February 10, 2016

VIA ECFS

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

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

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, Writers Guild of America, West, Inc. ("WGAW") submits this letter summarizing the following meetings that WGAW members Allison Abner and Elias Davis, WGAW Political Director Corrina Freedman, WGAW Senior Research & Public Policy Director Ellen Stutzman, WGAW Senior Research & Policy Analyst Laura Blum-Smith and WGAW DC Representative Michael Forscey of Forscey PLLC had on Monday February 8, 2016 and Tuesday February 9, 2016:

- A meeting with Owen Kendler, Joel Rabinovitz and Jim Bird of the Office of the General Counsel; Ali Zayas, Susan Singer, Eugene Kiselev, Mary Beth Murphy, Ty Bream, Julie Saulnier, Brendan Holland, Hillary DeNigro of the Media Bureau; and Elizabeth McIntryre of the Wireline Competition Bureau.

- A meeting with Commissioner Clyburn, Holly Saurer, Legal Advisor, Anna Gentry and Taylor Moore of Commissioner Clyburn's office.

- A meeting with Commissioner Rosenworcel and Marc Paul, Legal Advisor to Commissioner Rosenworcel.

- A meeting with Gigi Sohn, Counselor to the Chairman, Eric Feigenbaum, Director of Outreach & Strategy, Jessica Almond, Legal Advisor, Louisa Terrell, Advisor, Anthony Jones and Jamille Kadre of Chairman Wheeler's office.

In the meetings, WGAW representatives expressed the organization's opposition to the merger between Charter Communications, Inc., ("Charter"), Time Warner Cable Inc., ("TWC") and Bright House Networks ("Bright House") (collectively, "Applicants") because it will reduce competition in the national broadband market and will give the merged company ("New Charter") increased incentive and ability to harm the online video market. WGAW representatives stated that this merger raises concerns similar to those expressed by FCC Chairman Wheeler and General Counsel Jon Sallet about the threat to competition in national video distribution markets[1] from the proposed Comcast-Time Warner Cable merger. In this instance as well, the transaction will give New Charter increased control over access to broadband consumers. The concern over increased national control is relevant in this merger for several reasons.

First, online video distributors ("OVDs"), many of which now distribute original video programming created by WGAW members that competes with content offered by television networks, require access to a national audience. WGAW representatives mentioned how content created for subscription OVDs includes new seasons of programming previously airing on television and often has budgets and compensation standards similar to television productions. OVDs constitute a competitive threat to the traditional and online video offerings of Applicants but rely on them and other such entities to reach consumers, making OVDs susceptible to abuse. While the Commission's 2015 *Open Internet Order* prohibits some anti-competitive Internet service provider ("ISP") behavior, it does not cover all potentially harmful practices and was explicitly not meant as a substitute for competition or antitrust enforcement.[2]

Second, the increased national control is exacerbated by a lack of competition at the local level. Applicants have provided information to show that two-thirds of homes in New Charter's footprint will have no alternative for high-speed broadband at speeds of 25 Mbps or greater, and just 22.8% will have competition from fiber.[3] At the FCC's current definition of advanced telecommunications capability, which requires access to speeds of 25 Mbps or higher, the lack of choice within New Charter's footprint is already severe. As speeds increase, such as to what Charter touts as its minimum speed of 60 Mbps service, New Charter's only competition will be from fiber providers. As Chairman Wheeler has stated, fiber broadband is that only technology that "gives the local cable company a competitive run for its money."[4] WGAW has analyzed broadband data in California, which reveals that nearly 70% of California households in New

[1] Statement from FCC Chairman Tom Wheeler on the Comcast-Time Warner Cable Merger, (Apr. 24, 2015), https://www.fcc.gov/document/chairmans-statement-comcast-twc-merger;
[2] Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, ¶ 203 (2015).
[3] Charter Communications, Inc., Response to FCC's Information and Data Request, MB Docket No. 15-149, at 61 (Oct. 16, 2015).
[4] FCC Chairman Tom Wheeler, Prepared Remarks at the 1776 Headquarters, Washington DC: The Facts and Figures of Broadband Competition, at 5 (Sept. 4, 2014), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2014/db0904/DOC-329161A1.pdf.

Charter's footprint will lack a choice other than New Charter for 25 Mbps or faster service and only 25% will have a fiber alternative.[5] This lack of competition will give New Charter considerable power over OVDs and consumers.

WGAW representatives outlined how the merger of these three companies would result in the nation's second-largest wired ISP, leading to a duopoly in the national broadband market. This is relevant because Comcast and New Charter have similar incentives to limit the attractiveness of an online video market that competes with MVPD services or online video services developed by MVPDs, and through this merger the two companies will have increased ability to coordinate anticompetitive practices.

WGAW representatives explained that New Charter will have a strong incentive to harm a competitive online video market, despite the representations Applicants have made to the Commission. Online video represents a potential threat to New Charter's traditional video business and affiliated online video offerings. New Charter will not want customers to switch from its video services to unaffiliated OVDs, which is an incentive the FCC has noted in prior transactions and one that increases as the distributor increases in size.[6] The company also does not want content providers, such as television networks, to go over the top ("OTT") and offer content directly to consumers online. WGAW representatives noted the comments made by Charter CEO Tom Rutledge who said, "Anybody who sells their content over the top and also expects to continue to exist within a bundle sold to cable or satellite providers is really deluding themselves"[7] and echoed the concerns raised by Time Warner regarding HBO's OTT service, HBO Now.[8] Through this merger, New Charter may have sufficient leverage to prevent networks from developing such offerings. In addition, as the WGAW noted in its filings with the Commission, this merger will cause New Charter to take on a significant amount of debt, further

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[5] WGAW analysis of National Telecommunications and Information Administration data and 2010 Census Block Data. US Department of Commerce, National Telecommunications and Information Administration, State Broadband Initiative, California (CSV format June 30, 2014); and Missouri Census Data Center, Standard Summary File 1 (2010 Census) Extract Assistant, California, http://mcdc.missouri.edu/cgibin/broker?_PROGRAM=websas.sf12010 x_extract_menu.sas&_SERVICE=appdev&st=.

[6] *See* Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, *Memorandum Opinion and Order*, MB Docket No. 10-56, 26 FCC Rcd. 4238, 4268-4271, ¶¶ 78-83 (2011). *See also* Applications of AT&T Inc. and DIRECTV for Content to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order,* MB Docket No. 10-56, ¶ 205 (2015); and Protecting and Promoting the Open Internet, GN Docket No. 14-28, *Report and Order on Remand, Declaratory Ruling, and Order*, ¶ 140 (2015).

[7] 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.

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

incentivizing company behavior to limit competitive options to its MVPD and OVD services. Finally, while OVDs increase demand for broadband, it is clear that New Charter will have the increased incentive to steer consumers towards its own online video offerings. For instance, New Charter has recently announced a "skinny bundle" product called Spectrum TV Stream, which provides access to broadcast networks and available add-ons of cable channels for $12.99 to $19.99 per month, and appears intended to compete directly with OVDs such as DISH's Sling TV service in terms of price and content offered.

WGAW representatives also highlighted how the merger will give New Charter an increased ability to harm the OVD market in ways not addressed by either the *Open Internet Order* or the time-limited conditions offered by Applicants. For instance, New Charter could raise the cost of standalone broadband service to make watching online video more expensive. Because the company will lack effective competition in two-thirds or more of its footprint, such a strategy would likely be successful, as consumers will not have an alternative high-speed broadband provider to switch to. New Charter could also impose data caps following the expiration of its three year commitment to refrain from such behavior. WGAW representatives noted that Charter officially included data caps on its Internet service until a few months before the merger and could easily reinstitute such a practice.[9]

New Charter could also use its set-top boxes and video interface to act as a content gatekeeper, preventing certain OVDs from being placed alongside cable content or being easily accessible by New Charter's MVPD customers through one device or interface. New Charter could also use its increased leverage to negotiate contracts with TV networks that limit their ability to develop OTT offerings or to make more content available online. Given the comments made by Charter CEO Tom Rutledge, such a development seems possible, particularly because New Charter would become the nation's third-largest MVPD. WGAW representatives also highlighted how New Charter could influence programmers Discovery and Starz to refrain from licensing content to OVDs or going OTT. Such actions would be enabled by the connections of John Malone, who will control New Charter's largest shareholder. While Discovery Communications representatives assert that Charter and Discovery have had John Malone as a common owner for years and neither has favored the other,[10] this ignores the reality that New Charter will be significantly larger and more powerful as a distributor, which may allow it to exercise such influence.

WGAW representatives explained that the merger raises significant concerns at this moment because if Charter is allowed to become the country's second-largest broadband

[9] Phillip Dampier, *Charter Communications Quietly Eliminates Usage Caps That Were Rarely Enforced Anyway*, Stop the Cap! (March 5, 2015), http://stopthecap.com/2015/03/05/charter-communications-quietly-eliminates-usage-caps-that-were-rarely-enforced-anyway/.
[10] Notice of Ex Parte Meeting, Tara M. Corvo to Marlene Dortch, MB Docket No. 15-149 (Jan. 14, 2016).

provider and to use its power to harm the online video market, on its own or in conjunction with Comcast, we will not realize the full potential of online video to increase competition, content choice and diversity. In just four years, subscription online video services have transformed from services that only offer licensed television and film content to exhibiting more than 50 original television-length series in 2015. TV networks such as HBO, Showtime and CBS have gone over the top and numerous new services have launched. These developments mean increased choice and flexibility for consumers and new opportunities for writers. WGAW representatives also explained how new platforms and services attract consumers by pushing the envelope with the type of content offered. Programming offered online such as *Orange is the New Black*, *Transparent* and *Narcos* are telling stories not typically seen on television. New online services have also increased opportunities for independent producers, including Lionsgate, Gaumount International Television and MRC. If the merger allows New Charter to exercise control over how the online video market develops, progress may stall. Fewer services may launch and fewer TV network may go OTT. WGAW representatives noted that it is clear the market is growing but it remains in its infancy and could easily be quashed if these incumbent distributors are allowed to merge and become more powerful.

For these reasons, WGAW representatives argued that the transaction does not serve the public interest because it will grant too much control over national broadband distribution to companies with an incentive to limit further growth of an online video market that offers more competition and choice. WGAW representatives urged the Commission to deny the merger but also stated that should the Commission decide to approve the merger with conditions, it must attempt to address the numerous ways New Charter may be able to harm the online video market. WGAW representatives suggested that conditions, which must be in place for a period much longer than the 2-3 year commitments offered by Applicants, must include a standalone broadband offering at an affordable price and a limitation on data caps, as well as conditions that limit New Charter's power to limit the ability of TV networks to distribute content online and use its set-top box and video interface to become a gatekeeper of online content. To address the concerns regarding John Malone's influence over New Charter and various programmers, WGAW representatives suggested requiring Liberty Broadband to divest its stake in New Charter. WGAW representatives also raised the prospect of a condition requiring competitively priced, wholesale access to New Charter's last mile ISP network as a means of addressing the power New Charter will have in local broadband markets because it does not face competition.

Pursuant to section 1.1206(b) of the Commission's rules, a copy of this letter is being filed electronically with the Office of the Secretary and served electronically on the Commission participants in the meeting. If you have any further questions, please contact me at (323) 782-4660.

Sincerely,

____________/s/__________________
Ellen Stutzman
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Writers Guild of America, West, Inc.

cc: Owen Kendler
Joel Rabinovitz
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