

REDACTED – FOR PUBLIC INSPECTION

December 11, 2015

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VIA ECFS

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

Re: Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Cable Television Relay Service Applications, MB Docket No. 15-149

Dear Ms. Dortch:

This letter provides more explanation about Charter's interconnection practices and New Charter's interconnection incentives after the Transaction. Part 1 explains the genesis of Charter's 2015 Peering Policy.<sup>1</sup> Part 2 explains why, upon the expiration of Charter's commitment to follow its settlement-free interconnection policy at the end of 2018, New Charter will have every incentive to continue its peering relationships on terms that are favorable to interconnecting parties.

1. The Genesis Of Charter's 2015 Peering Policy.

Charter's 2015 Peering Policy grew out of Charter's negotiation of a peering arrangement with Netflix. Netflix did not have a peering arrangement with Charter and sought to negotiate one that would not only serve Netflix but that would also promote peering throughout the industry. Both Netflix and Charter entered the peering negotiations with an understanding that good network management is critical to preserving the customer experience. Network congestion is the bane of a network's performance. Sudden and significant spikes in peak traffic at any particular point of presence ("POP") can create a critical network threat, particularly if that traffic is from one of the larger CDNs, such as Netflix. The parties determined that "critical network threats" can arise either from (1) a compound growth rate of peak utilization over a rolling six-month period that exceeded some benchmark level or (2) a sudden significant spike in the peak traffic as compared to any previous peak in any previous month. Both parties agreed that communicating and planning for such potential growth spurts is critical to maintain the integrity of the network.

To set the first criterion—a compound growth rate of peak utilization over a rolling six-month period that exceeded some benchmark level—the parties **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

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<sup>1</sup> See Letter from S. Feder, Jenner & Block to M. Dortch, Secretary, FCC, re Applications of Charter Communications, Inc., MB Docket No. 15-149 (July 15, 2015) ("2015 Peering Policy" or "Policy").

**[END HIGHLY CONFIDENTIAL INFORMATION]** The parties therefore agreed to use the average of all six-month periods, *i.e.*, 5.9%, which would provide significant headroom.<sup>2</sup>

The 5.9% benchmark, which represents a doubling of traffic about every 12 months, means that Charter has committed to expand its network as necessary to facilitate the continued growth of Netflix's peak traffic level at each of Charter's POPs up to 5.9%, and for the parties to meet and develop a plan for traffic growing above that rate. Establishing such an upper benchmark helps Charter plan its network builds. Again, for a peering party with a large volume of traffic like Netflix, more than doubling of traffic in a 12-month period could have a material adverse impact on Charter's network *absent* the collaborative planning that is required and encouraged by the peering arrangement.

To set the second criterion—a sudden significant spike in the peak traffic as compared to any previous peak in any previous month—**[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

**[END HIGHLY CONFIDENTIAL INFORMATION]**

Again, both parties agreed that it would be beneficial to require the parties to communicate and plan for spikes that exceed 10% in order to ensure that the network is able to handle such traffic levels.

Charter used these two criteria, and its agreement with Netflix, as a basis for its 2015 Peering Policy, in which Charter offered to provide to any Internet participant with traffic of at least 3 Gbps at each POP the same settlement free peering terms that it had given to Netflix. As with the Netflix agreement,

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<sup>2</sup> In further support of the 5.9% compounded average growth rate on a rolling six-month period, Charter looked at the traffic of **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

**[END HIGHLY CONFIDENTIAL INFORMATION]**—Charter's largest current peers after Netflix—and found their compounded growth rates for the six-month period ending October 2015 to be **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** respectively. In addition, Charter determined that the overall growth of its network traffic during the last two years was about **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** thus indicating that the 5.9% growth rate allowed significant headroom.

the 2015 Peering Policy provides the framework for Charter and the interconnecting parties that choose to participate thereunder to work closely together to monitor traffic and augment ports—and for Charter to take on these activities and interconnection traffic at no charge to the interconnecting party.

Charter's network remains a critical asset for the delivery of all of its products for all of its users. The Policy therefore seeks to ensure that, if a critical network threat event were to occur due to any of the actions of a participant, Charter would have the ability to manage its network to obviate the potential threat to the integrity of its entire network infrastructure for all of its users, by providing for the *suspension*—not termination—of the applicable interconnection agreement *until* the utilization concerns are handled. In this regard, the 2015 Peering Policy further provides that the parties will meet to plan resolution of the event and the suspension will be removed upon a reasonable showing that the critical network threat has been resolved.

The requirement that the parties regularly discuss the management and capacity of the interconnection will minimize the potential that critical network threats arise. Coupled with the critical network threat procedures discussed above, this policy will result in Charter's continued management of a high quality network and productive interconnection agreements. Critically, suspension of the interconnection agreement does not bar the content provider from accessing Charter's subscribers: even if Charter suspended its obligations under a peering agreement and the content provider did not secure a new agreement, that content provider's traffic would still reach Charter subscribers through Charter's "Internet drains"—*i.e.*, circuits where multiple parties to the Internet connect (rather than dedicated ports). In the absence of a peering arrangement with another entity, that entity's traffic reaches Charter's subscribers through these Internet drains.<sup>3</sup> Moreover, by limiting the terms and conditions of the 2015 Peering Policy to larger Internet participants (with at least 3 Gbps at each POP), Charter has balanced the desire of some third-parties to obtain dedicated ports for their use with the need to manage network operations and build outs.

We note that the 2015 Peering Policy was not meant to preclude a CDN or transit provider from negotiating a peering agreement that provides for other terms. In fact, Charter and **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** recently entered into the attached peering agreement, which provides for a critical network threat when **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

**[END HIGHLY CONFIDENTIAL INFORMATION]** since it will allow Charter to plan effectively for the capacity demands that its network will face consistent with the traffic study information.

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<sup>3</sup> In fact, even though Netflix accounted for approximately **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** of Internet traffic on Charter's backbone, See Attachment 1 (chart containing the percentage of Charter's total traffic comprised of Netflix traffic on a monthly basis from December 1, 2012 through June 1, 2015) and Attachment 2 (historical Netflix monthly traffic on Charter's network), Netflix did not have a peering agreement with Charter until after Charter's adoption of the 2015 Peering Policy in July of 2015; prior to that time, Netflix traffic traveled through these drains and reached Charter subscribers without difficulty.

<sup>4</sup> See Attachment 3.

We also emphasize that the 2015 Peering Policy does not replace Charter's older, long-standing settlement-free peering policy, which remains available to essentially all Internet participants. The older policy has only a low 300 Mbps traffic volume threshold and nominal technical requirements primarily focused on ensuring that there is a consistent and secure interconnection. There is also no traffic growth limit under this peering policy, thus allowing new or smaller CDNs to grow without limitation. However, not all firms operating under this policy are new or small: **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]**

**[END HIGHLY**

**CONFIDENTIAL INFORMATION]** We are not aware of Charter ever cancelling or suspending any agreement under that older policy.

Additionally, although the 2015 Peering Policy has more requirements than the older policy, it was never intended to, and cannot, prevent a CDN or transit provider from competing to win additional business from one another and to grow their traffic levels. For those parties choosing to operate under the 2015 Peering Policy, the potential critical network threat that might result in temporary suspension can be obviated by engaging in a dialogue in advance with Charter so that the potential degradation of the network can be avoided. For any Internet participant that decides not to follow the 2015 Peering Policy, the following options remain: (1) utilize Charter's older peering policy; (2) enter into a specific peering agreement with Charter that provides for each parties' needs; or (3) access Charter's customers through an Internet drain (as Netflix historically did). The flexibility and desire of Charter to work with Internet participants while at the same time protect the integrity of its network is consistent with Charter's overarching business objectives and practices.

2. Given The Relatively Small Share Of The ISP Market New Charter Will Have Nationally, The Highly Dynamic And Competitive Marketplace And New Charter's Customer Strategy That Is Friendly To OVDs, New Charter Will Have Every Incentive To Continue Peering On Reasonable Terms After 2018.

Even after the expiration of Charter's commitment to follow its settlement-free interconnection policy at the end of 2018, New Charter will have every incentive to continue its peering relationships on terms that are favorable to interconnecting parties. First, at the time the Transaction is closed, New Charter will not have materially increased bargaining leverage. Second, in the few years after the Transaction is closed, New Charter's bargaining leverage relative to other rapidly growing Internet service providers ("ISPs") is likely only to *decrease*. Finally, any attempt by New Charter to impose unfavorable interconnection terms would jeopardize its higher-margin residential broadband business.

*First*—even assuming that there is any national market for access to broadband customers receiving speeds of 25+ Mbps—a proposition the Applicants reject<sup>5</sup>—New Charter would serve fewer than **[BEGIN HIGHLY CONFIDENTIAL INFORMATION]** **[END HIGHLY CONFIDENTIAL INFORMATION]** of these customers at the time the Transaction is consummated. That number is far smaller than the percentage served by Comcast today, and only slightly larger than the percentage served by AT&T. New Charter would thus not have any meaningfully increased bargaining leverage when negotiating Internet interconnection arrangements and could not extract significant concessions from transit providers, content delivery networks ("CDNs"), or other network providers that transmit Internet content—including video content from online video distributors ("OVDs")—to ISPs.

<sup>5</sup> See Attachment 4 for a chart listing Charter's peers and monthly traffic balances for December 2014-March 2015.

<sup>6</sup> See Applicants' Opposition to Petitions to Deny at 33-39.

*Second*, New Charter's share of this alleged market is likely only to *decrease* as other ISPs implement their announced build-out plans. At present, AT&T's U-verse broadband service passes about 30 million households.<sup>7</sup> As a condition for its merger with DIRECTV, AT&T made a binding commitment to deploy fiber to the premises ("FTTP") to 12.5 million additional locations within four years of the transaction's closing (*i.e.*, by July 24, 2019).<sup>8</sup> Given that the new FTTP expansion will be at least as fast as U-verse, this expansion reflects up to a 42% increase in households passed by AT&T's high-speed broadband lines. AT&T has also announced substantial expansion of its GigaPower service.<sup>9</sup> And Google Fiber has begun offering gigabit-speed FTTP connections in three cities, with deployments underway in six more cities, and is considering entry into another eleven cities.<sup>10</sup> CenturyLink, which has one of the largest fiber footprints in the U.S., has announced plans to provide 1 Gbps service to eight cities, and CenturyLink's CEO has stated that the company is trialing technologies to "enable up to 200 megabit over legacy copper networks."<sup>11</sup> Frontier Communications, which has in excess of 2.4 million high-speed Internet subscribers, is expanding its core-fiber footprint.<sup>12</sup> Verizon FiOS also competes for high-speed Internet subscribers. And of course, the agencies have previously determined that Comcast has a significant broadband network and established subscriber base, setting the stage for future growth. In sum, the expanding scale of other ISPs can be expected to cause New Charter's percentage of broadband subscribers nationally to decline, only decreasing what is already a benign bargaining position vis-à-vis parties seeking broadband interconnection services at the end of the commitment period.

The presence of alternative ISPs with footprints and subscribers bases comparable to (and, in the case of Comcast, far larger than) New Charter's will ensure that parties seeking interconnection will have multiple independent means of reaching broadband users. This Transaction thus differs fundamentally from the Comcast-TWC transaction, with respect to which Commission staff was concerned that the elimination of TWC as a separate ISP would provide Comcast with substantial bargaining leverage in its dealings with other networks, particularly CDNs owned by or otherwise important to OVDs.<sup>13</sup> If anything,

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<sup>7</sup> See, e.g., Mark Lowenstein, *Lowenstein's View: What should AT&T do now that it owns DirecTV?*, FierceWireless (July 29, 2015), <http://www.fiercewireless.com/story/lowensteins-view-what-should-att-do-now-it-owns-directv/2015-07-29>.

<sup>8</sup> See *Applications of AT&T Inc. and DIRECTV for Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 30 FCC Rcd 9131 App'x B, § III (2015).

<sup>9</sup> See, e.g., AT&T, Press Release, *AT&T Plans To Reach 38 More Metros with Blazing Fast Gigabit Internet Speeds* (Dec. 7, 2015), [http://about.att.com/story/plans\\_to\\_reach\\_38\\_more\\_metros\\_blazing\\_internet\\_speeds.html](http://about.att.com/story/plans_to_reach_38_more_metros_blazing_internet_speeds.html) (announcing AT&T's deployment of its GigaPower service to "38 additional metros across the United States," totaling "at least 56 metros served").

<sup>10</sup> See *Exploring Fiber for Chicago and Los Angeles*, Google Fiber, Official Blog (Dec. 8, 2015), <http://googlefiberblog.blogspot.com/2015/12/exploring-fiber.html> (noting that "Chicago and Los Angeles will join 18 metros where [Google Fiber is] serving customers, designing and building networks, or exploring the possibility of Google Fiber").

<sup>11</sup> Statement of Glen Post, III, President, CEO & Director, CenturyLink, Q2 2015 Earnings Call Transcript, CenturyLink (Aug. 5, 2015), <http://ir.centurylink.com/Cache/1500074614.PDF?Y=&O=PDF&D=&fid=1500074614&T=&iid=4057179>.

<sup>12</sup> See Sean Buckley, *Frontier To Refresh Its FiOS Platform, Expand FTTH Footprint After Verizon Deal Closes*, FierceTelecom, Aug. 3, 2015, <http://www.fiercetelecom.com/story/frontier-refresh-its-fios-platform-expand-ftth-footprint-after-verizon-deal/2015-08-03>.

<sup>13</sup> See Remarks of Jon Sallet, FCC Gen. Counsel, *Telecommunications Policy Research Conference: The Federal Communications Commission and Lessons of Recent Mergers & Acquisitions Reviews 14* (Sept. 25, 2015) <https://www.fcc.gov/document/speech-general-counsel-jon-sallet-lessons-recent-merger-reviews>; see also Remarks of Bill Baer, Ass't Atty Gen., U.S. DEP'T OF JUSTICE, ANTITRUST DIV., *Video Competition: Opportunities and Challenges* at Duke Law School 6 (Oct. 9, 2015),

the merger of Charter with TWC and the consequent increase in the combined firm's ability and incentive to partner with OVDs should be viewed as a consumer benefit, rather than a potential ground for concern.<sup>14</sup>

*Finally*, New Charter will lack any incentive to seek to impose unfavorable interconnection terms on transit providers, CDNs, or other network providers in a manner that might indirectly harm the OVDs that use such transmission channels. As Dr. Fiona Scott Morton explained in great detail in her latest declaration, New Charter's incentives are to support OVDs, not to hamper them.<sup>15</sup> The content offered by OVDs drives the growth of traffic on the Internet, and, in turn, the demand for high-speed data services which will have higher profit margins at New Charter than any other service will.<sup>16</sup> The content offered by OVDs is largely differentiated from that offered by MVPDs, and the substantial majority of video subscribers use both OVD and MVPD services. Because New Charter is aware that many subscribers use both OVD and MVPD services, rather than just one service, New Charter is very unlikely to attempt to gain video subscribers by making access to OVDs more costly.

Dr. Scott Morton's conclusions are bolstered by the fact that the ability of consumers to switch to a different ISP in much of the New Charter footprint will further constrain any attempt by New Charter to make access to OVDs more costly. Any attempt by New Charter to impose unfavorable interconnection terms would almost certainly be countered by that OVD alerting its customers. That is exactly what Netflix did in 2014 when it "launched a public relations war to claim it was being fleeced by Comcast and other Internet service providers."<sup>17</sup> Customers told that their ISP is providing sub-optimal service for their OVDs can then respond by changing ISPs. Or the OVD could retaliate by degrading (or threatening to degrade) its service to the ISP and its customers if the ISP does not back down.<sup>18</sup> The threat of

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<http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-keynote-address-future-video-competition>; *see also* Bill Baer, Ass't Atty Gen., U.S. DEP'T OF JUSTICE, ANTITRUST DIV., *Remarks at the Chatham House Annual Antitrust Conference*, (June 18, 2015), <http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-chatham-house-annual-antitrust>.

<sup>14</sup> Indeed, the risk of harm to OVDs from an ISP's interconnection practices is particularly attenuated given that OVDs themselves typically do not seek to establish direct connections with ISPs. Instead, OVDs have at their disposal a variety of third-party transit providers, CDNs, and other network providers that have existing connections with ISPs and can deliver content to a particular ISP's network. Only the largest edge providers and OVDs—those who own CDNs and who, because of their popularity, have enormous leverage over ISPs—seek to have direct connections with ISPs. The same will be true after the Transaction is consummated. For example, DISH—which has made numerous unsupported accusations in this proceeding regarding New Charter's purported "incentive and ability" to harm OVDs—never alleges that SlingTV has even sought direct connections with ISPs, and our understanding is that it has not done so.

<sup>15</sup> See Reply Declaration of Fiona Scott Morton § V (Nov. 2, 2015), Exhibit A to Joint Opposition ("Scott Morton Declaration").

<sup>16</sup> See *id.* ¶ 101 (explaining that the risk to New Charter from such a strategy is particularly acute given that "the gross margins on broadband services are higher than the gross margins on video or phone services[,] and margins on video are not only smaller, but shrinking over time").

<sup>17</sup> See, e.g., Jon Brodtkin, *Netflix, call your lawyers: FCC is ready for interconnection complaints*, arstechnica (Feb. 27, 2015), <http://arstechnica.com/business/2015/02/netflix-call-your-lawyers-fcc-is-ready-for-interconnection-complaints/>.

<sup>18</sup> For instance, Netflix reportedly cut off its high quality signals to ISPs that refused to join Open Connect. See Todd Spangler, *TWC: Netflix Is Withholding Content To Gain 'Unprecedented' Access to ISPs*, Multichannel News, Jan. 16, 2013, <http://www.multichannel.com/news/cable-operators/twc-netflix-withholding-content-gain-unprecedented-access-isps/326053>. Similarly, CBS.com cut off TWC's HSD

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customers switching to an alternative ISP as a result of the OVD's potential reaction would deter New Charter from seeking to impose unfavorable interconnection terms on key interconnected networks used by that OVD.

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Please do not hesitate to contact me should you have any questions.

Sincerely,

/s/ Samuel L. Feder

Samuel L. Feder

Attachments

cc: Vanessa Lemmé

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customers, including those taking MVPD services from other providers, during the 2013 TWC/CBS retransmission consent dispute. See Brian Stelter, *Time Warner Left Bruised in Fee Battle with CBS*, N.Y. Times, Oct. 31, 2013, at B1, <http://www.nytimes.com/2013/11/01/business/media/time-warner-reports-record-quarterly-loss-of-tv-subscribers.html>.

# Attachment 1

**[BEGIN HIGHLY CONFIDENTIAL MATERIAL]**

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# Attachment 2

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# Attachment 3

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# Attachment 4

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