BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the matter of Joint Application of Charter Communications, Inc.; Charter Fiberlink CACCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC (U6878C).	Application 15-07-009 (Filed July 2, 2015)

OPENING BRIEF OF DISH NETWORK CORPORATION

MARCH 1, 2016

Jeffrey H. Blum, Senior Vice President
& Deputy General Counsel
DISH NETWORK CORPORATION
1110 Vermont Avenue, NW, Suite 750
Washington, D.C. 20005
(202) 463-3703
Jeffrey.Blum@dish.com

and

Richard H. Levin, Attorney at Law
309 South Main St.
P.O. Box 240
Sebastopol, CA 95473-0240
Tel.: (707) 824-0440
rl@comrl.com

Counsel for DISH Network Corporation

I. Introduction and Summary

DISH Network Corporation ("DISH") respectfully opposes the above-referenced acquisition of Time Warner Cable Inc. ("TWC") and Bright House Networks ("BHN") by Charter Communications, Inc. ("Charter") (together, the "Applicants"). Charter, TWC and BHN have not demonstrated, based on their Application, that this merger would serve the public interest. DISH urges the California Public Utility Commission ("CPUC") to deny this transaction as presented by the Applicants.[1]

This merger would empower the combined company to hurt or destroy online video rivals, including our Sling TV over-the-top ("OTT") video service, through its control over the broadband pipe. The merger would also enable the combined company to harm the broadband-reliant services provided by MVPDs. The combined new Charter ("New Charter") would serve almost 30 percent of the homes in the United States that have broadband speeds of at least 25 Mbps ("high-speed").

Among other harms, this transaction would exacerbate the consolidation of the broadband market both nationally and in California. This transaction will create a duopoly in the market for high-speed broadband service, as it will result in two broadband providers – New Charter and Comcast – controlling at *least* 70% and possibly as high as 90% of the nation's high-speed broadband homes between them. New Charter and Comcast's massive control of the high-speed broadband market would allow the companies to coordinate efforts through collusion or parallel conduct to reduce competition, while raising prices for consumers. The impact of this transaction would be especially acute for broadband deployment in California, given that New

[1] Subsidiaries of DISH include a multichannel video programming distributor ("MVPD") and an online video distributor ("OVD"), both of which compete with Charter, TWC and BHN.

Charter would be the dominant broadband provider in California (particularly in 10 Southern California counties) and approximately 70 percent of those households will have no alternative high-speed broadband provider.

DISH has provided a number of submissions to the Federal Communications Commission ("FCC") that detail the broadband consolidation threatened by this transaction. The submissions are available at the following links:

- *October 13, 2015 DISH Network Corp. Petition to Deny* (discussion of duopoly at 27-32): http://apps.fcc.gov/ecfs/comment/view?id=60001303632

- *November 23, 2015 DISH Network Corp. Ex Parte* (providing updated duopoly market share information): http://apps.fcc.gov/ecfs/document/view?id=60001342681

II. This Transaction Threatens Serious Harms

As a result of this transaction, New Charter will have an increased incentive to harm new and emerging OTT services – like our Sling TV service – that compete with the combined company's video offerings.

DISH has provided a number of submissions to the FCC that detail New Charter's incentive and ability to harm OTT services. The submissions are available at the following links:

- *December 21, 2015 DISH Network Corp. Ex Parte*: http://apps.fcc.gov/ecfs/document/view?id=60001389570

- *January 20, 2016 DISH Network Corp. Ex Parte* (discussion of New Charter's incentive and ability to harm OTT at 5-13): http://apps.fcc.gov/ecfs/document/view?id=60001409180

- *January 27, 2016 DISH Network Corp. Ex Parte* (discussion of how Charter views OTT as a threat at 5-11): http://apps.fcc.gov/ecfs/document/view?id=60001415333

- *February 12, 2016 DISH Network Corp. Ex Parte* (includes PowerPoint presentation of the competitive threats/harms of this transaction): http://apps.fcc.gov/ecfs/document/view?id=60001427474

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. 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.

DISH has provided a number of submissions to the FCC that detail Charter's views on UBP. The submissions are available at the following links:

- *December 14, 2015 DISH Network Corp. Ex Parte*: http://apps.fcc.gov/ecfs/document/view?id=60001356239
- *January 20, 2016 DISH Network Corp. Ex Parte* (discussion of Charter's use of UBP at 2-3; 13-14): http://apps.fcc.gov/ecfs/document/view?id=60001409180
- *January 27, 2016 DISH Network Corp. Ex Parte* (discussion of Charter's use of UBP at 11-16): http://apps.fcc.gov/ecfs/document/view?id=60001415333

Contractual Restrictions. This merger will give New Charter significant additional leverage when negotiating with third-party programmers. 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.

DISH has provided a number of submissions to the FCC that detail New Charter's ability to harm OVDs through contractual restrictions. The submissions are available at the following links:

- *October 13, 2015 DISH Network Corp. Petition to Deny* (discussion of programming harms at 63-65): http://apps.fcc.gov/ecfs/comment/view?id=60001303632
- *January 20, 2016 DISH Network Corp. Ex Parte* (discussion of programming harms at 4; 15-16): http://apps.fcc.gov/ecfs/document/view?id=60001409180

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 Charter. 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.

DISH has provided a number of submissions to the FCC that detail New Charter's ability to harm OVDs through blocking or discrimination on the public Internet. The submissions are available at the following links:

- *October 13, 2015 DISH Network Corp. Petition to Deny* (discussion of harm via the public Internet at 55-58): http://apps.fcc.gov/ecfs/comment/view?id=60001303632
- *November 6, 2015 DISH Network Corp. Ex Parte* (discussion of harm via the public Internet at 3): http://apps.fcc.gov/ecfs/document/view?id=60001333514

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). Charter's settlement-free peering policy 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.

DISH has provided a number of submissions to the FCC that detail New Charter's ability to thwart OVDs at the point of interconnection. The submissions are available at the following links:

- *October 13, 2015 DISH Network Corp. Petition to Deny* (discussion of harm via interconnection at 4-5; 56-57): http://apps.fcc.gov/ecfs/comment/view?id=60001303632
- *February 26, 2016 DISH Network Corp. Ex Parte* (discussion of harm via interconnection at 3): http://apps.fcc.gov/ecfs/document/view?id=60001519960

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.

DISH has provided a submission to the FCC that details New Charter's ability thwart OVDs via predatory pricing of its bundle of video and broadband services. The submission is available at the following link:

- *February 26, 2016 DISH Network Corp. Ex Parte* (discussion of predatory bundled pricing at 3): http://apps.fcc.gov/ecfs/document/view?id=60001519960

III. This Transaction Will Not Benefit the Public Interest

In addition, the Applicants have also failed to show that the purported benefits of this merger are transaction specific or will serve the public interest. For example, Charter cannot plausibly claim that investment and buildout improvements are a benefit of this transaction, because they would likely have occurred absent the transaction. But that is precisely what Charter has attempted to do: for every milestone and associated commitments that Charter has set forth, there is substantial evidence that most—if not all—of the claimed investment and buildout was already planned and will likely occur with or without the transaction.

DISH has provided a number of submissions to the FCC regarding the illusory benefits of this transaction. The submissions are available at the following links:

- *October 13, 2015 DISH Network Corp. Petition to Deny* (discussion of illusory benefits at 32-42): http://apps.fcc.gov/ecfs/comment/view?id=60001303632
- *November 12, 2015 DISH Network Corp. Reply* (discussion of illusory benefits at 24-31): http://apps.fcc.gov/ecfs/comment/view?id=60001308509
- *November 30, 2015 DISH Network Corp. Ex Parte* (outlining the illusory claimed benefits of the transaction in the case of BHN): http://apps.fcc.gov/ecfs/document/view?id=60001347263
- *January 4, 2016: DISH Network Corp. Ex Parte* (outlining the illusory claimed benefits of the transaction in the case of TWC): http://apps.fcc.gov/ecfs/document/view?id=60001398734

IV. Conclusion

In short, this merger would empower New Charter to degrade the performance of rival OVDs and MVPDs in the knowledge that it is either extremely unlikely or downright impossible for New Charter's broadband subscribers to punish it by migrating to another high-speed ISP.

The purported public interest benefits of this merger do not outweigh its many harms. As presented by the Applicants, the Commission should deny this merger.

Respectfully submitted,

Jeffrey H. Blum, Senior Vice President
& Deputy General Counsel
DISH NETWORK CORPORATION
1110 Vermont Avenue, NW, Suite 750
Washington, D.C. 20005
(202) 463-3703
Jeffrey.Blum@dish.com

and

/s/
Richard H. Levin
Attorney at Law
309 South Main Street
P.O. Box 240
Sebastopol, CA 95472
(707) 824.0440
Email: rl@comrl.com

Counsel for DISH Network Corporation

Dated: March 1, 2016