, ¶ 19 (Oct. 13, 2015) (attached as Exhibit B to DISH Petition).

⁶³ Opposition at 69.

⁶⁴ *Id.* at 70.

⁶⁵ *Id.* at 71.

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Netflix degradation incident. During overlapping periods, both operators leveraged their control over interconnection to significantly degrade their own customers' access to Netflix content. Comcast and TWC ceased only when Netflix agreed to pay them a terminating access fee.⁶⁶ The Commission has found that coordination concerns merit especially careful consideration where, as here, the industry has been shown to be conducive to coordination.⁶⁷

The presence of this incentive is not news to the Commission. In the Commission's words, "[o]nline content, applications, and services available from edge providers over broadband increasingly offer actual or potential competitive alternatives to broadband providers' own . . . video services."⁶⁸ The Commission has further acknowledged that MVPDs "have incentives to interfere with the operation of third-party Internet-based services that compete with the providers' revenue-generating . . . pay-television services."⁶⁹ New Charter and Comcast would be motivated to act no differently.

The Applicants' argument that the ability of New Charter and Comcast to collude would be constrained because of conflicting technological platforms and business plans also lacks merit.⁷⁰ The Commission has expressly rejected such a rationale in the past.⁷¹ The Applicants do not explain how the differences in the scope of programming that New Charter and Comcast would offer or the differences in their delivery platforms would preclude coordinated behavior.

⁶⁶ See DISH Petition at 29 & n.104.

⁶⁷ *Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, Staff Analysis and Findings*, 26 FCC Rcd. 16189, 16227 ¶ 75 (Nov. 29, 2011) ("AT&T/T-Mobile Analysis").

⁶⁸ *Preserving the Open Internet, Report and Order*, 25 FCC Rcd. 17905, 17916 ¶ 22 (2010) ("2010 Open Internet Order").

⁶⁹ *Id.*

⁷⁰ Opposition at 70.

⁷¹ See *AT&T/T-Mobile Analysis* ¶¶ 72-78.

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Such differences have not been recognized as structural factors that make coordinated conduct in a highly concentrated market less likely.⁷² Indeed, in condemning recent mergers based on an increased risk of coordinated interaction, the antitrust agencies and the courts placed great weight on the high combined market share that the merged firm and its largest competitor would have and gave no consideration to those companies' differences in business strategy, range of product offerings, or mode of service delivery.⁷³ Thus, no matter how much programming New Charter and Comcast offer and how that programming is delivered to customers, foreclosure of rival OVDs would be mutually beneficial as long as rival OVD content continues to compete with the duopolists' linear video or affiliated OVD services.

The Applicants further assert that there is no mechanism through which New Charter and Comcast could collude and that they lack any realistic means of enforcing a collusive agreement.⁷⁴ This argument completely ignores the risk that New Charter and Comcast could foreclose rival OVDs through parallel accommodating conduct.

⁷² See, e.g., DOJ and FTC, Horizontal Merger Guidelines § 7.2 (2010), available at <http://www.justice.gov/atr/horizontal-merger-guidelines-08192010#7> (“*Horizontal Merger Guidelines*”).

⁷³ See, e.g., Memorandum Opinion, *United States v. H&R Block et al.*, No. 1:11-cv-00948 (Nov. 10, 2011) (finding that merger of H&R Block and TaxAct would result in coordinated effects in the online do-it-yourself tax preparation market where the combined company and its market-leading rival, Intuit, would control 90% of that market, without considering that the new H&R Block would have offered both brick-and-mortar and online tax preparation services while Intuit was operating entirely online); Complaint, *United States v. Anheuser-Busch InBEV SA/NV et al.*, No.1:13-cv-00127 (Jan. 31, 2013) (alleging coordinated effects in challenge to merger of InBEV and beer manufacturer Modelo, which would have resulted in a 72 % combined market share of InBEV and MillerCoors—InBev’s largest beer competitor—in the market for beer, where the merged company would have offered a wide range of beverages and MillerCoors competed in the beer market only).

⁷⁴ Opposition at 71.

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As mentioned above, parallel accommodating conduct is expressly considered by the antitrust agencies to be a distinct form of coordination that may diminish competition, even in the absence of a mechanism to collude or means of enforcing a collusive agreement. As explained by the Horizontal Merger Guidelines:

Coordinated interaction alternatively can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations 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. Coordinated interaction includes conduct not otherwise condemned by the antitrust laws.⁷⁵

The Commission and the Department of Justice have recognized that a merger may diminish competition by enabling or encouraging post-merger coordination through parallel accommodating conduct.⁷⁶ For example, in its Comcast/NBCU order, the Commission found that Comcast/NBCU would have the power to exclude video distribution rivals by preventing them from obtaining access to video programming or by raising the price of that programming. Importantly, the Commission explained that video distribution competition would be harmed, even if the exclusionary conduct were limited to some but not all video distribution rivals, so long as “the foreclosed rivals constrain Comcast’s pricing”⁷⁷ or “the remaining rivals would go

⁷⁵ See *Horizontal Merger Guidelines* § 7.

⁷⁶ See, e.g., Competitive Impact Statement, *United States v. International Paper Company and Temple-Inland, Inc.*, 1:12-cv-00227, at 7-8 (Feb. 10, 2012) (finding that merger would likely cause International Paper to engage in parallel accommodating conduct by reasoning that, if a large rival attempted to raise the market price by reducing output, “International Paper would likely accommodate its rival’s actions by reducing or not increasing its own output”).

⁷⁷ *Applications of Comcast Corp., General Electric Co. and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4255 ¶¶ 39 & n.94 (2011).

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along with allowing output in the market to fall and the market price to rise rather than treating that outcome as an opportunity to compete more aggressively.”⁷⁸ The second of these scenarios expressly recognizes that parallel accommodating conduct can result in anticompetitive effects.

This transaction creates similar risks of parallel accommodating conduct between New Charter and Comcast that could result in harm to competition from rival OVDs. Simply engaging in parallel accommodating foreclosures would be enough for the duopolists to kill an OVD such as Sling TV: a mechanism to collude or a means to enforce a collusive agreement would not be necessary.

V. THE MERGER “BENEFITS” ARE NOTHING MORE THAN REPACKAGED PLANS AND CONJECTURE

Charter also fails to provide any evidence that that the combination of Charter with TWC and BHN is necessary to achieve many, if not all, of the benefits it touts. From infrastructure through jobs and cost savings, Charter has offered little more than recycled (non-merger-specific) business plans and conjecture. These are not the concrete benefits that the Commission requires transactions of this type to produce for the public.

A. The Applicants’ Own Documents Show That Charter’s Infrastructure Plans Do Not Depend on the Merger

Digital Transition. Charter continues to insist that its commitment to “transition [TWC] and [BHN]’s systems to all-digital within 30 months of the [t]ransaction’s close,” is a merger-specific benefit to the public.⁷⁹ But the Applicants’ own documents contradict this. In fact, it is very possible that the transaction will *postpone* the very transition that Charter touts. DISH observed in its Petition to Deny that TWC is on track to complete the digital transition for a full

⁷⁸ *Id.*

⁷⁹ Opposition at 6.

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half of its subscriber base by the end of 2015, and has plans for another 25 percent transition in 2016.⁸⁰ Multiple TWC internal documents confirm that TWC planned, absent the merger, to upgrade its remaining footprint to digital and TWC Maxx speeds by the end of **{{BEGIN HCI**

END HCI}}.⁸¹ If we assume a generous transaction close date of March 31, 2016, this means that TWC had planned to complete its transition a full **{{BEGIN HCI** **END HCI}}** before the date that Charter promises to do so. Similarly, BHN also plans to complete the digital transition for **{{BEGIN HCI** **END HCI}}**.⁸²

Like TWC, BHN appears on track to complete its transition well in advance of the 30-month Charter commitment. Surely such *delays* as Charter promises from planned deployments are not public benefits, much less merger-specific benefits.

Speed Upgrades. In parallel with its vaunted plans to transition New Charter's footprint to all-digital, Charter plans to introduce a uniform, minimum tier of 60 Mbps downstream speed across New Charter's territory.⁸³ Of course, to the extent that the digital transition is not transaction-specific, neither can be any promised increased available speed.⁸⁴ But a *minimum*

⁸⁰ DISH Petition at 36; *see also* **{{BEGIN HCI**

END HCI}}.

⁸¹ **{{BEGIN HCI**

END HCI}}

⁸² **{{BEGIN HCI**

END HCI}}

⁸³ Opposition at 7.

⁸⁴ As the Commission is well aware, TWC Maxx, which TWC has planned to introduce across its footprint, is capable of speeds up to 300 Mbps downstream. *See, e.g., Faster. Clearer. Reliable*, TIME WARNER CABLE, <http://www.timewarnercable.com/en/enjoy/better-twc/internet.html> (last visited Nov. 10, 2015).

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speed tier of 60 Mbps is not necessarily a benefit to consumers. *Available* speeds of 60 Mbps, yes, but *minimum* speeds of 60 Mbps, with the attendant price tag and without a lower cost alternative? The least expensive Internet access plan from Charter, 60 Mbps downstream, currently costs \$39.99/month, but prices increase after 12 months and go up again after two years of service to \$59.99/month.⁸⁵ On the other hand, in TWC Maxx areas, consumers can purchase standalone Internet at 100 Mbps downstream speeds for \$44.99/month, 50 Mbps downstream for \$34.99/month, 10 Mbps downstream for \$29.00/month, and 3 Mbps downstream for \$14.99/month.⁸⁶ Former TWC customers, then, may end up paying either: 1) about the same price for a lower speed tier, *or* 2) a higher price for a speed tier that they may not need. They may also end up being priced out of Charter’s Internet service all together. TWC’s internal sensitivity analysis shows that any price increase to TWC’s \$14.99/month plan corresponds to **{{BEGIN HCI** **END HCI}}**.⁸⁷ Charter’s proposal, then, amounts to a minimum purchasing requirement that works to nobody’s benefit but Charter’s, since such minimums would help the company cross-subsidize its video business to the disadvantage of competing OTT alternatives.⁸⁸

⁸⁵ See *Additional Offers*, CHARTER, <https://www.charter.com/browse/content/packages> (last visited Nov. 11, 2015); *Charter Communications Review*, REVIEWS.COM, <http://www.reviews.com/cable-internet/charter-communications/> (last visited Nov. 11, 2015). Charter submits to the Commission that as of January 2015, its standalone Internet costs \$59.99/month. Charter Responses at 234.

⁸⁶ See *High-Speed Internet Plans and Packages*, TIME WARNER CABLE, <http://www.timewarnercable.com/en/plans-packages/internet/internet-service-plans.html> (last visited Nov. 10, 2015) (outlining available plans and their costs); *Faster. Clearer. Reliable*, TIME WARNER CABLE, <http://www.timewarnercable.com/en/enjoy/better-twc/internet.html> (last visited Nov. 10, 2015) (detailing how Internet plans will be upgraded under the TWC Maxx program at “no additional charge”).

⁸⁷ **{{BEGIN HCI** **END HCI}}**

⁸⁸ See *supra* Section III.B.

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WiFi Deployment. Charter repeats its promise to buildout 300,000 “additional” out-of-home WiFi access points within four years of the transaction’s close.⁹³ But “additional” to what? Apparently, to Applicants’ *current* out-of-home WiFi deployments, not to the Applicants’ planned or projected deployments over that time frame. As a result, it remains far from clear that the additional access points will come into fruition only as a result of the transaction. Although Charter itself may have found itself behind the curve in WiFi deployments, expecting to have deployed only **{{BEGIN HCI** **END HCI}}** out-of-home WiFi spots by the end of 2016,⁹⁴ both TWC and BHN have been expanding their WiFi networks aggressively. TWC, for example, deployed an *additional* **{{BEGIN HCI** **END HCI}}** out-of-home access points in 2015, to bring its total in excess of **{{BEGIN HCI** **END HCI}}**.⁹⁵ BHN, for its part, installed more than **{{BEGIN HCI** **END HCI}}** new access points between January 2014 and March 2015, for a total of more than **{{BEGIN HCI** **END HCI}}** out-of-home WiFi access points at the end of that period.⁹⁶ By DISH’s calculations, simply continuing this demonstrated rate of growth would result in over **{{BEGIN HCI** **END HCI}}** new WiFi access points over the next 48 months, *far in excess* of the promised 300,000. Again, Charter has repackaged existing business plans and has attempted to sell them as a transaction benefit.

⁹³ See Opposition at 307.

⁹⁴ Charter Responses at 243.

⁹⁵ **{{BEGIN HCI** **END HCI}}**

⁹⁶ **{{BEGIN HCI** **END HCI}}**

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B. Charter’s Promise to Expand BHN’s Low Income Access Plan is Confounding

Charter also continues to promote extending some form of BHN’s low-income Internet program to New Charter’s footprint while continuing to ignore TWC’s “Everyday Low Price” existing offering (2 Mbps downstream speeds in non-Maxx areas, 3 Mbps downstream speeds in Maxx areas).⁹⁷ Charter ignores the criticisms lodged about the BHN program, including that it is hard to find out about, difficult to qualify for, and challenging to enroll with.⁹⁸ Although Charter directs readers of the Opposition to the www.everyoneon.org site, that site fails to offer any instruction as to how a family might sign up for the program, and any reference to the program on BHN’s own site remains missing. Apparently the program is only available to families with children in K-12 school on subsidized lunch programs.⁹⁹ Moreover, if such families have managed to scrape together enough to pay for some sort of Internet service at home within the last three months, they lose their eligibility for the program.¹⁰⁰ Charter does not even commit to continuing the program at the current price of \$9.95/month, noting only that it is “still developing the details of the low-income program.”¹⁰¹ What, then, is the benefit of this lower-speed (2 Mbps down, 512 kbps up), harder to qualify and sign-up for, and potentially not-even-

⁹⁷ See *High-Speed Internet Plans and Packages*, TIME WARNER CABLE, <http://www.timewarnercable.com/en/plans-packages/internet/internet-service-plans.html> (last visited Nov. 11, 2015); Press Release, Time Warner Cable to Transform TV and Internet Experience in New York City and Los Angeles, Time Warner Cable (Jan. 30, 2014), <http://ir.timewarnercable.com/investor-relations/investor-news/financial-release-details/2014/Time-Warner-Cable-to-Transform-TV-and-Internet-Experience-in-New-York-City-and-Los-Angeles/default.aspx>.

⁹⁸ See DISH Petition at 38.

⁹⁹ See *About Us: Connect2Compete*, EVERYONEON, <http://everyoneon.org/about/c2c/> (last visited Nov. 11, 2015).

¹⁰⁰ *Id.*

¹⁰¹ Opposition at 28.

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D. Charter Has Failed to Show That Any Cost Savings or Innovation Will Inure to the Public’s Benefit

Charter has also failed to adduce any evidence that any cost savings and innovation will inure to the public benefit. While Dr. Katz opines that New Charter is “likely” to pass through some portion of its programming cost savings to its subscribers,¹⁰⁶ Charter makes no promises. And while Dr. Scott Morton goes to great lengths to explain that economies of scale enable greater fixed cost investments,¹⁰⁷ Charter has declined to promise any infrastructure investment that was not already “on the books” for each Applicant and, indeed, has failed to make any commitment as to funds devoted to research and development. These cost savings and associated “benefits,” therefore, cannot serve to counterbalance the competitive harms posed by this transaction.

¹⁰⁶ See Morton Reply Declaration ¶ 214 (referencing Michael L. Katz, Charter-TWC-BHN: Efficiencies Analysis, MB Docket No. 15-149, Section II.B; ¶ 40 (Nov. 2, 2015) (“[E]ven a monopolist—which New Charter clearly will not be—would be expected to pass some portion of its cost savings through to customers . . .”).

¹⁰⁷ See *id.* ¶¶ 199-209.

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VI. CONCLUSION

For the foregoing reasons, the Commission should deny the Application or designate it for a hearing.

Respectfully submitted,

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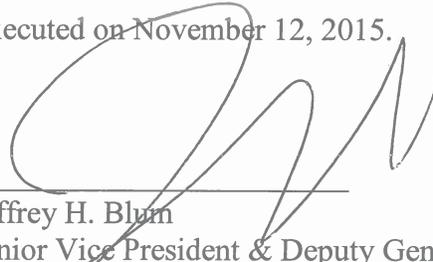
November 12, 2015

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DECLARATION

I declare under penalty of perjury that the facts contained within the foregoing Reply of DISH Network Corporation, except for those facts for which official notice may be taken and those that other parties have submitted to the Federal Communications Commission confidentially under the protection of the *Protective Orders* in MB Docket No. 15-149, are true and correct to the best of my information, knowledge and belief.

Executed on November 12, 2015.

A handwritten signature in black ink, appearing to read 'J. Blum', is written over a horizontal line. The signature is fluid and cursive.

Jeffrey H. Blum
Senior Vice President & Deputy General Counsel
DISH Network Corporation

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CERTIFICATE OF SERVICE

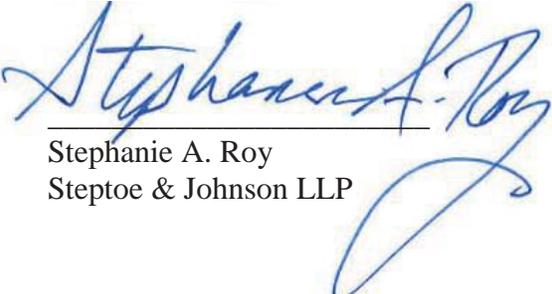
I, Stephanie A. Roy, hereby certify that on November 12, 2015, I caused true and correct copies of the foregoing to be served by electronic mail upon the following counsel:

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