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REDACTED – FOR PUBLIC INSPECTION

April 19, 2016

By ECFS

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

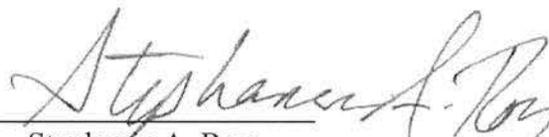
Re: Notice of *Ex Parte* Letter, Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, MB Docket No. 15-149

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 April 19, 2016. DISH has denoted with “**{{BEGIN HCI END HCI}}**” symbols where Highly Confidential Information has been redacted. A Highly Confidential version of this letter is being simultaneously filed with the Commission and will be made available under the terms of the *Protective Order*.

Please contact me with any questions.

Respectfully submitted,


Stephanie A. Roy
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”) submits this letter to request a meaningful standalone broadband condition to mitigate the anticompetitive harms of the Charter/TWC merger, should the Commission be inclined to approve this transaction. DISH provides the below condition in response to staff feedback regarding its standalone broadband proposal.¹

That condition should not just be limited to a requirement that New Charter provide high-speed broadband access on a standalone basis. If this was all that New Charter were required to do, the condition’s remedial intent could, and likely would, easily be defeated. Rather, New Charter should be required to offer standalone broadband services at reasonable market-based and non-discriminatory prices. Such standalone broadband services must be made available at a minimum speed of 60 Mbps download/4 Mbps upload, and otherwise at the same speeds, both download and upload, that New Charter offers with any bundle of one or more other New Charter services.

¹ See DISH Network Corp., Petition to Deny, MB Docket No. 15-149, at Exhibit A (Oct. 13, 2015).

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Simply put, OVDs sell video for the customer to bundle with her broadband connection. They cannot be successful if the only broadband service reasonably accessible to the customer is already bundled with the ISP's own video service, or if such broadband service is offered at a price so high as to make it economically undesirable to purchase on a standalone basis. The requirement for New Charter to offer standalone broadband services at reasonable market-based and non-discriminatory prices is necessary in light of the increasing propensity on the part of large ISPs to price standalone broadband uneconomically in order to bolster their other service offerings, thereby dealing a potentially lethal blow to OVDs.

The highly confidential documents submitted by the Applicants show that New Charter is ready and willing to impose a penalty on customers who wish to take only a standalone broadband service, and has done so. A condition requiring New Charter to make standalone broadband services available at reasonable market-based and non-discriminatory prices is moreover consistent with antitrust law on tying, which views a standalone offer of the tying product at a prohibitively high price as akin to not offering the product at all, and is necessary to counter the increasing use of unreasonable bundled discounts by large ISPs, and New Charter itself, as a tool of exclusivity. It is also consistent with the standalone broadband condition imposed on Comcast in its merger with NBCU.

I. The Transaction Should Not Be Approved Absent a Standalone Broadband Condition

Post-transaction, New Charter will provide high-speed broadband to 19.4 million households.² For these households, New Charter will stand between OVDs and their existing and potential customers. But the broadband gatekeeper does not want competitors to its own video service inside the gates. Both common sense and the voluminous evidence assembled by DISH in this proceeding point to the same certainty: New Charter will have an incentive to use the considerable means at its disposal to protect its own video services from the competition proffered by OVDs. Nor will New Charter's broadband business suffer from hurting OVDs, for a simple reason: most (about two-thirds) of New Charter's high-speed customers have nowhere else to go, and the rest have limited options and high switching costs. The forbearance of TWC's broadband customers when TWC was degrading Netflix's service illustrates this well—hurting OVDs would be almost all upside for an ISP such as post-merger Charter.

² Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, Public Interest Statement, MB Docket No. 15-149, at 28 (June 25, 2015) (“Charter Application”).

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- **To Be Meaningful, a Standalone Broadband Offer Should Not Be Uneconomic or Discriminatory**

If the merger is approved without this condition, New Charter would have an even handier weapon at its disposal: making it uneconomical to buy standalone broadband from New Charter. The business model of all pure OVDs relies on customers bringing their own broadband, for which customers already pay dearly. But there would be no standalone broadband *to* bring if the only economic package available to New Charter's broadband subscribers were through a bundle including the service that the OVD is trying to displace. A meaningful offer of standalone broadband at a reasonable market-based and non-discriminatory price is therefore necessary for all OVDs, and particularly essential to those OVDs such as *Sling TV* whose products compete directly with New Charter's video offerings.

- **A Requirement of Reasonable Market-based and Non-discriminatory Terms is Consistent With Antitrust Law**

The prohibition on uneconomic terms effectively does no more than track the antitrust precedent on tying. It is black letter law that unlawful tying is present when the unbundled product is offered at such uneconomic prices that the only realistic option for consumers is to buy the bundled offering. For example, courts have found that an illegal tie exists when the seller makes purchase of the tying and tied products together as a bundle the “only viable economic option.”³

Of course, OVDs should not have to resort to the expensive and uncertain proposition of an antitrust lawsuit and a multi-year court proceeding—even if relief is ultimately obtained, the harm may well have been done. The standalone broadband condition is necessary to mitigate the anticompetitive effects of this transaction.

³ See e.g., *United Shoe Machinery Corp. v. United States*, 258 U.S. 451, 464 (1922) (package discount might have an “effect . . . so onerous as to compel” the buyer to take the package); *Ways & Means, Inc. v. IVAC Corp.*, 506 F. Supp. 697, 701 (N.D. Cal. 1979), *aff'd*, 638 F.2d 143 (9th Cir. 1981) (“[S]eparate availability will not preclude antitrust liability where a defendant has established its pricing policy in such a way that the only viable economic option is to purchase the tying and tied products in a single package.”); *Nobel Sci. Indus., Inc. v. Beckman Instruments, Inc.*, 670 F. Supp. 1313, 1324 (D. Md. 1986), *aff'd*, 831 F.2d 537 (4th Cir. 1987) (same).

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- **A Requirement of Reasonable Market-based and Non-discriminatory Terms is Warranted In Light of the Increasing Use of Steep Discounts as a Tool of Exclusion**

This concern is not a hypothetical one.

In its *Comcast/NBCU* decision, the Commission recognized that the merged company would have the incentive and ability to use forced bundling and cross-subsidization to protect its video business, and adopted a standalone residential broadband condition as a result.⁴ The Commission understood that Comcast/NBCU's incentives would be to require customers interested in purchasing Comcast's broadband services to also purchase bundled services.⁵ Just like Comcast, New Charter could "hinder competition from DBS and OVD providers . . . by requiring a cable subscription in order to receive broadband services or by charging an excessive price for standalone broadband services."⁶ Since *Comcast/NBCU*, ISPs have shown an increasing propensity to price standalone broadband uneconomically in an apparent effort to foreclose the opportunities of independent OVDs.⁷ Consider some examples: Verizon currently

⁴ See *Applications of Comcast Corp., General Elec. Co. and NBC Universal, Inc., Memorandum Opinion and Order*, 26 FCC Rcd. 4238, 4362-63, Appendix A at D (2011) ("*Comcast/NBCU Order*"). The Commission determined that the standalone broadband condition would be minimally disruptive to Comcast since the company already offered such an option. See *id.* at 4279 ¶ 103.

⁵ See *id.* at 4279 ¶ 102; Netflix Comcast Petition at 30 ("The DOJ and the Commission recognized these incentives in their review of Comcast's acquisition of NBC Universal. The DOJ concluded that 'Comcast is the dominant high-speed ISP in much of its footprint and therefore could disadvantage OVDs in ways that would prevent them from becoming better competitive alternatives to Comcast's video programming distribution services.'") (citations omitted).

⁶ *Comcast/NBCU Order*, 26 FCC Rcd. at 4279 ¶ 102.

⁷ See e.g., Felix Simon, *Monopolizing Bandwidth*, Reuters (Feb. 17, 2014), <http://blogs.reuters.com/felix-salmon/2014/02/17/monopolizing-bandwidth/> (reporting that although Internet service is very cheap for cable companies to provide since their networks are already built, "the cable companies have every incentive to price broadband as high as possible, so as to make the marginal extra cost of getting TV as well as small as possible"); See Shalini Ramachandran, *Cord-Cutting: Cable's Offer You Can't Refuse*, Wall Street Journal (Nov. 13, 2012), <http://www.wsj.com/articles/SB10001424127887324073504578109513660989132> (quoting analyst Craig Moffett: Cable operators "recognize their most advantaged product is broadband . . . They don't want to sacrifice that advantage by giving the opportunity for customers to cherry pick their best product at a low price and take the rest of your services from somebody else. In effect, they are pricing [it] at a price that discourages you from taking broadband only."); Karl

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offers a 100 Mbps standalone Internet product for only \$10 less than its triple-play bundle that includes Internet of the same speed;⁸ TWC currently offers a 20 channel line-up, including premium channels, a Roku streaming player, and 50 Mbps Internet for \$49.99, while offering standalone Internet at the same speed for *\$15 more*;⁹ and even after being fined for non-compliance with the *Comcast/NBCU* broadband condition, Comcast still priced its standalone Internet service *higher* than its triple-play bundle,¹⁰ and told investors it planned to “just bundl[e] better” when attempting to merge with TWC.¹¹ New Charter will also have every incentive to use its bundling, cross-subsidy advantage to protect its video product.

Bode, *Press Realizes Carriers Jack Up Price of Stand Alone Broadband*, DSL Reports (Nov. 13, 2012), <http://www.dslreports.com/shownews/Press-Realizes-Carriers-Jack-Up-Price-of-Stand-Alone-Broadband-122034> (“ISPs jack up the cost of standalone Internet so users are less likely to ditch bundled television or phone services.”).

⁸ *Compare Fios Fastest Internet*, Verizon, <http://www.verizon.com/home/fios-fastest-internet/> (last visited Apr. 15, 2016), *with Services: Shop*, Verizon, <http://www.verizon.com/home/services/#Shop> (last visited Apr. 15, 2016). Verizon has historically made standalone Fios prohibitively expensive, offering customers standalone Internet for \$80 while offering a 290 channel TV-Internet bundle for just \$5 more. *See* Shalini Ramachandran, *Cord-Cutting: Cable’s Offer You Can’t Refuse*, Wall Street Journal (Nov. 13, 2012), <http://www.wsj.com/articles/SB10001424127887324073504578109513660989132> (pricing for New York market).

⁹ *Compare Select and Compare Services: All Packages*, Time Warner Cable, <http://www.time-warnercable.com/en/plans-packages/cable-internet.html> (last visited Apr. 15, 2016), *with Select and Compare Services: Internet*, Time Warner Cable, <http://www.timewarnercable.com/en/plans-packages/cable-internet.html> (last visited Apr. 15, 2016). TWC has previously offered a basic 20 Mbps Internet-TV bundle with video-on-demand service for just \$5 more than its standalone Internet offering of the same speed. *See* Shalini Ramachandran, *Cord-Cutting: Cable’s Offer You Can’t Refuse*, Wall Street Journal (Nov. 13, 2012), <http://www.wsj.com/articles/SB10001424127887324073504578109513660989132>.

¹⁰ *See id.* (Comcast’s “Blast Plus” promotion offered customers a triple-play bundle including 30 Mbps Internet for \$50 per month, while standalone Internet at the same speed cost \$70 per month).

¹¹ *See* Transcript of Deutsche Bank Conference at 3 (Mar. 10, 2014) (Comcast’s EVP: “[W]e would seek to bundle more and that is call center training, that’s teaching people to sell another RTU on a call, on a service call, fix a billing problem, upsell to a third product, so just bundling better.”); *see also* Transcript of Comcast/TWC Conference Call with Wall Street Investors, at 5

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II. Cross-subsidization

Applicants' own documents confirm this propensity, and have implied what they call a **{{BEGIN HCI END HCI}}** on subscribers purchasing standalone broadband.

The Applicants have claimed that they would not risk losing broadband customers for the sake of their video business. DISH has shown that, in the case of degradation of rival OVDs, this is a false dilemma: New Charter will be willing and able to degrade competing OVDs and thereby protect its video services without any substantial risk of losing broadband customers.¹² Additional evidence is provided by the fact that the Applicants appear to have consistently priced their standalone broadband offering and broadband/video bundles so as to protect their video service. They have done that because they have explicitly recognized that their video subscribers are more likely to defect than their broadband subscribers. These last seldom leave, as most of them have nowhere else to go.

Here is the rationale for protecting video, stated in a **{{BEGIN HCI**

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(Feb. 13, 2014) (Comcast's CFO: "[W]e are confident that revenue opportunities exist by including greater bundling penetration in residential[.]").

¹² See DISH Network Corp., Petition to Deny, MB Docket No. 15-149, at 4-5, 28-31 (Oct. 13, 2015) ("DISH Petition"); DISH Network Corp., Reply, MB Docket No. 15-149, at 3-4, 8, 10-13 (Nov. 12, 2015) ("DISH Reply"); Letter from Pantelis Michalopoulos, Counsel to DISH Network Corp., to Marlene H. Dortch, FCC, MB Docket No. 15-149 (Dec. 7, 2015).

¹³ **{{BEGIN HCI**

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The same document admits candidly {{BEGIN HCI

END HCI}}¹⁴

As TWC further explained: {{BEGIN HCI

END HCI}}¹⁵

The recommendation for the future? Even further {{BEGIN HCI

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Over the years, the Applicants' awareness of broadband subscribers' captive status and the greater choices enjoyed by video customers has not lessened. {{BEGIN HCI

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¹⁴ {{BEGIN HCI

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¹⁷ {{BEGIN HCI
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Similarly, when TWC {{BEGIN HCI
END HCI}}¹⁸

It is therefore no wonder that Charter's current pricing scheme includes a \$10 penalty for purchasing standalone service, which represents a 33% increase over the portion of the bundled price attributable to broadband, according to Charter's own website.¹⁹ The penalty, of course, would be even larger if the portion of the bundle price attributable to broadband was, in fact, less. Charter does not provide the basis for the allocation, and it alone has full and granular knowledge of its costs.

The strategies described here, combined with the previous evidence submitted by DISH about New Charter's incentive and ability to harm OVDs shows the necessity of a merger condition requiring New Charter to offer standalone broadband services at reasonable market-based and non-discriminatory prices and at a minimum speed of 60 Mbps download/4 Mbps upload, and otherwise at the same speeds (both download and upload) that New Charter offers in any bundle with one or more other New Charter services. In *Comcast/NBCU*, the Commission explicitly recognized the same incentives at play here, and reasoned that Comcast's "threat [to competition] would be reduced" by a standalone broadband condition.²⁰ Accordingly, the Commission required Comcast to offer service of at least 6 Mbps down at a price no greater of \$49.95 for three years.²¹ The Commission also required that the standalone offering be on equivalent terms and conditions to the most comparable broadband Internet access service in a bundled offering.²²

¹⁸ {{BEGIN HCI

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¹⁹ *See Packages*, Charter Communications, <https://www.charter.com/browse/content/packages> (last visited Apr. 13, 2016) (indicating that standalone Internet costs \$39.99 a month for twelve months. When Internet service is bundled with video, the cost of the broadband component is \$29.99/month (for 12 months) and the cost of the video component is \$59.99/month. As such, there is a \$10 penalty (\$39.99 minus \$29.99) to purchase broadband as a standalone product).

²⁰ *Comcast/NBCU Order*, 26 FCC Red. at 4279 ¶ 102.

²¹ *Id.* The Commission also required that if Comcast offered additional speeds in conjunction with other bundled service packages, Comcast must also offer such speeds on a standalone basis at reasonable, market-based prices. *Id.*

²² *Id.*

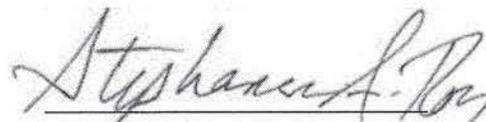
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III. Standalone Broadband Condition

DISH therefore proposes a condition, set forth in Attachment A, to mitigate the anticompetitive harms of the transaction to OVD providers. In brief, DISH's proposed condition states that New Charter must offer standalone versions of Charter's broadband Internet services at reasonable market-based and non-discriminatory prices and display any such standalone offer prominently. This condition would be in effect for at least 10 years, subject to renewal by the Commission.²³ New Charter's standalone broadband services must be offered at a minimum speed of 60 Mbps download/4 Mbps upload, and otherwise at the same speeds (both download and upload) that New Charter offers in any bundle of one or more other New Charter services. The condition also includes a reporting requirement to the Commission to ensure compliance during the term of the condition.

This condition will ensure that New Charter customers who wish to subscribe to an OVD service without a cable TV bundle can easily do so by purchasing a standalone broadband service from New Charter. As the Commission explained in *Comcast/NBCU*, such a condition would reduce harm to online video distribution "by ensuring that consumers have the flexibility to choose an MVPD provider that is separate from their broadband provider."²⁴

Respectfully submitted,


Pantelis Michalopoulos
Stephanie A. Roy
Counsel for DISH Network Corp.

²³ The Commission adopted a seven-year term for the conditions in the Comcast/NBCU merger where there was no increase in broadband concentration, unlike here. See *id.* Appendix A. That difference, among other things, justifies a ten-year timeframe.

²⁴ See *Comcast/NBCU Order*, 26 FCC Rcd. at 4279 ¶ 102.

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Appendix A

Proposed Standalone Broadband Condition – MB Docket No. 15-149

Definitions

“Company” means Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership both individually and collectively, including the combined entity of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership, as well as any successor-in-interest, affiliate or subsidiary directly or indirectly controlling, controlled by, or under common control with Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership, or the combined entity of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership.

“Broadband Internet Access Services” means a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. This term also encompasses any service that is providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in any FCC approval order of the merger.

Condition

For a period of at least ten years from the transaction’s close,

- (i) Company shall offer standalone Broadband Internet Access Services, sold separately from any bundled product and/or service offering. Company shall offer such standalone Broadband Internet Access Services at reasonable market-based and non-discriminatory prices. The standalone Broadband Internet Access Services must be offered at a minimum speed of 60 Mbps download/4 Mbps upload, and otherwise at the same speeds (both download and upload) that Company offers to customers who purchase any bundle of one or more other Company service.
- (ii) Starting no later than 30 days after the date of this Order, Company shall visibly offer and actively market standalone retail Broadband Internet Access Service, including but not limited to (a) providing a linkable web page devoted exclusively to describing (e.g., price and speed) and permitting online purchase of all retail Broadband Internet Access Service standalone options; (b) running at least one major advertising promotion of the 60 Mbps download/4 Mbps upload standalone retail Broadband Internet Access Service offering annually; and (c) ensuring that the standalone Broadband Internet Access Service offering appears with

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prominence equal to that of bundled offerings on any product list or in any window, menu or other similar place on any call center screen.

- (iii) Within 30 days from the date of this Order, annually thereafter and upon any price adjustment of a standalone Broadband Internet Access Service offering, Company shall provide to the Commission a report describing: (a) its compliance with this condition, including the number of standalone Broadband Internet Access Service lines provisioned; (b) the standalone Broadband Internet Access Service speeds and pricing being offered to customers in its top 30 markets; (c) the Broadband Internet Access Service speeds and pricing being offered as part of each package of one or more Company products and/or services in its top 30 markets as well as the package price; and (d) the prices and speeds at which competitors offer standalone Broadband Internet Access Service (to the extent known by Company) in its top 30 markets.