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February 12, 2016

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:

Pursuant to Section 1.1206(b)(2) of the Commission's rules,[1] and the *Protective Order* in the above-captioned proceeding,[2] DISH Network Corporation ("DISH") hereby submits this ex parte letter and accompanying redacted presentations. On February 10, 2016, William Zarakas, a principal with the Brattle Group, Martha Rogers, an Associate with the Brattle Group, and the undersigned met with Joel Rabinovitz, Jim Bird, Elizabeth Cuttner, and Owen Kendler of the Office of General Counsel; Betsy McIntyre, Chris Sova, Adam Copeland, Bill Rodgerson, Mike Ray, and Bakari Middleton of the Wireline Competition Bureau; Paroma Sanyal and Charles Mathias of the Wireless Telecommunications Bureau; and Julie Saulnier, Hillary DeNigro, Ali Zayas, Ty Bream, Jessica Campbell, Mitali Shah, Jamila Bess-Johnson, Susan Singer, and Eugene Kiselev of the Media Bureau. At that meeting, DISH discussed the enclosed presentations.

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[1] 47 C.F.R. § 1.1206(b)(2).

[2] *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*, FCC 15-110 (Sept. 11, 2015) ("*Protective Order*").

The attached PowerPoint presentations, which were distributed at the meeting, contain Highly Confidential Information. DISH has denoted with "**{{HCI HCI}}**" symbols information that it has deemed Highly Confidential pursuant to the *Protective Order* in the presentation entitled "DISH Presentation Charter-TWC Proposed Merger." The second presentation, entitled "Analysis of Internet Churn: Time Warner Cable, Bright House Networks and Charter Communications," is Highly Confidential in its entirety under the *Protective Order*. A redacted version of the DISH Presentation is simultaneously being filed with the Commission.

In accordance with the *Protective Order* and Sections 0.457 and 0.459 of the Commission's rules,[3] DISH Network Corporation ("DISH") respectfully requests that the unredacted copies of its filing be afforded confidential treatment and not be placed in the Commission's public files. Specifically, the information designated as Highly Confidential Information in the presentations was taken from or derived from Confidential or Highly Confidential Information in the Applicants' filings and responses to the Commission's requests for information and data, or is the Highly Confidential Information of DISH. The information designated Highly Confidential is of the type authorized for redaction as Highly Confidential under Appendix A of the *Protective Order.* DISH requests that the Commission return this submission if its request for confidentiality is denied.[4]

Please contact the undersigned if you have any questions.

Respectfully submitted,

Stephanie A. Roy

Pantelis Michalopoulos
Stephanie A. Roy
Counsel to DISH Network Corporation

cc: Martha Rogers
Bill Zarakas
Betsy McIntyre
Jamila Bess-Johnson
Chris Sova
Paroma Sanyal
Charles Mathias
Julie Saulnier

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[3] 47 C.F.R. §§ 0.457, 0.459.

[4] *Id.* § 0.459.

Hillary DeNigro
Adam Copeland
Bill Rodgerson
Mike Ray
Bakari Middleton
Owen Kendler
Ali Zayas
Ty Bream
Jessica Campbell
Mitali Shah
Joel Rabinovitz
Susan Singer
Eugene Kiselev
Elizabeth Cuttner
Jim Bird

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DISH Presentation
Charter-TWC Proposed Merger

Pantelis Michalopoulos
Stephanie A. Roy

February 10, 2016

This is Not the First Cable Industry Attempt to Coalesce in the Face of a Threat

- Threats to cable TV are often followed by coordinated action by the cable industry to marginalize those threats:
  - In the 1990s, the advent of DBS was followed by the Primestar consortium and the Primestar/News Corp. carriage-for-spectrum agreement
  - In the 2010s, the launch of OTT video was followed first by Comcast/TWC and then by Charter/TWC
- These cable industry responses share two characteristics:
  - Coordination among the cable industry "brethren"
  - The cable industry's effort to neutralize a threatening new technology by turning it into a complement for its service

Coordination Then and Now

- **Then:**
  - Dr. John Malone: "There's some kind of peace in which Rupert gets what he wants, which is broader distribution of his programming networks in exchange for which he's not quite as aggressive [in DBS]."
    - Complaint, *United States v. Primestar*, Inc. ¶ 53 (May 12, 1998) ("Primestar Complaint").
  - Dr. John Malone: The role of a cable executive participating in the negotiations "was one of 'a peacemaker. . . . He kept trying to convince everybody that there was more profit in peace than war.'"
    - Primestar Complaint ¶ 5.
  - And the cable industry's initial denial: "Are you suggesting to me that before Rupert Murdoch presented himself to Capitol Hill as a satellite competitor to cable, he was meeting with cable to cut a deal? We don't have any comment."
    - Stephen Keating, Cutthroat, at 211 (1999).

Coordination Then and Now

- **Now:** Charter's most significant investor—once again, Dr. John Malone—favors coordination between Comcast and Charter
  - If Dr. Malone had his way, he would "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."
    - Interview With Vanity Fair (Oct. 8, 2015).
  - "The fewer big players, the easier it is to get alignment"
    - Liberty Media Investors' Conference (Oct. 10, 2013).
  - **{{HCI**

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The Complementary Strategy Then and Now

- **Then:**
  - "Those cable companies have no economic incentive to use this valuable DBS satellite capacity to steal their own cable subscribers and thus cannot be expected to do so. Rather, their strategy is to keep this scarce asset out of the hands of any firm that would compete vigorously against their cable operations."
    - Primestar Complaint ¶ 7.
  - "It's a win for the industry to get Rupert Murdoch to think of himself more as a programmer in North America than as a satellite guy," Malone said . . . "That's a win for the cable industry, sure."
    - Cutthroat, at 221.
- **Now:**
  - **{{HCI**

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    - **{{HCI** **HCI}}**
  - Charter plans to allow OVDs on Spectrum Guide that are **{{HCI**

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    - **{{HCI** **HCI}}**

Coordination Between New Charter and Comcast Would be Easy and Lethal

- Comcast and New Charter will together control more than **{{HCI HCI}}** of high-speed broadband homes in the United States
  - Letter from Stephanie A. Roy, Counsel to DISH Network Corp., to Marlene H. Dortch, FCC, MB Docket No. 15-149, at 2 (Nov. 23, 2015).
- "Cheating" would be unlikely
  - The lack of overlap means that cheating is not an attractive option
    - OVDs will not need either Comcast or New Charter.
    - They will need both Comcast and New Charter
  - The benefits of foreclosure may only be available if there is no cheating
  - The costs of foreclosure would appear to be similarly low for New Charter and Comcast
  - The comments by Charter's most significant investor suggest that New Charter would not view cheating as a credible fear

Foreclosure of OVDs Will be Profitable

- Very few people leave Charter's broadband services unless they move, die, or cannot pay
- **{{HCI HCI}}**
- Professor Morton calculates voluntary churn in a flawed and circuitous way. She bases her analysis on:
  - Charter's average total monthly churn in 2014, and
  - The FCC's 2010 estimate that 57% of users who switched providers in the three previous years did not do so "because of moving residences"
    - Declaration of Fiona Scott Morton, MB Docket No. 15-149, ¶¶ 55, 56 (June 25, 2015) ("Morton Decl."); Broadband decisions: What drives consumers to switch—or stick with—their broadband Internet provider, FCC Working Paper, at 5 (2010) ("Broadband Decisions")
- She then concludes that 20% (57% of the 36% of broadband subscribers who have switched in the three previous years) of *all* broadband users switched providers for reasons other than moving *Morton Decl. ¶ 56.

Foreclosure of OVDs Will Be Profitable (cont.)

- There are at least two fatal problems with Professor Morton's method even setting aside her use of a three-year industry-wide percentage:
  - First, it overstates churn because the 57% includes consumers who have not moved but were disconnected for non-payment, a significant source of churn, as well as those leaving for customer service issues, slow speeds, and high prices, among others
    - *See* Broadband Decisions at 5
  - The second and most fundamental problem is that voluntary churn numbers are actually available from the Applicants, and that they are eye-poppingly lower than the 57% of total churn used by Professor Morton
    - Charter's voluntary churn (as defined by Charter) includes only those customers who switch their Internet service from Charter to another provider
      - Information produced by Charter shows that its voluntary churn was between **{{HCI HCI}}** and **{{HCI HCI}}** of total churn each month of 2015 through August, both for all broadband subscribers and for standalone broadband subscribers.
      - This means that Charter's monthly voluntary churn was a very low **{{HCI HCI}}** of subscribers
        - **{{HCI HCI}}**
    - Even using a new set of numbers provided by Charter, which may include additional categories of departing subscribers beyond those switching to another provider, the voluntary share of total churn ranges between **{{HCI HCI}}** and **{{HCI HCI}}**, which translates into a mere **{{HCI HCI}}** of total subscribers each month.
      - **{{HCI HCI}}**

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New Charter Will Have Its Cake and Eat It Too

- Charter has every reason to believe its voluntary churn will remain at or below these low figures even if its OVD competitors experience problems on New Charter's network
- **{{HCI** **HCI}}** during the period in which Netflix service was degraded on Charter's and TWC's networks from November 2013 to March 2014
  - Zarakas Decl. ¶¶ 17-21.
- This is not surprising. With only one third of customers having access to an alternative high-speed broadband access provider, there is little to discipline New Charter
  - *See* FCC, Media Bureau Broadband Data Exhibits, MB Docket No. 15-149 (Nov. 13, 2015).
- New Charter will be able to hurt competitors of its video business without hurting its own broadband business

Even if Foreclosure Were More Costly, It Would Likely be Profitable

- The video business remains very profitable for the Applicants
- Video accounts for **{{HCI HCI}}** in revenue and **{{HCI HCI}}** in profits
    - {{HCI HCI}}
- Average Revenue Per Unit is actually higher for video (**{{HCI HCI}}**) than for broadband (**{{HCI HCI}}**) for the Applicants on average
    - {{HCI HCI}}
- Even by the calculations of the Applicants, the average gross video margin is high and not dramatically lower than the average broadband margin—**{{HCI HCI}}**
    - {{HCI HCI}}
- In fact, the difference between Charter's broadband and video margins are significantly slimmer still: its video margin is **{{HCI HCI}}**, and its broadband margin is **{{HCI HCI}}**.
    - {{HCI HCI}}

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Even if Foreclosure Were More Costly, It Would Likely be Profitable

- Post-transaction, video will be even more profitable because of significant cost savings in negotiations with programmers
  - Professor Katz estimates that New Charter will save approximately **{{HCI HCI}}** per subscriber and **{{HCI HCI}}** in marginal cost per subscriber in programming costs
    - Reply Declaration of Michael L. Katz, MB Docket No 15-149, ¶ 10 (Nov. 2, 2015) ("Katz Reply").
  - Professor Evans has shown that there is no credible basis for the proposition that between 50 and 60 percent of these savings will be passed on to consumers
    - David S. Evans, Evans Declaration I, MB Docket No. 15-149, ¶¶ 20, 119-129 (Jan. 15, 2016).
  - In any event, these savings will make the difference between video and broadband margins smaller still
- Even if there were a credible fear of broadband departures, Professor Morton underestimates the video gains
- Professor Morton considers only video subscribers who upgrade because of the degradation of the OTT product; importantly, Professor Morton does not consider video subscribers who would have cut or shaved the cord but for the degradation

The Preference for OTT Services as a Complement to Charter is No Sign of Friendship

- "Charter views the availability of OVD services in its footprint as a benefit to Charter, its customers, and OVDs."
    - Letter from John L. Flynn, Counsel to Charter Communications Inc., to Marlene H. Dortch, FCC, MB Docket No. 15-149, at 2 (Jan. 14, 2016).
  - The applicants use a variant of "complement" more than 20 times in their/their experts' filings
  - But it is more accurate to say that Charter *prefers* OVDs to be complementary products to linear cable, much as Primestar in the 1990s envisioned DBS as a complement to cable
- The difference between Comcast's Xfinity and Charter's Spectrum approaches is not a sign of Charter's friendly approach
  - It is a more effective way to marginalize OVDs than Comcast has taken
  - All the benefits for OVDs supposedly created by Charter's control over 19 million broadband customers as well as by in inclusion in the Spectrum Guide are ones that Charter can grant or withhold
- The Spectrum Guide is one more gate at which OVDs must seek entrance, and through which only favored OVDs can pass
  - By definition, the favored OVDs are those that complement Charter's linear product
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Here are the “friend” and “foe” lists in full:

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Charter as OVD Gatekeeper

- Professor Morton asserts that Charter's Spectrum Guide will feature OVDs in exchange for a **{{HCI**
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    - Morton Reply Decl. ¶ 47; **{{HCI** **HCI}}.**
- But Professor Morton fails to acknowledge the significant limitations on Charter's interest in OVDs. Internal documents indicate that Charter planned to:
  - Work with OVDs that **{{HCI**
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  - Push its OVD partners to **{{HCI**
    HCI}}; and
  - Extract significant additional economic terms, including:
    - **{{HCI** **HCI}}**
    - **{{HCI** **HCI}}**

Charter as OVD Gatekeeper (cont.)

- In practice, Charter may even be driving a harsher bargain than Professor Morton asserts
- Charter's **{{HCI**

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  - {{HCI HCI}}
- Those terms appear to be more onerous than those of independent and agnostic device manufacturers, **{{HCI**

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  - {{HCI HCI}}

Charter Sees OVDs as a Threat

- Charter's internal documents confirm that the company sees OVDs as a serious threat to its core cable business:
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    - **{{HCI HCI}}**
  - **{{HCI HCI}}**
    - **{{HCI HCI}}**
- Charter's research revealed that: **{{HCI HCI}}**

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Sling TV Directly Competes with Charter's Linear Video Service

- DISH's *Sling TV* and Sony's Vue are linear OVDs and are therefore direct substitutes for Charter's traditional video service
- Professor Morton incorrectly argues that *Sling TV* is not a substitute for Charter's service because it "appeal[s] mainly to customers that do not already have MVPD service" and "who would not otherwise be purchasing video services."
    - Morton Reply Declaration ¶ 85.
  - Very few *Sling TV* subscribers also subscribe to a linear MVPD service:
  - **{{DISH HCI**

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- Aiming at people who have never had a cord or have already cut it does not make *Sling TV* any less of a substitute because both Charter and *Sling TV* compete for these consumers

Like *Sling TV*, Charter Targets Cord-Nevers and Prior Cord-Cutters

- Research conducted for Charter in March 2015 found that:
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  - {{HCI HCI}}
    - {{HCI HCI}}
  - {{HCI HCI}}
    - {{HCI HCI}}

Like *Sling TV*, Charter Targets Cord-Nevers and Prior Cord-Cutters (cont.)

- In what appears to be a direct response to *Sling TV*, Charter has launched its own OTT "skinny bundle" service (labeled "Spectrum TV Stream"), which is available to Charter's broadband-only subscribers, and priced it at $12.99 a month (with an upgrade to $19.99 a month)
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Charter Does Not View Linear OVDs as Complementary

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- {{HCI HCI}}
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Charter Has Threatened Programmers in Order to Hamper the Creation of Linear OTT Products

- Charter's CEO has threatened programmers:
  - "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"
  - "If I were a content company, I'd think long and hard about, whether I wanted to give up access to 100 million homes and whether I wanted to give up my advertising model, and go to a direct to consumer SVOD, subscription-video-on-demand model without advertising, I think I'd think long and hard about that"
    - Interview with CNBC, November 19, 2014
- One day before DISH announced its OTT deal with Scripps Networks:
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    - {{HCI HCI}}
- Charter should be prevented from expanding its leverage with which to threaten programmers to dissuade them from licensing their content to *Sling TV* and other OVDs

Charter Recognizes the Merits of Usage Based Pricing ("UBP")

- Charter has considered UBP since at least as early as 2011
  - Charter views UBP as an effective counter to the threat of OTT services
  - OTT services threaten Charter's transport margin for video delivery
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  - *See* Letter from Pantelis Michalopoulos, Counsel to DISH Network Corp., to Marlene Dortch, FCC, MB Docket No. 15-149 (Dec. 14, 2014).
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- "Reed [Hastings] has to bear in his economic model some of the cost of the capacity that he's burning"
  - John Malone, Liberty Media Investor Conference (June 2013).

John Malone Has Already Strategized on How to Avoid Charter's Usage Based Billing Commitments

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The Merger will Eliminate Potential Out-of-Footprint Competition Between Charter and TWC

- Professor Morton states that it would be a "speculative concern" that the transaction may reduce future competition in TV Everywhere services, because "the parties' current and planned services only work within each party's footprint, and users must subscribe to the parties' MVPD services in order to access the content."
  - Morton Reply Decl. ¶ 17.
- Charter has also stated that **{{HCI**

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- However, **{{HCI**

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The Merger "Benefits" Are Illusory

- Charter and TWC's infrastructure plans do not depend on the merger
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- Charter's plans for a minimum speed of 60 Mbps without a lower cost alternative are not a benefit for consumers
    - *See* Application at 2, 7-8; DISH Network Corp., Petition to Deny, MB Docket No. 15-149, at 35 (Oct. 13, 2015); DISH Network Corp., Reply, MB Docket No. 15-149, at 14-15 (Nov. 12, 2015) ("DISH Reply").
- Charter's promise to build one million line extensions is actually less than what the parties would achieve on their own
    - DISH Reply at 27.
- The promise to build 300,000 additional WiFi access points is simply a repackaged existing business plan
    - DISH Reply at 28.
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    - {{HCI HCI}}

PRESENTATION ENTITLED
"ANALYSIS OF INTERNET CHURN: TIME WARNER CABLE, BRIGHT HOUSE NETWORKS AND CHARTER COMMUNICATIONS"
REDACTED IN ITS ENTIRETY