



*Jeffrey H. Blum  
Senior Vice President & Deputy General Counsel  
Jeffrey.Blum@dish.com  
(202) 293-0981*

December 2, 2015

## **EX PARTE PRESENTATION**

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

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

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, DISH Network Corporation ("DISH") submits this letter summarizing a meeting on Tuesday December 1, 2015 with William Lake, Chief, Media Bureau; Jim Bird, Senior Counsel, Office of General Counsel; Hillary DeNigro, Chief, Industry Analysis Division, Media Bureau; Paroma Sanyal, Chief Economist, Wireless Telecommunications Bureau; Nese Guendelsberger, Deputy Chief, International Bureau; Owen Kendler, Attorney, Office of General Counsel; Joel Rabinovitz, Attorney, Office of General Counsel; William Dever, Attorney, Office of General Counsel; Bahareh Moradi, Attorney, Office of General Counsel (by telephone); Andrew Erber, Attorney, Office of General Counsel; Elizabeth Cuttner, Attorney, Office of General Counsel; Ty Bream, Attorney, Industry Analysis Division, Media Bureau; Jamila Bess Johnson, Attorney, Industry Analysis Division, Media Bureau; Alexis Zayas, Attorney, Industry Analysis Division, Media Bureau; Julie Saulnier, Attorney, Industry Analysis Division, Media Bureau; Mitali Shah, Junior Economist, Industry Analysis Division, Media Bureau; Adam Copeland, Attorney, Competition Policy Division, Wireline Competition Bureau; Bakari Middleton, Attorney, Competition Policy Division, Wireline Competition Bureau; Christopher Sova, Attorney, Competition Policy Division, Wireline Competition Bureau (by telephone); Michael Ray, Attorney, Competition Policy Division, Wireline Competition Bureau; Karen Schroeder, Attorney, Consumer and Governmental Affairs Bureau; and Will Reed, Attorney, Spectrum Enforcement Division, Enforcement Bureau. Present on behalf of DISH were Charlie Ergen, CEO and Chairman; Thomas Cullen, Executive Vice President; Stanton Dodge, Executive Vice President and General Counsel; Jeffrey Blum, Senior Vice President and Deputy General Counsel; Alison Minea, Director and Senior Counsel; and Hadass Kogan, Corporate Counsel.

During the meeting, DISH explained that the pending Charter/Time Warner Cable ("TWC") merger as currently constructed presents serious competitive concerns for the broadband and video marketplaces and should therefore be denied. This merger would empower

the combined company to hurt or destroy online video rivals, including the Sling TV over-the-top (“OTT”) video service, through its control over the broadband pipe. The merger would also enable the combined company to harm the broadband-reliant services provided by MVPDs. The combined new Charter (“New Charter”) would serve almost 30 percent of the homes in the United States that have broadband speeds of at least 25 Mbps (“high-speed”).

The Commission has recognized the growing importance of OTT services, and the need to protect the nascent online video market.<sup>1</sup> DISH explained, consistent with its Petition to Deny,<sup>2</sup> that this transaction risks harming that market in a number of ways.

First, this transaction will create a suffocating duopoly: this transaction will result in two broadband providers controlling about 90 percent of the nation’s high-speed broadband homes between them. They will not need to collude in order to bring their collective weight to bear on an OVD. Parallel foreclosures, with one of the two following the other, would be enough for an OVD to be shut off from most of the high-speed homes in the country.<sup>3</sup>

Second, the impact of New Charter would cause a significant proportion of the combined company’s high-speed broadband subscribers to lack access to alternative high-speed broadband options. Indeed, Charter admits that almost two thirds of households in the New Charter footprint will not have access to at least one alternative high-speed broadband provider. For these customers, switching ISPs is not just an inconvenience, but an impossibility.<sup>4</sup>

Third, the systems of the two Applicants abut each other to a much greater extent than those of Comcast and TWC. This means greater loss of potential competition, as well as “benchmarking” opportunities, compared to the failed Comcast/TWC transaction.<sup>5</sup>

New Charter’s enlarged ability to harm competing OVDs would give it a heightened incentive to do so, in order to help its own video business.<sup>6</sup> The Applicants have countered that New Charter will care more about its broadband business than about its linear cable service, and that New Charter would lose broadband subscribers if it degrades OVDs that consumers want to reach through its broadband connections. This sounds familiar because it is. The same claims

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<sup>1</sup> See Statement from FCC Chairman Tom Wheeler on the Comcast-Time Warner Cable Merger (Apr. 24, 2015), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-333175A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-333175A1.pdf); Jonathan Sallet, FCC, Remarks at the Telecommunications Policy Research Conference: The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews, at 2 (Sept. 25, 2015), [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0925/DOC-335494A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0925/DOC-335494A1.pdf).

<sup>2</sup> See DISH Network Corporation, Petition to Deny, MB Docket No. 15-149 (Oct. 13, 2015).

<sup>3</sup> *Id.* at 27-32.

<sup>4</sup> *Id.* at 32.

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

<sup>6</sup> *Id.* at 46-55.

were debunked in the Comcast proceeding for one simple reason: it is extremely difficult to leave a high-speed broadband ISP, and few customers ever do.

The Applicants also argue that New Charter will be restrained from hurting OVDs by the existing open Internet rules and its commitment to observe a subset of these rules for three years, even if they are reversed by the courts during this three-year period. But neither the subset of rules cherry-picked by the Applicants, nor even the open Internet rules in place today, would be adequate to rein in the behavior of New Charter.<sup>7</sup> Much of the harmful conduct whose potential the transaction will unleash is not subject to bright-line rules, but only to general conduct standards. Disputes arising under them will inevitably take time to resolve. Even if the OVD or consumer is vindicated, a promise not to do it again is not a substitute for not having the opportunity to do it in the first place, particularly since OVDs are fragile as they try to grow into maturity.

The Applicants have also failed to show that the purported benefits of this merger are transaction specific or will serve the public interest.<sup>8</sup> For example, Charter cannot plausibly claim that investment and buildout improvements are a benefit of this transaction, because they would likely have occurred absent the transaction. But that is precisely what Charter has attempted to do: for every milestone and associated commitments that Charter has set forth, there is substantial evidence that most—if not all—of the claimed investment and buildout was already planned and will likely occur with or without the transaction.

DISH also discussed the inadequacy of behavioral conditions to ameliorate the harms of this proposed merger. The gatekeeper role that New Charter would perform thanks to its broadband access service would be complex. OVD sabotage can be achieved in many opaque and subtle ways. The Applicants' commitments are inadequate to mitigate the harm to consumers, competition, and innovation that would result from the merger as presently constructed.

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In short, this merger would empower New Charter to degrade the performance of rival OVDs and MVPDs in the knowledge that it is either extremely unlikely or downright impossible for New Charter's broadband subscribers to punish it by migrating to another high-speed ISP. The purported public interest benefits of this merger do not outweigh its many harms. As presented by the Applicants, the Commission should deny this merger.

Respectfully submitted,

/s/ Jeffrey H. Blum

Jeffrey H. Blum

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<sup>7</sup> *Id.* at 55-58.

<sup>8</sup> *Id.* at 32-42.

cc: William Lake  
Jim Bird  
Hillary DeNigro  
Paroma Sanyal  
Nese Guendelsberger  
Owen Kendler  
Joel Rabinovitz  
William Dever  
Bahareh Moradi  
Andrew Erber  
Elizabeth Cuttner  
Ty Bream  
Jamila Bess Johnson  
Alexis Zayas  
Mitali Shah  
Julie Saulnier  
Adam Copeland  
Bakari Middleton  
Christopher Sova  
Michael Ray  
Karen Schroeder  
Will Reed