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REDACTED – FOR PUBLIC INSPECTION

January 27, 2016

By ECFS

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

Re: Notice of *Ex Parte* Letter, 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 Corporation (“DISH”) submits the attached public, redacted version of its *ex parte* letter dated January 27, 2016. DISH has denoted with “{**BEGIN HCI END HCI**}” symbols where Highly Confidential Information has been redacted. The designated Highly Confidential Information in the letter was taken from or derived from Highly Confidential Information in the Applicants’ filings. A Highly Confidential version of this letter is being simultaneously filed with the Commission and will be made available pursuant to the terms of the *Protective Order*.

Please contact me with any questions.

Respectfully submitted,



Andrew Golodny
Counsel for DISH Network Corp.

Enclosure

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).*

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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:

DISH Network Corporation (“DISH”) responds to Charter’s letter dated January 14, 2016.¹ DISH has provided evidence through Charter’s own, internal documents proving that Charter views online video distributors (“OVDs”) as a **{{BEGIN HCI END HCI}}** threat and that Charter has been persistently evaluating usage-based pricing (“UBP”) scenarios, showing an inclination to resort to this **{{BEGIN HCI END HCI}}** against OVDs upon expiration of the three-year condition it has proposed. Charter now contends that the documents show something very different—Charter’s recognition that OVDs are overwhelmingly positive for the company and Charter’s aversion to UBP. Charter accuses DISH of “rely[ing] on the public’s lack of access to the unredacted version of documents, mischaracterizations of out of context quotes, and disregard of other record documents.”² But it is Charter that mispresents its own documents and record before the Commission.

¹ See Letter from John L. Flynn, Counsel for Charter Communications, Inc., to Marlene Dortch, Secretary, FCC, MB Docket No. 15-149 (Jan. 14, 2016) (“Charter Rebuttal Ex Parte”).

² *Id.* at 1.

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OVDs. First, one charge is tellingly missing from Charter’s accusations—Charter does not say that the quotations are inaccurate, because it cannot. The documents in fact contain all of the quotations attributed to them by DISH, including:

- **{{BEGIN HCI
END HCI}}**

- **{{BEGIN HCI**

END HCI}} and

- **{{BEGIN HCI**

END HCI}}⁵

Charter resorts to the familiar out-of-context protest. But no context is capable of detracting from the threat from OVDs that these Charter statements describe.

Second, far from relying on the public’s lack of access to the documents in question, DISH is constrained by that lack of access in its ability to make Charter’s unvarnished views of over-the-top (“OTT”) services fully a part of the public record. Charter can remedy the public’s lack of access to these documents single-handedly by simply designating the documents as public. Doing so would appear to cause little or no prejudice either to Charter or to any third

³ **{{BEGIN HCI**

END HCI}}

⁴ **{{BEGIN HCI
END HCI}}**

⁵ **{{BEGIN HCI**

END HCI}}

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parties; for example, in instances of correspondence referencing a communication with a third party, Charter can simply redact the name of the third party, and reveal the remaining content.

If the public is able to review the documents, it will not conclude that they “show Charter’s recognition that OVDs are overwhelmingly positive for the company because they drive growth of its higher-margin broadband business.”⁶ Instead, the public will have access to evidence that demonstrates that Charter views OVDs as a threat and that the company has the incentive and ability to thwart the success of these new services.

Of the three documents regarding OVDs whose meaning is in dispute between DISH and Charter, only one lists **{{BEGIN HCI**
HCI **END HCI}}** In fact, even the **{{BEGIN**
END HCI}} do not help Charter. Such **{{BEGIN HCI** **END HCI}}** are inapplicable to linear OVDs such as *Sling TV*.

As for the other two documents, Charter twists their meaning entirely; one of them stands for the proposition that **{{BEGIN HCI**
END HCI}} This does not show that Charter is friendly with OVDs, but that it is **{{BEGIN HCI**
END HCI}}⁹ The third document recommends **{{BEGIN HCI**
END HCI}}¹⁰ As DISH stated in its December 7, 2015 submission, “integrating OVDs into the Charter ecosystem (by making them just another ‘app’ available through Charter’s interface) **{{BEGIN HCI**
END HCI}}¹¹ That interface, to be sure, would

⁶ Charter Rebuttal Ex Parte at 1.

⁷ **{{BEGIN HCI**
END HCI}}

⁸ **{{BEGIN HCI**
END HCI}}

⁹ *Id.*

¹⁰ **{{BEGIN HCI**
END HCI}}

¹¹ Letter from Pantelis Michalopoulos and Stephanie A. Roy to Marlene Dortch, Secretary, FCC, MB Docket No. 15-149 (Dec. 7, 2015) (“DISH OVD Ex Parte”) quoting **{{BEGIN HCI**

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not be open to all OVDs; it would allow access only to **{{BEGIN HCI**

END HCI}} This is akin to the Primestar cable consortium’s effort to control DBS by integrating DBS with the cable television offerings, and prevent it from being a substitute for cable. How this plan proves Charter’s friendly feelings towards OVDs remains a mystery after Charter’s January 14, 2016 letter. To the contrary, it shows an acute awareness of the OVD threat and an effort to neutralize it. Moreover, Charter’s ideas for **{{BEGIN HCI**

END HCI}} include one that may circumvent in its effect the Commission’s Open Internet rules.¹³

As described below, many other documents establish that Charter has viewed and continues to view OVDs as a threat to its linear video subscription business.

UBP. Charter sets up a strawman when it portrays DISH as stating that Charter has already decided to deploy UBP — it has obviously not. DISH did not say this. What DISH did say is that UBP “is in the cards for New Charter,” and that “[i]f allowed to merge, the Applicants will have an increased incentive and ability to leverage UBP across their collective footprint—whether today or in three years—to push OTT services to the margins.”¹⁴

After setting up this strawman, Charter goes on to characterize DISH’s claim as “irrational.”¹⁵ But smoking gun evidence submitted just this month to the Commission (more than two months after it was requested)¹⁶ shows that this “irrational” claim matches high-level deliberations. Stunningly, **{{BEGIN HCI**

END HCI}}

¹² **{{BEGIN HCI**

END HCI}}

¹³ *See infra* at 10.

¹⁴ Letter from Pantelis Michalopoulos and Stephanie A. Roy, Counsel to DISH, to Marlene Dortch, Secretary, FCC, MB Docket No. 15-149 at 1, 5 (Dec. 14, 2015) (“DISH UBP Ex Parte”).

¹⁵ Charter Rebuttal Ex Parte at 9.

¹⁶ In response to the Commission’s Information and Data Request of November 2, 2015 to Liberty Broadband Corporation, Liberty produced responsive material to the Commission on January 11, 2016, and provided a copy of that production to DISH on January 21.

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END

HCI}}

These newly filed documents confirm DISH’s evaluation of other evidence in this proceeding showing that Charter has a deep-seated inclination for UBP as the {{BEGIN HCI
END HCI}} that Charter is keenly aware of calls for UBP coming from {{BEGIN HCI
END HCI}} and that {{BEGIN HCI
END

HCI}}

Charter’s Actions Against Sling TV. Tellingly, Charter’s denial of taking anti-competitive actions against *Sling TV* is carefully circumscribed. It is limited to a clarification as to {{BEGIN HCI
END HCI}}—Charter emphasizes that {{BEGIN HCI
END

HCI}} But Charter does not explain why the programmer felt the need to {{BEGIN HCI
END HCI}} and Charter does not explain why {{BEGIN HCI
END HCI}}

A. New Charter Will Have an Incentive and Ability to Harm OVDs

Charter once again argues that, because of its high profit margins for broadband service (compared to video service), it will not have an incentive post-transaction to foreclose or harm OVDs. DISH has repeatedly demonstrated that the traditional video cable subscription remains very valuable to Charter, and that efforts to suppress OVD competition would not harm New Charter’s broadband profits.²⁰ Because of the lack of choice among high-speed broadband providers in two-thirds of Applicants’ footprint, New Charter will be able to degrade OVDs

¹⁷ {{BEGIN HCI
END HCI}}

¹⁸ Charter Rebuttal Ex Parte at 8.

¹⁹ {{BEGIN HCI
END HCI}}

²⁰ See Reply of DISH Network Corp., MB Docket No. 15-149 at 8-13 (Nov. 12, 2015) (“DISH Reply”).

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without risk of customers switching to an alternative provider. The documents referenced by DISH in its filings confirm that Charter has been concerned about OVDs because they directly threaten its linear video service.

Charter Views OVDs as Threats

Applicants' internal documents cited by DISH confirm that Charter has long viewed OVDs as a serious threat to its core cable business and has worked to counter this threat through a variety of strategies. While Charter may view some OVDs as a **{{BEGIN HCI
END HCI}}** to its linear video business,²¹ the FCC has found that only when "a program is available from an OVD but not from an MVPD, the OVD may be perceived as [a] supplement."²² By contrast, "[w]hen the same program is offered by both an OVD and an MVPD, an OVD may be perceived as a substitute."²³ OVDs such as DISH's *Sling TV* and Sony's *Vue* are linear OVDs (because they offer the same programs as MVPDs), and therefore direct substitutes for Charter's own linear video offerings.

DISH cited a document drafted by Charter's **{{BEGIN HCI
END HCI}}** for the seemingly uncontroversial statement that **{{BEGIN HCI
END HCI}}**²⁴

While the document describes **{{BEGIN HCI
END HCI}}** the corollary theorem that *linear* OVDs are substitutes instead of complements. This document was written in **{{BEGIN HCI
END HCI}}** before *Sling TV* or *Vue* were launched, and at the time, **{{BEGIN HCI
END HCI}}**

²¹ **{{BEGIN HCI
END HCI}}**

²² Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming ¶ 215, MB Docket No. 14-16 (April 2, 2015).

²³ *Id.*

²⁴ See DISH OVD Ex Parte at 4, citing **{{BEGIN HCI
END HCI}}**

²⁵ *Id.*

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END HCI}}²⁶ Developments since then, including the launch of *Sling TV*, have made even more of a reality out of **{{BEGIN HCI
END HCI}}**

Charter also discusses at length an email from **{{BEGIN HCI
END HCI}}**²⁷ Charter mischaracterizes both the email and the reason why DISH quoted from it in DISH’s December 7th letter. DISH did not cite the email as an example of “an intent to foreclose OVDs” (though it certainly could be evidence of such an intent at an early stage) but rather simply as another example of Charter being “particularly concerned about OVDs that are direct substitutes for either some or all of its linear video services.”²⁸ The email itself shows **{{BEGIN HCI**

END HCI}}²⁹

Additional materials, not previously cited by DISH, further confirm that Charter views OVDs as a threat:

- **{{BEGIN HCI**

END HCI}}³⁰

²⁶ *Id.*

²⁷ *See* Charter Rebuttal Ex Parte at 4-5.

²⁸ *See* DISH OVD Ex Parte at 2-3.

²⁹ *See* **{{BEGIN HCI**

END HCI}}

³⁰ **{{BEGIN HCI**

END HCI}}

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- {{BEGIN HCI

END

HCI}}

- {{BEGIN HCI

END HCI}}

A recent meeting between Commission staff and Time Warner, Inc. further confirms Charter’s hostile view towards OVDs. Representatives from HBO described statements made by Charter which “raise concerns because they suggest that a combined Charter/Time Warner Cable would be inclined to take action directed at programmers in response to the development of ‘over the top’ or ‘OTT’ services with the purpose and/or effect of slowing down the development of OTT options to the detriment of consumers.”³³

Charter as an OVD Aggregator

DISH has explained that Charter’s strategy is to appoint itself as an aggregator of OVD services through its own Spectrum Guide.³⁴ Charter plans to {{BEGIN HCI

END HCI}} As the aggregator, Charter plans to only allow OVDs on

³¹ {{BEGIN HCI

END HCI}}

³² {{BEGIN HCI
END HCI}}

³³ See Notice of Ex Parte Meeting, Steven G. Bradbury to Marlene Dortch, MB Docket No. 15-149 (Jan. 13, 2016).

³⁴ See DISH OVD Ex Parte at 3. See generally Charter, *TV Channel Apps*, <http://www.charter.net/support/tv/tv-channel-apps> (listing various apps available through Spectrum).

³⁵ {{BEGIN HCI

END HCI}}

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Spectrum Guide that are **{{BEGIN HCI**
END HCI}}³⁶

Charter has not refuted this point, but has instead doubled down on it. Charter dismisses Charter’s role as self-appointed OVD gatekeeper as a “technical effort to make OVD content seamlessly available on Spectrum Guide,”³⁷ but Charter’s strategy is far from a mere “technical effort.” Indeed, the Charter Spectrum Guide is far from a free-for-all for OVDs. **{{BEGIN HCI**

END HCI}}³⁹ This kind of **{{BEGIN HCI**
END HCI}} of services that could not possibly be substitutes for Charter’s linear video is hardly an embrace of OVDs, not any more than calling them the **{{BEGIN HCI**
END HCI}}⁴⁰ is a sign of friendship.

Charter’s additional plan is to **{{BEGIN HCI**
END HCI}}
Far from being “OVD friendly,”⁴¹ **{{BEGIN HCI**

END HCI}} And finally, Charter is not

³⁶**{{BEGIN HCI** **END HCI}}** The Charter interface today includes about 60 services and apps chosen by Charter but notably excludes *Sling TV* and Sony Vue. See TV Channel Apps, <http://www.charter.net/support/tv/tv-channel-apps>.

³⁷ Charter Rebuttal Ex Parte at 5.

³⁸ **{{BEGIN HCI**

END HCI}}

³⁹ *Id.* at 3.

⁴⁰ **{{BEGIN HCI**

END HCI}}

⁴¹ Charter Rebuttal Ex Parte at 5.

⁴² **{{BEGIN HCI**

END HCI}}

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admitting OVDs to its platform {{BEGIN HCI

END HCI}}⁴³ Notably, the advantage provided to those {{BEGIN HCI
END HCI}} would appear to be substantially similar to the advantage afforded by “paid prioritization,” a practice banned under the Commission’s Open Internet rules. This is a prime example of why Charter’s three-year commitment to abide by the bright-line rules, and only the bright-line rules, in the event that the Open Internet rules are overturned on appeal, is inadequate at best and specious at worst.

Charter Has Worked to Undermine Sling TV

Charter is especially unconvincing when it denies undermining *Sling TV* or {{BEGIN HCI
END HCI}} While the existence of {{BEGIN HCI
END HCI}} may not be significant in themselves, what is important is that Charter was monitoring *Sling TV* at a level only justified if it viewed *Sling TV* as a severe competitive threat, and to the point that a {{BEGIN HCI
END HCI}} was conducted and prepared.

Further, Charter tries to deflect from the {{BEGIN HCI
END HCI}} Charter disavows any role because it was a {{BEGIN HCI
END HCI}} But Charter cannot explain why {{BEGIN HCI
END HCI}}

It is no wonder that the {{BEGIN HCI
END HCI}} felt this way when Charter CEO Tom Rutledge has effectively threatened OVDs in public. Before the regulatory

⁴³ {{BEGIN HCI
END HCI}}

⁴⁴ {{BEGIN HCI
END HCI}}

⁴⁵ See Letter from Pantelis Michalopoulos and Stephanie A. Roy to Marlene Dortch, FCC Secretary at 4, MB Docket No. 15-149 (Dec. 7, 2015)

⁴⁶ {{BEGIN HCI
END HCI}}

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scrutiny of this proposed transaction, Mr. Rutledge told CNBC that: “anybody who sells their content over the top and also expects to continue to exist inside a bundle of services sold to cable or satellite providers, I think is really deluding themselves.”⁴⁷ Mr. Rutledge essentially threatened to drop programmers from the Charter bundle if they offer content OTT: “to the extent that people go a la carte direct . . . they may or may not be carried in the future as a result of that.”⁴⁸

Nor did DISH “misunderstand” what {{BEGIN HCI

END HCI}} Indeed, Charter’s clarification {{BEGIN HCI

END HCI}} certainly meets the common definition of {{BEGIN
END HCI}}

HCI

B. New Charter Is Poised to Deploy Usage Based Billing

Charter acknowledges that it has been evaluating various UBP scenarios since at least 2011, but tries to downplay its analysis as an academic or “devil’s advocate” exercise, arguing that each of these documents makes the case for why Charter should not deploy UBP. Its rebuttal sets up a strawman, however. DISH never claimed that Charter has already deployed UBP; it has obviously not done so. The documents do reflect its decision to not do so for the time being, but instead to {{BEGIN HCI

⁴⁷ See Tom DiChristopher, *Over-the-top HBO will not kill the cable bundler: Plepler*, CNBC (Nov. 20, 2014) <http://www.cnbc.com/2014/11/20/over-the-top-hbo-will-not-kill-the-cable-bundle-plepler.html>.

⁴⁸ Charter Communications, Inc. 3Q15 Earnings Conference Call (Aug. 4, 2015), <http://seekingalpha.com/article/3396305-charter-communications-chtr-thomas-m-rutledge-on-q2-2015-results-earnings-call-transcript?part=single>.

⁴⁹ {{BEGIN HCI

END HCI}}

⁵⁰ Charter Rebuttal Ex Parte at 7.

⁵¹ {{BEGIN HCI

END HCI}}

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END HCI}}⁵² Thus, as DISH has explained, New Charter seems poised to deploy UBP once its three-year commitment to not do so is over.⁵³

Charter claims that it is “irrational” for DISH to point out New Charter’s UBP preparations “when the very documents on which DISH relies and other documents in the record show just the opposite.”⁵⁴ But Charter’s charge of irrationality, as well as the assurances Charter offers in public, are strikingly inconsistent with high-level private correspondence submitted to the Commission just this month. None other than **{{BEGIN HCI**

END HCI}}

Specifically, **{{BEGIN HCI**

END HCI}} **{{BEGIN HCI**

⁵² **{{BEGIN HCI**

HCI **END HCI}}** Charter claims that DISH **{{BEGIN HCI** **END HCI}}** the cited language. Charter Rebuttal Ex Parte at 10 n.42. DISH submits the full quote (*infra* at 14) for the Commission’s review, which supports DISH’s argument that Charter **{{BEGIN HCI** **END HCI}}** See DISH UBP Ex Parte at 3-4.

⁵³ DISH UBP Ex Parte at 1.

⁵⁴ Charter Rebuttal Ex Parte at 9.

⁵⁵ **{{BEGIN HCI** **END HCI}}**

⁵⁶ **{{BEGIN HCI**

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urges the Commission to follow up and ask appropriate questions about **END HCI}}** DISH
END HCI}}

That someone like **END HCI}}** so plainly favors implementing UBP inescapably leads to the conclusion in DISH’s December 14th letter that “UBP is in the cards for New Charter.” Charter’s attempts to explain away the documents referenced in that letter are not successful.

Charter claims that each of the documents that DISH cites “makes the case for why Charter should *not* deploy” UBP.⁵⁷ But Charter omits the full implication of these documents: that Charter has considered UBP *repeatedly* since at least as early as 2011; that Charter has recognized UBP as an effective counter to the **END HCI}}**⁵⁸ and that Charter continues to evaluate UBP as a tool, including by **END HCI}}**

END HCI}}

Specifically, Charter’s **END HCI}}** presentation lays out the rationale for why it did not launch UBP in **END HCI}}**⁶⁰ But as the competitiveness of OVDs increases, and both Charter and other wireline pay-TV providers face increasing pressure to counter the erosion of their video profits, this rationale is likely to dissolve. Charter recognizes this, as the company **END HCI}}**

END HCI}}

END HCI}}

⁵⁷ Charter Rebuttal Ex Parte at 9 (emphasis in original).

⁵⁸ **END HCI}}**

⁵⁹ **END HCI}}**

⁶⁰ Charter Rebuttal Ex Parte at 9.

⁶¹ **END HCI}}**

END HCI}}

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Indeed, Charter’s **{{BEGIN HCI** **END HCI}}** presentation confirms that the company **{{BEGIN HCI** **END HCI}}**⁶²

That presentation also reveals that part of this capability **{{BEGIN HCI**

END HCI}}

Charter’s evaluation of whether to deploy UBP continued into **{{BEGIN HCI** **END HCI}}**, with **{{BEGIN HCI**

END HCI}}, Charter should **END HCI}}** of UBP to address the **END HCI}}** Charter knows that UBP would be a threat to OVD competitors because **{{BEGIN HCI** **END HCI}}**

And Charter continued to evaluate UBP in **{{BEGIN HCI** **END HCI}}**, going as far as to **{{BEGIN HCI**

⁶² **{{BEGIN HCI** **END HCI}}**

⁶³ **{{BEGIN HCI** **END HCI}}**

⁶⁴ **{{BEGIN HCI**

END HCI}} Importantly, contrary to Charter’s claim, it is Charter that fails to cite the full email exchange and mischaracterizes it. DISH submits the full quote for the Commission’s review: **{{BEGIN HCI**

END HCI}} It is clear that even **{{BEGIN HCI**

END HCI}}

⁶⁵ **{{BEGIN HCI** **END HCI}}**

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END HCI}}

As recently as {{BEGIN HCI

END HCI}}⁶⁷ DISH agrees with Charter that an investor's desires are not probative of Charter's incentives or plans.⁶⁸ Instead, it is {{BEGIN HCI
END HCI}} the company appears poised to implement UBP as soon as any merger review ends or its commitments expire.

Beyond the high level correspondence {{BEGIN HCI
END HCI}} described above, other documents not previously included in DISH's filings further describe the incentive that New Charter would have to implement UBP:

- {{BEGIN HCI

END HCI}}

- {{BEGIN HCI

END HCI}}

⁶⁶ {{BEGIN HCI

END HCI}}

⁶⁷ {{BEGIN HCI

END HCI}}

⁶⁸ Charter Rebuttal Ex Parte at 10.

⁶⁹ {{BEGIN HCI

END HCI}}

⁷⁰ {{BEGIN HCI

END HCI}}

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Notwithstanding Charter's recent claims that the above documents illustrate its commitment that it **{{BEGIN HCI** **END HCI}}** UBP,⁷¹ they reveal that Charter recognizes that its use of UBP against the OVD threat is merely a matter of time and timing, as New Charter is likely to be unconstrained by the **{{BEGIN HCI** **END HCI}}** that have held back UBP deployment until now. When Charter's **{{BEGIN HCI** **END HCI}}** has previously described it as **{{BEGIN HCI** **END HCI}}** that Charter's promises on the subject have been **{{BEGIN HCI** **END HCI}}** the Commission should not accept the effectiveness of the Applicants' proposed UBP condition.

Sincerely,



Pantelis Michalopoulos
Stephanie A. Roy
Counsel for DISH Network Corporation

⁷¹ Charter Rebuttal Ex Parte 9-10 (emphasis in original).