PROPOSED CONDITION: NEW CHARTER MUST CREATE ROOM ON ITS PLATFORM FOR INDEPENDENT NETWORKS FORCED TO ACCEPT ANTI-COMPETITIVE PROHIBITIVE EXHIBITION OVER-THE-TOP ("OTT") PROVISIONS

BACKGROUND

Charter's historic use of prohibitive exhibition clauses, commonly called prohibitive alternative distribution methods, or "ADMs" for short, is a clear anti-competitive practice. These clauses have hindered independent programmers, video competition in the marketplace, including small companies such as SkyAngel and large companies such as Intel and its former *On Cue* video product, and consumers. Several independent networks were carried by SkyAngel and were targeted to be distributed by *On Cue*. Further, such ADM provisions are inconsistent with the spirit, and arguably the clear language, of the carriage access rules, specifically Section 76.1301 *Prohibited Practices*, subsection (b) *Exclusive rights*.

Unfortunately, many independent networks are afraid to openly discuss this "little dirty secret" with regulatory and government officials for legitimate retaliatory concerns. Without the flourishment of OTT, the importance to the survival of an independent network in gaining carriage on the big cable networks has been well known. Former FCC Commissioner Michael Copps, while an active Commissioner stated:

> *"If an aspiring cable channel cannot win carriage on these big concentrated networks, its fate is sealed. It's doomed."* (Source: Seattle Times, Editorials/Opinions, Aug. 31, 2009)

To correct past harms and minimize the concerns of discriminatory, anticompetitive, and retaliatory behavior and to enhance the diversity of programming services in the interest of the public, the FCC should require "New Charter" to accept the following merger condition:

1. All alternative distribution method ("ADM") prohibition clauses in existing and future agreements with Charter Communications, Time Warner Cable, Advanced Newhouse (Bright House), and "New Charter" shall be deemed negated.

2. "New Charter" shall not retaliate against any programmer that: a.) offers its services via alternative distribution methods. b.) has raised alternative distribution method clauses with government agencies and elected officials. Such retaliation by "New Charter" shall be considered a violation of 76.1301 b and for such purposes only, an online video distributor shall be considered a multichannel video programming distributor.

§ 76.1301 Prohibited practices.

(a) ***Financial interest.*** No cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.

(b) ***Exclusive rights.*** No cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.

(c) ***Discrimination.*** No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

3. This condition shall apply to any Independent Programmer that can demonstrate that its affiliation agreement with Charter Communications has had a "prohibitive exhibition clause". If the Independent Programmer meets the requirements of a through g, then New Charter shall extend carriage, as specified below, within 60 days of closing the proposed merger.

    a. The Network does not have any common ownership with any MVPD or broadcaster and is thus an "Independent Programmer".
    b. Network is currently not carried in more than 10 percent of Charter Communications video households.
    c. Network is a 24/7 US owned national cable network.
    d. The network has been launched 24/7 for at least two years upon closing of the merger.
    e. The network is launched and carried in the US across at least 5 million homes.
    f. The network is launched on at least two of the following larger MVPDs, "Launched MVPDs": AT&T U-Verse TV, DirecTV, Dish Network, Verizon FiOS TV.
    g. The Network can demonstrate to the FCC that at least within 24 months of the merger closure date Charter and Network have or had an affiliation agreement with a Prohibitive Exhibition provision limiting the network from providing its linear feed via the internet.

    If the above criteria is met, then "New Charter" shall extend carriage as follows:

    - Carriage term of 10 years for carriage in all markets and all Systems within 90 days of Merger close date.
    - All other terms and conditions per the largest Launched MVPD.