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February 26, 2016

EX PARTE PRESENTATION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th 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 Wednesday February 24, 2016 with William Lake, Chief, Media Bureau; Owen Kendler, Attorney, Office of General Counsel; Betsy McIntyre, Attorney, Policy Division, Wireline Competition Bureau; Hillary DeNigro, Associate Bureau Chief, Media Bureau; Brendan Holland, Chief, Industry Analysis Division, Media Bureau; Adam Copeland, Acting Assistant Division Chief, Competition Policy Division, Wireline Competition Bureau; Jim Bird, Senior Counsel, Office of General Counsel; Joel Rabinovitz, Attorney, Office of General Counsel; Kiley Naas, Office of General Counsel; Bakari Middleton, Attorney, Competition Policy Division, Wireline Competition Bureau; Kristine Fargotstein, Attorney, Wireline Competition Bureau; Michael Ray, Attorney, Competition Policy Division, Wireline Competition Bureau (by telephone); Ty Bream, Attorney, Industry Analysis Division, Media Bureau (by telephone); Julie Saulnier, Attorney, Industry Analysis Division, Media Bureau (by telephone); Jamila Bess Johnson, Attorney, Industry Analysis Division, Media Bureau; Alexis Zayas, Attorney, Industry Analysis Division, Media Bureau; and Eugene Kiselev, Economist, Media Bureau. Present on behalf of DISH were Roger Lynch, CEO of Sling TV; Alison Minea, Director and Senior Counsel; and Hadass Kogan, Corporate Counsel.

During the meeting, DISH explained that the pending merger of Charter Communications, Time Warner Cable and Bright House Networks (together, the "Applicants") presents serious competitive concerns for the broadband and video marketplaces. This transaction would permit and motivate the combined company ("New Charter") to hurt or destroy online video rivals, including the Sling TV over-the-top ("OTT") video service through its control over the broadband pipe. Post-merger, New Charter would be the dominant broadband provider in many of the country's largest and most important geographic markets (including New York, Los Angeles, and Dallas, among others). In addition, together New

Charter and Comcast would create a duopoly in the broadband market, controlling at least 70 percent to as high as 90 percent of the high-speed broadband homes in the country. The impact of this broadband consolidation would be particularly acute for New Charter customers, given that approximately two-thirds of customers in the New Charter footprint would not have access to a competing high-speed broadband alternative.

As a result of this transaction, New Charter will have an increased incentive to harm new and emerging OTT services – like Sling TV – that compete with the combined company's video offerings. And, due to its increased size and scale, New Charter will have a number of tools at its disposal to harm these competing services, including, among other things, the following:

Usage Based Pricing ("UBP"). As DISH has explained, Charter views UBP as an effective counter to the threat posed by OTT services, and has been evaluating such scenarios since at least 2011.[1] Charter's enthusiasm for UBP and its potential for discriminating against OTT rivals further undermine the already insufficient condition on UBP that the Applicants have proposed. Post-transaction, New Charter will have an increased incentive and ability to leverage UBP across its entire footprint, to the detriment of competing OTT services.

Contractual Restrictions. This merger will give New Charter significant additional leverage when negotiating with third-party programmers.[2] As a result, the combined company will be able to employ contractual tools – including, among other things, most favored nation ("MFN") or alternative distribution mechanism ("ADM") provisions – that limit the ability of programmers to grant online rights to competing online video distributors ("OVDs"). For example, with its increased scale post-transaction, New Charter would possess even more leverage than the Applicants' companies have now to impose restrictions on programmers who seek to grant online rights to competing OVDs, including by prohibiting these grants outright.

Interference With, or Discrimination Against, OVDs. New Charter will be able to harm competing OVD services on the public Internet portion of its broadband pipe. The Applicants 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 time. 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

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[1] *See* Letter from Pantelis Michalopoulos and Stephanie A. Roy, Counsel to DISH Network, to Marlene H. Dortch, FCC, MB Docket No. 15-149, Redacted PowerPoint Presentation at 22 (Feb. 12, 2016); Letter from Pantelis Michalopoulos and Stephanie A. Roy, Counsel to DISH Network, to Marlene H. Dortch, FCC, MB Docket No. 15-149 (Jan. 27, 2016); Letter from Pantelis Michalopoulos and Stephanie A. Roy, Counsel to DISH Network, to Marlene H. Dortch, FCC, MB Docket No. 15-149 (Jan. 20, 2016); and Letter from Pantelis Michalopoulos and Stephanie A. Roy, Counsel to DISH Network, to Marlene H. Dortch, FCC, MB Docket No. 15-149 (Dec. 14, 2015).

[2] *See* DISH Network Corporation, Petition to Deny, MB Docket No. 15-149, pp. 63-65 (Oct. 13, 2015) ("DISH Petition to Deny").

Charter.[3] 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 during their infancy.

Interconnection Fees. New Charter will also be able to thwart competing OTT services at the points of interconnection to the combined company's broadband network (in effect, the "on ramp" to the New Charter network).[4] Charter's settlement-free peering policy[5] does little to mitigate New Charter's ability to harm rival OVDs at this "choke point." Among other things, the duration of this policy is wholly insufficient, leaving New Charter free to impose unreasonable fees once the short life span of this commitment expires.[6]

Bundled Pricing. New Charter will also be able to undermine streaming services by manipulating the pricing of its broadband offerings to discourage or even prohibit customers from taking a standalone broadband product. By subsidizing its video service with broadband revenue, New Charter could price a combined broadband and video offering so as to induce customers to purchase New Charter's bundle of services instead of buying broadband from New Charter and video service from an OVD. New Charter could also limit consumer access to a standalone broadband product, or simply fail to offer a standalone broadband service entirely.

* * *

In short, DISH explained that this merger will give the combined company innumerable ways through which to thwart competing OVDs. The harm that would result from the use of ***any*** of the tactics described above could deal a significant blow, if not destroy, a fragile OVD service in its infancy. The Commission must deny the merger or, at the very least, solve all of the harms presented by this transaction, including the threats posed by the anti-competitive methods discussed herein.

Respectfully submitted,

/s/ Jeffrey H. Blum
Jeffrey H. Blum

[3] *Id.* at 55-58.

[4] *Id*. at 4.

[5] *See* Letter from Samuel L. Feder, Counsel to Charter Communications, to Marlene H. Dortch, FCC, MB Docket No. 15-149 (Jul. 15, 2015).

[6] DISH agrees with the concerns raised by Level 3 Communications regarding Charter's settlement-free peering policy. *See* Letter from Joseph C. Cavender, Level 3 Communications, LLC, to Marlene H. Dortch, FCC, MB Docket No. 15-149 (Oct. 20, 2015).

cc: William Lake
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