

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

In the Matter of Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CCO, 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 No. 15-07-009
(Filed July 2, 2015)

OPENING BRIEF OF THE WRITERS GUILD OF AMERICA, WEST INC.

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I. SUMMARY AND INTRODUCTION

Writers Guild of America, West, Inc. (“WGAW”) submits this Brief in the above-referenced proceeding in consideration of the proposed transfers of control between Charter Communications, Inc. (“Charter”); Charter Fiberlink CA-CCO, LLC; Time Warner Cable Inc. (“Time Warner Cable” or “TWC”); Time Warner Cable Information Services (California), LLC; Advance/Newhouse Partnership (“Advance/Newhouse”); Bright House Networks, LLC (“Bright House” or “BHN”); and Bright House Networks Information Services (California) (collectively, “Joint Applicants”). WGAW’s Brief is in response to the Scoping Memo and Ruling (“Scoping Memo”) promulgated by the Assigned Commissioner and Administrative Law Judge (“ALJ”) on November 13, 2015 and the Presiding Officer’s Ruling Modifying Schedule of Proceeding issued February 11, 2016.

With this transaction, Charter proposes to acquire Time Warner Cable and Bright House, roughly quadrupling in size and becoming the nation’s second largest Internet Service Provider (“ISP”), with a 23% market share of high-speed broadband nationally.¹ In California, where Charter currently serves census blocks that include 12% of the state population, the post-merger entity (“New Charter”) will serve census blocks representing 53% of the population. Comcast Corporation (“Comcast”), the nation’s largest ISP, will serve much of the remainder of the state, and together the two companies’ footprints will encompass 86% of the state population. If this merger is approved, the increased concentration in broadband distribution combined with a lack of local competition will harm the public interest.

The proposed transfers will have an adverse impact on broadband competition, affordability and investment, and will negatively affect state and local economies, while offering

¹ Charter Communications, Inc., Charter-TWC-BHN Transaction Update (Form 425) (Dec. 3, 2015), *available* at <http://www.sec.gov/Archives/edgar/data/1091667/000109166715000302/a120215chtr425resourcecent.htm> (“Joint Applicants Transaction Update”).

no measures that would sufficiently mitigate these harms. The transaction will undermine broadband affordability by removing TWC's lower-priced service tiers from the market, and will eliminate benchmark competition and potential overbuilding by any of the Joint Applicants. It will also increase New Charter's incentive to impose measures such as data caps or usage-based billing, which will hurt broadband affordability. Finally, the transaction will reduce the number of competitors in the national market for broadband and the number of ISPs serving California. This poses significant harm to the upstream online content markets whose future is intertwined with goals such as broadband deployment, investment and affordability, and whose growth has supported state and local economies.

WGAW believes that the California Public Utilities Commission ("CPUC" or "Commission") should deny these transactions, and that it is within the CPUC's jurisdiction to do so based on a finding that the transaction will harm competition and will run counter to public interest criteria laid out in Pub. Util. Code §854(c). However, should the CPUC decide to approve the transaction, it must require strong and enforceable conditions to mitigate the "significant adverse consequences" that will result without adequate protections. Such conditions should include:

- Strong protection for affordable standalone broadband options, including a prohibition on imposition of data caps or usage-based billing for ten years
- Expansion of Joint Applicants' proposed low-income broadband program in order to increase effectiveness
- Adherence to the entirety of the Commission's Open Internet rules for ten years
- Concrete build-out commitments for California
- Platform neutrality protections

II. WRITERS GUILD OF AMERICA, WEST, INC.

WGAW is a labor organization headquartered in Los Angeles that represents more than 8,000 professional writers of film, television, online video programming, local news and documentaries. Virtually all of the entertainment programming and a significant portion of news programming seen on television and in theaters are written by WGAW members and the members of our affiliate, Writers Guild of America, East (jointly, “WGA”). More than 7,000 Guild members live in California and make significant contributions to the state and local tax base. In 2014, WGAW members reported \$1 billion in earnings and \$383 million in residual compensation from reuse of written material.²

In recent years, WGA members have benefitted from the advent and growth of the online video market, which has been enabled by the increased availability of high-speed Internet. WGA members now create original video programs offered by online video distributors (“OVDs”) such as Netflix, Amazon, Hulu and Crackle. Almost four hundred WGAW members have reported working on original online video programs, generating more than \$21 million in income. Writers have also benefited from the growth in services that make television series and feature films available online. WGAW members have earned almost \$90 million in residual income from online services licensing or selling television series and feature films.

III. STANDARD OF REVIEW

The standard of review for this transaction is whether the transfers, on balance, serve the public interest, under Cal. Pub. Code §854(c). Additionally, under Cal. Pub. Code §854(e), Joint Applicants bear the burden of proof, requiring an affirmative showing that this standard has been

² Writers Guild of America West, Annual Financial Report at 2 (June 29, 2015), *available at* http://www.wga.org/uploadedFiles/who_we_are/annual_reports/annualreport15.pdf.

met.³ The Code enumerates eight factors which help to delineate the public interest, including whether the transaction will “[b]e beneficial on an overall basis to state and local economies”⁴ and whether the transaction will “[p]rovide mitigation measures to prevent significant adverse consequences which may result.”⁵

However, in evaluating such a transaction, the Commission’s consideration of the public interest is not limited to the factors laid out in §854(c). As the Commission noted in D.00-06-079, “[O]ur decisions over the years have laid out a number of factors that should be considered in making the determination of whether a transaction will be adverse to the public interest.” Specifically, the Commission confirmed that “[a]ntitrust considerations are also relevant to our consideration of the public interest.”⁶ The importance of including competitive effects in the definition of the public interest was reiterated recently in both the Proposed Decision (“PD”) and Alternate Proposed Decision (“APD”) issued in this Commission’s review of the Comcast-TWC merger. The Comcast APD states, “[C]ompetition is a relevant factor in weighing the public interest and is one of the factors that must be considered in the Commission’s decision-making process. Specifically, the Commission must take into account any antitrust implications and competitive considerations when it weighs the public interest.”⁷ In making this finding, the Comcast APD relied on substantial precedent, including the *Northern California Power Agency*

³ Pub. Util. Code § 854(e).

⁴ Pub. Util. Code § 854(c)(6).

⁵ Pub. Util. Code § 854(c)(8).

⁶ In the Matter of Qwest Communications Corporation, LCI International Telecom Corp., USLD Communications, Inc., Phoenix Network, Inc., and U S West Long Distance, Inc., and U S West Interprise America, Inc., D.00-06-079 (Jan. 22, 2000) at 14.

⁷ Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a) and related transactions, A.14-04-013 and A.14-06-12, *Alternate Proposed Decision Denying Application to Transfer Control* (Apr. 10, 2015) at 19, n.29 (“Comcast-TWC APD”), citing *Northern California Power Agency (NCPA) v. Public Utilities Com. (PUC)*, 5 Cal. 3d 370, 377 (1971) at 380.

v. Public Utilities Commission decision, in which the California Supreme Court noted that “[t]he Commission must place the important public policy in favor of free competition in the scale along with the other rights and interest of the general public” and that this requires findings of fact which address antitrust considerations.⁸ Such findings include “definition of relevant market,” “determination of effect upon competition,” and “finding as to the reasonableness of any restraint.”⁹

It is therefore within the Commission’s jurisdiction to assess and issue findings on how this transaction will affect competition in broadband and the distribution of online video programming, which has been a key driver of broadband demand. This is reinforced by the authority of the Commission cited above, as such issues fall under the general rubric of “competitive considerations” of the transaction, and by the Commission’s Scoping Memo in this proceeding, which incorporates the eight public interest criteria in §854(c), as well as three further issues for evaluation of the transaction, including “How will the Transaction affect broadband deployment and/or affordability?”¹⁰

Further, as the Comcast APD notes, the Commission’s jurisdiction to review broadband competition in the context of these transactions is also “entirely consistent with pro-competitive State policy embedded in other sections of the Public Utilities Code.”¹¹ The Comcast APD cites sections of Pub. Util. Code § 709 regarding the State’s goals regarding telecommunications, which include “[t]o promote lower prices, broader consumer choice, and avoidance of anticompetitive conduct” and “[t]o remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower

⁸ *NCPA v. PUC*, 5 Cal. 3d at 379.

⁹ *Id.* at 380.

¹⁰ Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge in Application 15-09-007 (Nov. 13, 2015) at 5 (“Scoping Memo”).

¹¹ Comcast-TWC APD at 24.

prices, and more consumer choice.”¹² In addition, a Ruling issued in the Commission’s Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California notes that the Federal Communications Commission (“FCC”) 2015 Open Internet Order affirms the role of states in regulating and assessing broadband despite its interstate nature, and confirms that broadband “...is an important aspect of any analysis of competition in California.”¹³

As we outline in this brief, the transaction’s effect on the online video market is a competitive consideration on its own. The online video market is also intrinsically tied to demand for high-speed broadband and therefore the transaction’s effect on online video will impact the issues of broadband competition, investment, affordability and deployment. This is because the online video market and the broadband market complement each other, forming a “virtuous cycle” of investment and innovation. This fact is the foundation of the FCC’s broadband regulations. As described in the 2015 Open Internet Order, the FCC’s interpretation is that “rules to protect Internet openness promote broadband deployment via the virtuous cycle”¹⁴ because “when a broadband provider acts as a gatekeeper [i.e., by interfering with online content or edge providers], it actually chokes consumer demand for the very broadband product it can supply.”¹⁵ Joint Applicants’ testimony substantially reinforces this point, noting that “[broadband] subscribers are likely to take advantage of speed by consuming more Online Video Distributor (“OVD”) services. The primary rationale for such speed increases is to *facilitate* use

¹² *Id.*, citing Pub. Util. Code §§ 709(f) and (g).

¹³ Order Instituting Investigation to Assess the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Limited Rehearing of Decision (D.) 08-09-042, I.15-11-007, *Ruling on Pending Motions and Issues Discussed at January 20, 2016 Prehearing Conference* (Feb. 4, 2016) at 5, citing Protecting and Promoting the Open Internet, *Report and Order on Remand, Declaratory Ruling, and Order*, GN Docket No. 14-28, 30 FCC Rcd. 5601, 5721-5722, ¶ 276, n.708 and 5803, ¶ 431, n.1276 (2015) (“*2015 Open Internet Order*”).

¹⁴ *2015 Open Internet Order*, 30 FCC Rcd. at 5660, ¶ 137.

¹⁵ *2015 Open Internet Order*, 30 FCC Rcd. at 5608, ¶ 20.

of streaming services.”¹⁶ The Comcast APD also supports this view, noting, “Even if we may not regulate the terms and conditions on which Comcast sells Internet access to content providers, we may take note of the potentially adverse consequences of Comcast’s use of its market power against content providers on the deployment of broadband in California.”¹⁷ Therefore, review of the issues related to the transaction’s competitive effect on online video and broadband is both relevant and within the jurisdiction of this Commission.

IV. PROPOSED TRANSACTIONS

In this transaction, Charter Communications, the nation’s sixth-largest ISP¹⁸ and seventh-largest multichannel video programming distributor (“MVPD”),¹⁹ proposes to acquire Time Warner Cable and Bright House Networks, increasing in size more than threefold and emerging from the transaction as the nation’s second-largest ISP and third-largest MVPD with 19.4 million broadband customers and 17.3 million video customers.²⁰ New Charter is also vertically integrated into upstream content markets through the ownership stake of John Malone, who also owns controlling stakes in programmers Starz and Discovery.²¹

In the provision of broadband, New Charter will be second in size only to Comcast, with 22.8 million customers. The post-merger landscape both nationally and in the state of California will be dominated by these two firms. While New Charter will serve census blocks representing

¹⁶ Exhibit JA-4, Scott-Morton Opening Testimony, Exhibit A at 9, ¶ 26.

¹⁷ Comcast-TWC APD at 72, citing the authority of the CPUC under Section 706(a) of the 1996 Telecommunications Act. 47 U.S.C. § 1302(a).

¹⁸ Press Release, Leichtman Research Group, About 645,000 Add Broadband in the Third Quarter of 2015 (Nov. 17, 2015), <http://www.leichtmanresearch.com/press/111715release.html>.

¹⁹ Press Release, Leichtman Research Group, Major Pay-TV Providers Lost About 190,000 Subscribers in 3Q 2015 (Nov. 16, 2015), <http://www.leichtmanresearch.com/press/111615release.html>.

²⁰ Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CCO, 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 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), A.15-07-009 (Jul. 2, 2015) at 18 (“CPUC Application”).

²¹ Exhibit WG-1, Blum-Smith Reply Testimony at 18-21.

53% of the state population, New Charter and Comcast together will cover 86%.²² In the ten-county region of Southern California, New Charter alone will pass 82% of households.²³

Nationally, these two companies will control between 70%²⁴ and 90%²⁵ of the high-speed (25 Mbps or higher) broadband market. The consolidation of control over high-speed broadband will give Comcast and New Charter the power to determine the development of broadband and online content markets, to the detriment of Californians.

V. TRANSACTION WILL REDUCE COMPETITION IN BROADBAND

This transaction will remove two competitors from the national market for broadband, a market which has been recognized both by the FCC and this Commission. Joint Applicants claim a *de minimis* reduction in competition in California due to the lack of overlap in their customer-facing service areas,²⁶ but they ignore the nature of the two-sided broadband market. On the other side of this market, edge or content providers must contend with the terminating monopoly power of ISPs that control access to the customers on their last-mile networks. This side of the market is relevant for purposes of the Commission's competitive analysis of this transaction because the consolidation of consumer-facing ISPs lessens the number of choices for edge providers to reach their target audiences, increasing the power that the merged company will hold over those edge providers, particularly OVDs. The FCC review of the proposed Comcast-TWC merger included an assessment of the impact on national distribution markets, including

²² *Id.* at 4:4-6.

²³ Exhibit ORA-1, Selwyn Reply Testimony at 9:5-6.

²⁴ Jon Brodtkin, *Comcast and Charter may soon control 70% of 25Mbps Internet subscriptions*, Ars Technica (Jan. 26, 2015), <http://arstechnica.com/business/2016/01/comcast-and-charter-may-soon-control-70-of-25mbps-internet-subscriptions/>.

²⁵ Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149, *Petition to Deny of Dish Network Corporation* (Oct. 13, 2015) at 26-27, n.95 ("Dish FCC Petition to Deny").

²⁶ Exhibit JA-1, Falk Errata Opening Testimony at 23:4-5.

broadband, where the merger would have substantially increased Comcast's market power over OVDs that seek national distribution.²⁷

Despite this national nature of OVDs, the instant transaction will also have specific effects in California, where it will see two competitors exit the state and Southern California markets. Just as the PD and APD issued in the Comcast-TWC proceeding note that “the proposed merger between Comcast and Time Warner [Cable] reduces the possibilities for content providers to reach the California broadband market,”²⁸ this merger will produce a similar result within the state.

a. The relevant market consists of wired broadband connections of 25 Mbps or higher

In defining the market for analysis and determining the level of competition, it is necessary to exclude wired connections offering speeds less than 25 Mbps. The relevance of this speed threshold has been established by the FCC, and affirmed in its most recent Broadband Progress Report. The FCC noted that, in reaching the 25 Mbps download/3 Mbps upload speed threshold for “advanced telecommunications services,” “the Commission relied in particular on the expanding demand for online video services,”²⁹ acknowledging the importance of defining such capabilities in relation to the data intensive applications and services that customers are demanding and using. The FCC specified at the time that “[t]rends in deployment and adoption,

²⁷ Exhibit WG-1, Blum-Smith Reply Testimony at 3:7-10, citing Jonathan Sallet, Federal Communications Commission General Counsel, Remarks as Prepared for Delivery at the Telecommunications Policy Research Conference at 12 (Sept. 25, 2015), *available at* <https://www.fcc.gov/document/speech-general-counsel-jon-sallet-lessons-recent-merger-reviews> (“Sallet Remarks”).

²⁸ Joint Application of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC, and Bright House Networks Information Services (California), LLC for Expedited Approval of the Transfer of Control of Time Warner Cable Information Services (California), LLC (U6874C); and the Pro Forma Transfer of Control of Bright House Networks Information Services (California), LLC (U6955C), to Comcast Corporation Pursuant to California Public Utilities Code Section 854(a) and related transaction, A.14-04-013 and A.14-06-12, *Proposed Decision Granting With Conditions Application to Transfer Control* (Feb. 13, 2015) at 68 (“Comcast-TWC PD”); Comcast-TWC APD at 74.

²⁹ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Improvement Act, *2016 Broadband Progress Report*, GN Docket No. 15-191, ¶ 14 (2016) (“*2016 Broadband Progress Report*”).

the speeds that providers are offering today, and the speeds required to use high-quality video, data, voice, and other broadband applications all point at a new benchmark”³⁰ and that “[v]ideo continues to drive demand for faster broadband.”³¹ The CPUC recently acknowledged and affirmed the applicability of the 25 Mbps definition for assessing competition in its recent Order Instituting Investigation into the state of telecommunications competition in California.³²

The appropriate market definition must also exclude wireless connections from the competitive analysis. The FCC recently reiterated in its 2016 Broadband Progress Report, “As they currently exist, fixed and mobile broadband services are not functional substitutes for one another....”³³ Among the reasons for this determination are that, though wireless broadband has increased in speed generally, other factors such as consistency of speed and per gigabit cost prevent wireless and wired services from being interchangeable.³⁴ As WGAW’s testimony documents, the high cost of wireless service prohibits substitution of a wireless connection for a wired one for purposes of online video consumption.³⁵ Joint Applicants’ testimony also supports exclusion of wireless broadband. While including wireless carriers in the list of “other choices of broadband providers” that Charter or New Charter customers enjoy,³⁶ Joint Applicants’ witness Dr. Fiona Scott Morton notes that “[c]urrently AT&T/Verizon have usage allotments that make it economically unattractive to use wireless as an in-home broadband service. T-Mobile and Sprint

³⁰ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, *2015 Broadband Progress Report and Notice of Inquiry On Immediate Action to Accelerate Deployment*, GN Docket No. 14-126, 30 FCC Red. 1375, 1377, ¶ 3 (2015) (“*2015 Broadband Progress Report*”).

³¹ *Id.* at 1395, ¶ 30.

³² Order Instituting Investigation to Assess the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Limited Rehearing of Decision (D.) 08-09-042, I.15-11-007 (Nov. 5, 2015) at 21.

³³ *2016 Broadband Progress Report*, ¶ 17.

³⁴ *Id.*, ¶¶ 29, 32, 33-34.

³⁵ Exhibit WG-1, Blum-Smith Reply Testimony at 5:11- 6:3. Using a mobile device to replace an average month of television viewing, currently 138 hours, could cost over \$710 per month using a tablet or \$300 per month using a smartphone.

³⁶ Exhibit JA-4, Scott-Morton Opening Testimony, Exhibit B at 49, ¶ 136.

do offer “unlimited” plans, however, they either deprioritize traffic above usage thresholds or limit data roaming usage.”³⁷ It is appropriate to consider the competitive market in which New Charter will operate to consist of wired connections over 25 Mbps.

b. Relevant markets lack competition

Within this properly-defined market New Charter will control 23% of wired, 25 Mbps connections nationally.³⁸ However, the rest of the market will be dominated by Comcast, the largest ISP. In combination, the two companies will control between 70%³⁹ and 90%⁴⁰ of high-speed connections in the US, resulting in a broadband duopoly. The level of national control is compounded by a lack of local competition; nationally, homes in just 34.5% of New Charter’s footprint will have a wired, 25 Mbps alternative.⁴¹

WGAW’s testimony provides an analysis of state and local broadband availability at the census block level, based on State Broadband Initiative data.⁴² In California, New Charter will offer service to census blocks representing 53% of the state population, an increase from the 12% that Charter’s footprint currently covers. Sixty-nine percent of the population in New Charter’s territory will have no alternative provider offering wired, 25 Mbps or higher service.⁴³ New Charter and Comcast’s combined footprints will cover 86% of the state population.⁴⁴ In Los Angeles County, a key market in the transaction, New Charter’s footprint will cover 98% of

³⁷ *Id.* at 51, ¶138 & n.187.

³⁸ Joint Applicants Transaction Update.

³⁹ Brodtkin, *supra* note 24.

⁴⁰ DISH FCC Petition to Deny at 26-27, n.95.

⁴¹ Exhibit WG-1, Blum-Smith Reply Testimony at 3:16-4:1.

⁴² *Id.* at 4, n.9 and Exhibit A. Data provided by US Department of Commerce, National Telecommunications and Information Administration, State Broadband Initiative, California (CSV format June 30, 2014); and Missouri Census Data Center, Standard Summary File 1 (2010 Census) Extract Assistant, California, http://mcdc.missouri.edu/cgi-bin/broker?_PROGRAM=websas.sf12010x_extract_menu.sas&_SERVICE=appdev&st=.

⁴³ *Id.* at 4:3-4.

⁴⁴ *Id.* at 4:4-6.

residents, and 70% of the population will have no alternative high-speed provider.⁴⁵ ORA's witness, Dr. Lee Selwyn, finds a similar lack of competition in his analysis of broadband availability in the 10 counties comprising Southern California, where New Charter will pass 82% of households⁴⁶ and 69.4% of those households will lack a high-speed alternative.⁴⁷ The increased size and lack of competition will make New Charter a powerful distributor with increased means and ability to harm broadband competition and the development of upstream content markets.

VI. TRANSACTION WILL HARM THE ONLINE VIDEO MARKET AND BROADBAND COMPETITION

This transaction will give New Charter increased incentive and ability to harm the online video market, a pro-competitive development that has increased consumer choice and competition in video programming markets. For California in particular, the online video market supports economic growth through the rise in content production for online distribution channels. The development of new upstream content markets is also inextricably linked to broadband competition, investment, demand and adoption because online video drives increased demand for and investment in advanced technologies. However, New Charter will have an increased incentive and ability to use its power as a large broadband distributor to reduce the competitive threat of the online video market.

a. The Transaction's effect on the online video market is integral to this proceeding

The Internet enabled the rise of the online video market, which has, in turn, driven demand for the high-speed broadband connections necessary to provide a robust viewing experience for consumers. This feedback loop forms a "virtuous cycle" of innovation which

⁴⁵ Exhibit WG-1, Blum-Smith Reply Testimony at 4:7-9.

⁴⁶ Exhibit ORA-1, Selwyn Reply Testimony at 9:5-6.

⁴⁷ *Id.* at 9:6-8.

promotes broadband competition, investment and expansion. The online video market has also had a positive effect in California through the growth of production activity that benefits state and local economies. It is relevant, therefore, to consider the transaction's effect on online video as part of the Commission's public interest evaluation and review of competitive considerations.

The relationship between online video and demand for broadband is well-documented. The FCC based its latest definition of "advanced telecommunication services" substantially on the services' capacity for activities such as online video,⁴⁸ and intends its regulations to protect and promote Internet openness, which "drives a 'virtuous cycle' in which innovations at the edges of the network enhance consumer demand, leading to expanded investments in broadband infrastructure that, in turn, spark new innovations at the edge."⁴⁹ As the FCC outlined in these regulations, "The key insight of the virtuous cycle is that broadband providers have both the incentive and the ability to act as gatekeeper standing between edge providers and consumers...when a broadband provider acts as a gatekeeper, it actually chokes consumer demand for the very broadband product it can supply."⁵⁰ Bill Baer, Assistant Attorney General for the Antitrust Division of the U.S. Department of Justice observed recently that the increase in online video offerings has made investment in fiber-based broadband more attractive for companies, and argued that "when we speak about preventing broadband providers from using their control over bottlenecks to hamper video competition, we're also hopeful that this vigilance may help lower barriers to entry for broadband itself."⁵¹

⁴⁸ *2016 Broadband Progress Report*, ¶ 14 ("In reaching [the 25 Mbps/3 Mbps standard], the Commission relied in particular on the expanding demand for online video services...")(internal citation omitted).

⁴⁹ *2015 Open Internet Order*, 30 FCC Rcd. at 5604, ¶ 7.

⁵⁰ *Id.* at 5608, ¶ 20.

⁵¹ Prepared Remarks of Bill Baer, Assistant Attorney General Antitrust Division U.S. Department of Justice, Video Competition: Opportunities and Challenges at 3-4 (Oct. 9, 2015), *available at* <http://www.justice.gov/opa/file/782401/download> ("Baer Remarks").

In the CPUC review of the Comcast-TWC transaction, the PD and APD likewise accepted the interdependence of online video and broadband, noting,

The power of the terminating monopolist to discriminate or otherwise act anti-competitively vis-à-vis edge or content providers could increase the cost and reduce the attractiveness of that competing content. This, in turn, lessens the demand for high-speed broadband access to the Internet, and thus runs counter to Section 706(a)'s mandate to promote competition in broadband services...⁵²

Indeed, even Joint Applicants' testimony documents the relationship between online video and broadband, noting that "[broadband] subscribers are likely to take advantage of speed by consuming more Online Video Distributor ("OVD") services. The primary rationale for such speed increases is to *facilitate* use of streaming services."⁵³ Dr. Scott Morton also notes,

It is well established that OVD services are a complement to broadband. OVD services are used extensively by broadband subscribers and are a major driving force in the overall growth of Internet traffic. In order to continue to use OVD services into the future, subscribers will need more and faster broadband services from ISPs like New Charter. In this fashion, the growing demand for OVD services directly spurs the demand for broadband.⁵⁴

The merger's effect on OVDs will also impact state and local economies, which further affirms the need to assess the effects of this transaction on the online video market. As will be explained in further detail below, the growth in original content produced for online distribution has had a positive impact on state and local economies because California, and specifically Los Angeles, is the home of the entertainment industry. These economies have benefitted from the increase in production activity for online video projects, particularly in the context of the decline in local production of feature films and television dramas.⁵⁵ The Comcast-TWC APD documented the connection between the potential harm to online content, the related effect on state and local economies, and the "virtuous cycle" connection to broadband deployment:

⁵² Comcast-TWC PD at 67; Comcast-TWC APD at 73.

⁵³ Exhibit JA-4, Scott Morton Opening Testimony, Exhibit A at 9, ¶26.

⁵⁴ Exhibit JA-5, Scott Morton Rebuttal Testimony, Exhibit A, ¶ 13.

⁵⁵ Exhibit WG-1, Blum-Smith Reply Testimony at 24:3-25:4.

“In more concrete terms, the proposed merger between Comcast and Time Warner reduces the possibilities for content providers to reach the California market. Many of these content providers are located in California, and a reduction in their ability to reach their intended markets would likely have a negative impact on the California economy. Such a negative effect on the economy is, itself, likely to discourage the deployment of broadband.”⁵⁶

The intertwined nature of the online video and broadband markets indicates that all aspects of the transaction that relate to New Charter’s incentive and/or ability to harm online video are relevant and within the Commission’s jurisdiction to review and make findings on. This includes Charter and New Charter’s MVPD or pay-tv businesses and relationships with programming entities. Though the MVPD business and the vertical content relationships may be outside of the Commission’s jurisdiction to regulate, they have a material impact on competitive issues in this transaction, and specifically on the harm to online video and broadband. As such, it is appropriate for the Commission to consider these vertical relationships as part of the competitive considerations of the transaction because they relate to online video and broadband competition, investment and affordability. However, should the Commission identify areas of concern in this transaction that would only be mitigated by conditions which may be outside of the Commission’s jurisdiction to enforce, the appropriate action is to deny the merger.

b. Online video is a pro-consumer, pro-competition development that drives demand for broadband

The rise of Internet distribution of video has expanded choice for consumers, increased competition in video programming markets and benefitted content creators. As WGAW’s testimony documents, this new market has experienced significant growth over a short period of time. Four hundred hours of video are uploaded to YouTube each minute.⁵⁷ Netflix’s streaming

⁵⁶ Comcast-TWC APD at 74.

⁵⁷ Exhibit WG-1, Blum-Smith Reply Testimony at 6:16-17.

service was introduced in 2007 and now has over 43 million U.S. subscribers.⁵⁸ Subscription online video services, a subset of OVDs,⁵⁹ collectively have approximately 89 million subscribers, producing \$6.4 billion in revenue, and the number of subscribers is expected to reach 114 million in 2020.⁶⁰ Streaming video and audio now comprise 70% of peak downstream traffic in North America, and digital video advertising is becoming a robust national market, reaching \$2 billion for the first half of 2015, a 35% increase from the same period in 2014.⁶¹

Internet distribution has led to a new market for original online video programming, which now competes directly with content offered by traditional television networks.⁶² WGAW's testimony illustrates the growth of this market by analyzing online series distributed over the past several years. 2013 was the first year that a robust market for TV-length programming emerged outside of television, with 18 original series released online. Just two years later, the number of scripted series released for initial distribution online has more than tripled, numbering 55 online series in 2015.⁶³ Growth is expected to continue; Netflix, the most prominent OVD, plans to double its number of original series.⁶⁴ Subscription OVDs led by Netflix, Amazon, Hulu and PlayStation now exhibit more original scripted series than the premium cable market—HBO, Showtime, Cinemax and Starz—as well as expanding into original programming outside of premium cable's traditional targets, such as children's programming. It took the premium cable market decades to develop this level of original

⁵⁸ *Id.* at 6:18-17:1.

⁵⁹ Subscription Online Video Distributors are a subset of the OVD market and are services where customers pay a regular subscription fee for access to a library of on demand video content. This includes OVDs such as Netflix and Amazon Prime, but not those OVDs whose customers pay a transactional fee for each piece of content, such as iTunes.

⁶⁰ Exhibit WG-1, Blum-Smith Reply Testimony at 7:1-4.

⁶¹ *Id.* at 7:4-8.

⁶² *Id.* at 7:9-10.

⁶³ *Id.* at 7:10-13.

⁶⁴ *Id.* at 7:13-14.

production within the traditional pay-tv market, but the subscription OVDs' direct-to-consumer model accomplished it in a few years.⁶⁵

Year	Online Scripted TV-length Series
2013	18
2014	29
2015	55

c. New Charter will have increased incentive to harm OVDs

The OVD market as documented above has been a pro-competitive development for consumers, who now have more flexible alternatives for video viewing. However, this market represents a competitive threat to Joint Applicants' traditional MVPD or pay-tv business segment. A trend known as cord-cutting has developed, in which consumers eliminate pay-tv service offered by an MVPD (or reduce the pay-tv service, known as "cord-shaving") and substitute a combination of broadband service and online video subscriptions. Estimates of cord-cutting vary, but WGAW's testimony notes an industry analyst approximation that nearly 13 million homes have wireline broadband but not a pay-tv subscription, which represents a nearly 16.5% increase year-to-date as of the third quarter of 2015.⁶⁷ Another research firm predicts that 50% of American adults below the age of 32 will not pay for cable TV by 2020.⁶⁸ Concurrently, the pay-tv market is mature, with total MVPD subscribership stagnant for the past several years.⁶⁹ This landscape poses a significant threat to MVPD-ISPs' pay-tv revenues, and the online video market bypasses the traditional MVPD role of content gatekeeper, providing an incentive to reduce the market's attractiveness as a potential substitute for a pay-tv subscription.

⁶⁵ *Id.* at 7:14-8:4.

⁶⁶ *Id.* at 8 (Table 1) and Exhibit B.

⁶⁷ *Id.* at 8:10-12.

⁶⁸ *Id.* at 8:12-13.

⁶⁹ *Id.* at 8:13-15.

Table 2								
Total MVPD Subscribers⁷⁰								
Year	2006	2007	2008	2009	2010	2011	2012	2013
Subscribers (millions)	95.8	97.7	98.9	100.7	100.8	101	101	100.9

As WGAW’s and other parties’ testimony details, MVPD actions have made clear that the OVD market constitutes a competitive threat. MVPDs now offer their video subscribers the ability to access pay-tv programming online, often in the form of Internet-delivered applications (“apps”). Each of the Joint Applicants offers this access, such as through TWC’s TWC TV app. This is also known as “TV Everywhere” or authenticated streaming, in which a customer must log in with his or her pay-tv credentials. Charter, along with other MVPDs,⁷¹ has also responded to OVD competition by introducing a “skinny” television product in October of 2015, known as Spectrum TV Stream and Spectrum TV Stream Plus. This Internet-delivered service requires a Charter broadband subscription, will cost \$12.99 to \$19.99 per month and offers access to broadcast networks, a choice of premium networks and an add-on package of cable channels including ESPN, AMC, FX, TBS and Discovery.⁷² The service is similar in price and content to OVD products such as satellite provider DISH’s Internet-only pay-tv or “linear OVD” service, Sling TV. DISH’s product offers IP-based access to a package of live cable channels including ESPN, AMC, TBS, TNT and the Disney Channel for \$20 per month, as well as additional channel packages specific to interests such as sports and children’s programming.⁷³ Charter’s

⁷⁰ *Id.* at 9 (Table 2), citing Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Fourteenth Report*, MB Docket No. 07-269, 20 FCC Rcd. 8610, 8669-8670, Table 5 (2012); Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Fifteenth Report*, MB Docket No. 12-203, 28 FCC Rcd. 10496, 10555, ¶ 129 (2013); Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, *Sixteenth Report*, MB Docket No. 12-203, 30 FCC Rcd. 3253, 3256, ¶ 2 (2015).

⁷¹ Exhibit ORA-1, Selwyn Reply Testimony at 33:17-34:2.

⁷² Exhibit WG-1, Blum-Smith Reply Testimony at 9:8-13.

⁷³ *Id.* at 10:1-4.

Spectrum TV Stream joins other skinny bundle products such as Comcast’s Stream TV offering, which also provides access to live TV streams of broadcast networks, HBO and some local channels, costs \$15 per month and does not count against customers’ data usage thresholds in locations where Comcast imposes usage-based billing.⁷⁴ The introduction of these new offerings indicates that New Charter will have an incentive to protect both its traditional pay-tv and new Internet-delivered offerings from OVD competition.

As described above, MVPD-ISPs have an incentive to interfere with third-party online video because it presents a competitive threat to their mature pay-tv services. While they benefit from the increased demand for broadband driven by the OVD market, MVPD-ISPs retain strong incentives to guide the growth of broadband and online video in a non-cannibalizing direction, and to prevent cord-cutting from becoming a greater threat. Joint Applicants continue to assert that New Charter’s incentives will be to support OVDs and argue that the incentive to compete against OVDs is specific to vertically-integrated MVPDs (namely, Comcast). Dr. Scott Morton claims, “The key difference between Comcast and New Charter...is that Comcast has an incentive to use such innovations to compete against OVDs to protect its vertical interests in NBCU programming, contrasted with Charter, who will benefit from developing products that benefit OVDs and customers alike.”⁷⁵ However, though the incentive to harm OVDs was identified as a concern in the Comcast-NBCU and Comcast-TWC merger transactions at the FCC⁷⁶ this incentive has also been identified beyond the context of MVPD-ISPs with significant control of content.

⁷⁴ *Id.* at 10:4-7.

⁷⁵ Exhibit JA-5, Scott Morton Rebuttal Testimony, Exhibit A, ¶ 59.

⁷⁶ Competitive Impact Statement, *United States v. Comcast Corp., General Electric Co., NBC Universal, Inc.*, No. 1:11-cv-00106, at 11 (D.D.C. Jan. 18, 2011) (“Comcast-NBCU Competitive Impact Statement”); Sallet Remarks at 12.

For instance, the FCC concluded in its review of AT&T's acquisition of DirecTV that "[p]ost-transaction AT&T has an increased incentive to discriminate against unaffiliated OVDs," based in part on the significant increase in MVPD customers.⁷⁷ The FCC has also stated repeatedly that "broadband providers have incentives to interfere with and disadvantage the operation of third-party Internet-based services that compete with their own services,"⁷⁸ and the DC Circuit Court affirmed this conclusion.⁷⁹ Assistant U.S. Attorney General Bill Baer recognized recently that "as online video distribution increases the cable companies have both the incentives and means to use their gatekeeper power to slow innovation to protect their video profits. In this way, the high-speed internet market and the video distribution market are inextricably intertwined."⁸⁰ And in the Comcast-TWC proceeding, it was not merely the vertical integration that posed a concern, but the substantial increase in Comcast's size. As FCC General Counsel Jonathan Sallet noted, "Increased incentives [to harm OVDs] are a direct result of the increased footprint of the merged firm" because the larger firm would be able to capture a greater portion of the gains of an anti-competitive strategy intended to harm OVDs in order to benefit the pay-tv system.⁸¹

Statements from Charter's CEO, Tom Rutledge, belie the "pro-OVD" portrayal the company has crafted in this proceeding. In late 2014, Rutledge stated, "Anybody who sells their content over the top and also expects to continue to exist within a bundle sold to cable or satellite

⁷⁷ Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, MB Docket No. 14-90, 30 FCC Rcd. 9131, 9207-9208, ¶ 205 (2015) ("*AT&T-DirecTV Order*") ("We conclude that post-transaction AT&T has an increased incentive to discriminate against unaffiliated OVDs.").

⁷⁸ Exhibit WG-1, Blum-Smith Reply Testimony at 10:16-11:1, citing *2015 Open Internet Order*, 30 FCC Rcd. at 5662, ¶ 140; *AT&T-DirecTV Order* at 9207-9208, ¶ 205. See also *Preserving the Open Internet Broadband Industry Practices, Report and Order*, GN Docket No. 09-191 and WC Docket No. 07-52, 25 FCC Rcd. 17905, 17916, ¶ 22 (2010).

⁷⁹ *Id.* at 10:14-15 & n.37, citing *Verizon v. FCC*, 740 F.3d 623, 645 (D.C. Cir 2014).

⁸⁰ *Id.* at 11:1-5, citing Baer Remarks at 3.

⁸¹ Sallet Remarks at 13.

providers is really deluding themselves,” and “[a]nybody who pushes that [over-the-top] envelope and sells their content to Netflix is really sowing their own seeds of destruction.”⁸²

These statements clearly illustrate Charter’s antagonism towards over-the-top, or online distribution of content and make clear that OVDs constitute a competitive threat to Joint Applicants. More recently, Time Warner Inc., a key player in the OVD market through its HBO Now online service, attested to this in an ex parte notice to the FCC. The notice reported a discussion of interactions between HBO and Charter, and specifically:

“[C]ertain statements made by representatives of Charter, both in private interactions and in public forums, including analyst calls and television interviews. Some of these statements raise concerns because they suggest that a combined Charter/Time Warner Cable would be inclined to take action directed at programmers in response to the development of “over the top,” or “OTT,” services with the purpose and/or effect of slowing down the development of OTT options to the detriment of consumers.”⁸³

It is clear that New Charter will see OVDs as a competitive threat. Joint Applicants’ arguments to the contrary rely on poor data, mischaracterization of the facts and false comparisons, such as an artificial difference from Comcast. Dr. Scott Morton claims that because OVDs are generally differentiated from MVPD service, there is no concern that OVDs will cannibalize MVPD service.⁸⁴ This argument implies that New Charter will support OVDs because they are complementary to its MVPD product. It may be true that some OVDs are currently complements to, rather than substitutes for, MVPD service, but this only reinforces that New Charter would benefit if the OVD market were to remain complementary, rather than

⁸² Richard Greenfield, *Will Tom Rutledge’s Harsh OTT Comments Doom Charter’s Acquisition of Time Warner Cable?*, BTIG (Jan. 15, 2016) attachment to Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149, *Ex Parte Communication from Pantelis Michalopoulos and Stephanie A. Roy, Counsel for DISH Network Corporation to Marlene H. Dortch, Secretary, FCC* (Jan. 20, 2016).

⁸³ Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149, *Ex Parte Communication from Steven G. Bradbury, Counsel for Time Warner Inc. to Marlene H. Dortch, Secretary, FCC* (Jan. 13, 2016) at 1-2.

⁸⁴ Exhibit JA-5, Scott Morton Rebuttal Testimony, Exhibit A, ¶ 21.

develop into a more robust competitive alternative. Joint Applicants' reliance on the stated support from Netflix⁸⁵ is similarly unpersuasive, as such support is consistent with the notion that New Charter would benefit from the ability to choose which OVD "partners" are the most accessible to its customers. The support of Netflix alone does not ensure the public interest; rather the ability for OVDs, including new entrants, to compete on equal footing will promote choice and competition for consumers. Further, both DISH and Sony have launched OVD services that include access to linear TV networks and are available to broadband customers, offering a direct substitute for traditional MVPD service.

As further evidence that New Charter's pro-OVD stance is distinct from Comcast, Dr. Scott Morton notes that "Comcast...has innovated in its development of technologies such as its X1 set-top box and its Stream service generally geared toward competing against OVD for cord-cutters"⁸⁶ but fails to acknowledge the similarity of Comcast's Stream TV with Charter's own Spectrum TV Stream product, a substantially similar service which, as described above, is clearly meant to compete against Sling TV and other similar products. New Charter will offer products in addition to its traditional MVPD service that are intended to compete with OVDs. Dr. Selwyn also notes that these or similar virtual MVPD-type services offered by each Applicant individually could also be offered out of footprint in the future, meaning that this transaction represents a foreclosure of that future competition.⁸⁷

Finally, Joint Applicants continue to assume a false level of competition to support their claim that New Charter will lack incentive to harm OVDs. Dr. Scott Morton claims that New Charter would gain little from OVD foreclosure because the foreclosure would "diminish the

⁸⁵ *Id.*, Exhibit A, ¶¶ 45-46.

⁸⁶ *Id.*, Exhibit A, ¶ 59.

⁸⁷ Exhibit ORA-1, Selwyn Reply Testimony at 144:6-19.

value of broadband services to the majority of the OVDs users and lead to customer losses.”⁸⁸ However, Joint Applicants and their witnesses have provided little convincing data that would support this assertion. Dr. Scott Morton cites a study by Global Strategy Group, commissioned in the course of the Comcast-TWC proceeding, to claim that significant numbers of broadband customers would switch providers if their Netflix service were degraded.⁸⁹ The design and results of this study have been roundly criticized,⁹⁰ and the study provides no information to support the claim that most broadband customers, in fact, have the option of an alternative high-speed provider. Instead, as WGAW and ORA have thoroughly documented, the local broadband market is uncompetitive and the vast majority of New Charter’s customers will lack an alternative high-speed provider to switch to in the case of OVD foreclosure or interference.⁹¹ With the dramatic increase in both broadband and MVPD customers, New Charter will have a greatly increased incentive to hinder the development of competing OVDs, and consumers and OVDs alike will have little recourse.

d. Transaction increases incentive to use vertical programming relationships to harm the OVD market

Not only will New Charter’s incentive to harm OVD competition based on its status as an MVPD-ISP increase as a result of this transaction, but its incentive to use programming relationships with Starz and Discovery Communications (“Discovery”) through key shareholder John Malone to harm the OVD market will also increase. John Malone controls Liberty Broadband, which will be the largest shareholder of New Charter, and also owns a controlling

⁸⁸ Exhibit JA-5, Scott Morton Rebuttal Testimony, Exhibit A, ¶ 40.

⁸⁹ Exhibit JA-4, Scott-Morton Opening Testimony, Exhibit B at 45 ¶ 121.

⁹⁰ DISH FCC Petition to Deny at 52-53 (“Among other things, the survey was not conducted in the ordinary course of business; the survey was not provided through an online panel provider and thus was not probability-based; it is unclear whether respondents understood and accurately replied to the questionnaire; the questions posed by the survey are misleading and leading; the survey overstates actual churn; and GSG eventually backed away from the results of its own survey.”)(internal citations omitted).

⁹¹ Exhibit WG-1, Blum-Smith Reply Testimony at 3:16-4:9 and Exhibit A; Exhibit ORA-1, Selwyn Reply Testimony at 9:4-8, 119-123 (Tables 16-19).

stake in Starz and Discovery. The merger will increase the incentive and ability of New Charter to use these vertical relationships to withhold programming from or otherwise disadvantage OVD competitors.

While the relationship between New Charter and these programmers is not direct ownership, it will exist through the ownership interest and the influence of key individuals. This influence is persuasive because the FCC has previously recognized, in reviewing two transactions involving an MVPD and related programming assets, that the largest shareholder had de facto control.⁹² In reviewing these transactions—News Corp.’s acquisition of a stake in DirecTV in 2004 (“News Corp-Hughes”) and Liberty Media’s acquisition of News Corp.’s ownership interest in DirecTV four years later (“Liberty Media-DirecTV”)—the FCC found that even though the largest shareholder did not maintain majority control of the relevant entities, the notion that other shareholders would follow the largest shareholder’s direction was not unreasonable.⁹³ In this transaction, the concerns are similar; New Charter’s largest shareholder will have the ability to induce content companies Discovery and Starz to foreclose or otherwise disadvantage OVD competitors. WGAW’s testimony documents the relevant connections:

Liberty Broadband

According to its website, “Liberty Broadband Corporation’s principal assets consist of its interest in Charter Communications, its subsidiary TruePosition and a minority equity investment in Time Warner Cable.”⁹⁴ Greg Maffei is the President and CEO of Liberty Broadband and

⁹² General Motors Corp. and Hughes Electronics Corp., Transferors, and the News Corporation, Transferee, For Authority to Transfer Control, *Memorandum Opinion and Order*, MB Docket No. 03-124, 19 FCC Rcd. 473, 476, ¶ 2 (2004) (“*News Corp.-Hughes Order*”); News Corp. and DIRECTV Group, Inc. and Liberty Media-DIRECTV Corp. for Authority to Transfer Control, *Memorandum Opinion and Order*, MB Docket No. 07-18, 23 FCC Rcd. 3265, 3267, ¶ 2 (2008) (“*Liberty Media-DIRECTV Order*”).

⁹³ *News Corp.-Hughes Order*, 19 FCC Rcd. at 519, ¶ 98; *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3290-3292, ¶¶ 55-59.

⁹⁴ Exhibit WG-1, Blum-Smith Reply Testimony at 18:8-10, citing *Company Overview*, Liberty Broadband Corporation, <http://www.libertybroadband.com/Company-Overview.aspx> (last visited Jan. 13, 2016).

serves on the board of directors. John Malone is Liberty Broadband's Chairman of the board as well as its largest shareholder. The company's proxy statement states that John Malone's shares in Liberty Broadband represent 47.1% of the company's voting power.⁹⁵

Liberty Broadband will also provide \$5 billion to finance the merger. If the transaction is approved, Liberty Broadband will control 18-19% of New Charter's stock and will be the largest shareholder. In addition, proxy rights granted by Advance/Newhouse Partnership will give Liberty Broadband control of the voting rights of 25% of New Charter stock. Liberty Broadband will also nominate 3 of the 13 New Charter board members.⁹⁶

Discovery Communications

Discovery Communications ("Discovery") is a publicly-traded global media company, operating television networks in the U.S. and 220 other countries. Discovery operates ten national networks in the United States; the largest are Discovery Channel, TLC and Animal Planet.⁹⁷ These networks are available in 97 million, 95 million and 94 million homes in the United States, respectively, and generated 70% of the company's U.S. revenue in 2014.⁹⁸

Advance/Newhouse Programming Partnership, which is owned by the same company that owns Advance/Newhouse Partnership,⁹⁹ itself the parent of Bright House Networks,¹⁰⁰ holds 32.3% of Discovery's Series A Common Stock and 35.2% of the company's Series C Common

⁹⁵ *Id.* at 18:10-13, citing Liberty Broadband Corporation, Proxy Statement (Form Def 14 A) at 8 (Sept. 11, 2015), available at <http://www.sec.gov/Archives/edgar/data/1611983/000104746915006779/a2225694zdef14a.htm>.

⁹⁶ *Id.* at 18:14-18, citing Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149, *Public Interest Statement* (June 25, 2015) at 15-16 ("FCC Application").

⁹⁷ *Id.* at 19:2-5, citing Discovery Communications, Inc., 2014 Annual Report (Form 10-K) at 4 (Feb. 19, 2015), available at <https://www.sec.gov/Archives/edgar/data/1437107/000143710715000004/disca-2014123110k.htm> ("Discovery 2014 Annual Report").

⁹⁸ *Id.* at 19:5-7, citing Discovery 2014 Annual Report at 5-7.

⁹⁹ *Id.* at 19:8-9 & n.71, citing Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149, *Response of Advance/Newhouse Partnership to FCC's Information and Data Request* (Oct. 13, 2015) at 18.

¹⁰⁰ *Id.* at 19:9 & n.72, citing CPUC Application at 10-11.

Stock.¹⁰¹ Key individuals further reinforce the relationship between these entities; the former Chairman of Bright House is now the Chairman of Discovery, and the current Bright House CEO is also on the board of Discovery.¹⁰² John Malone is also a member of the Discovery board as well as owning almost all of Discovery's Series B Common Stock, and his stock ownership constitutes 28.7% of voting power. Several members of the board are also board members of various Liberty entities.¹⁰³

Starz

Starz Inc. operates premium networks Starz, Encore and Movieplex. Starz counted 23.3 million subscribers at the end of 2014 and Encore had 34 million.¹⁰⁴ Starz Inc. also produces original programming that it airs on its networks. Greg Maffei, CEO of Liberty Broadband, is Chairman of the board of Starz Inc. John Malone's stock ownership represents 47.2% of voting power in Starz.¹⁰⁵

In the FCC proceeding, Joint Applicants have noted that Liberty Broadband will only be able to vote a maximum of 25.01% of New Charter's shares, and argue that this will limit the vertical influence Liberty Broadband and John Malone will have over New Charter and obviate any related anticompetitive incentives and abilities.¹⁰⁶ Joint Applicants have also pointed to corporate governance rules such as fiduciary duty responsibilities as sufficient protection against

¹⁰¹ *Id.* at 19:10-11, citing Discovery Communications, Inc., 2015 Proxy Statement (Form Def 14A) at 99 (May 20, 2015), available at <https://www.sec.gov/Archives/edgar/data/1437107/000119312515119082/d897844ddef14a.htm> ("Discovery 2015 Proxy Statement").

¹⁰² *Id.* at 19:11-13, citing *Leadership*, Discovery Communications, <https://corporate.discovery.com/our-company/leadership/> (last visited Jan. 14, 2016).

¹⁰³ *Id.* at 19:13-20:2 and 21:22-26, citing Discovery 2015 Proxy Statement. at 102.

¹⁰⁴ *Id.* at 20:4-6, citing Starz, 2014 Annual Report (Form 10-K) at 5 (Feb. 25, 2015), available at https://www.sec.gov/Archives/edgar/data/1507934/000150793415000014/starz_10-kx12312014.htm.

¹⁰⁵ *Id.* at 20:6-9, citing Starz, 2015 Proxy Statement (Form Def 14A) at 4 (Apr. 23, 2015), available at https://www.sec.gov/Archives/edgar/data/1507934/000150793415000034/starz_2015xproxy.htm.

¹⁰⁶ *Id.* at 20:10-13, citing Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149, *Response of Charter Communications to FCC's Information and Data Request* (Oct. 16, 2015) at 102-103 ("Charter October 16 FCC Response").

any vertical harms by preventing any of these companies’¹⁰⁷ boards from following the direction of John Malone if such direction did not benefit that company’s shareholders.¹⁰⁸ However, representations by the various companies to the Securities and Exchange Commission (“SEC”) contradict this. For instance, Charter discloses the following to shareholders:

Liberty Broadband Corporation owns a significant amount of Charter’s common stock, giving it influence over corporate transactions and other matters.

Members of our board of directors include directors who are also officers and directors of our principal stockholder. Dr. John Malone is the Chairman of Liberty Broadband Corporation, and Mr. Greg Maffei is the president and chief executive officer of Liberty Broadband Corporation. As of December 31, 2014, Liberty Broadband Corporation beneficially held approximately 25.75% of our Class A common stock... Liberty Broadband Corporation’s substantial influence over our management and affairs could create conflicts of interest if Liberty Broadband Corporation faced decisions that could have different implications for it and us.¹⁰⁹

Liberty Broadband’s current stake in Charter is not meaningfully larger than the voting share it will have in New Charter, yet Joint Applicants assert that Liberty Broadband and John Malone will be unable to influence New Charter. Joint Applicants have also stated that John Malone and Greg Maffei, CEO of Liberty Broadband and Chairman of the board of Starz, will be on the board of New Charter.¹¹⁰

Discovery and Starz also acknowledge John Malone’s outsized influence in their reports to the SEC. Discovery’s ten-person board of directors includes three designees of Advance/Newhouse Programming Partnership and two or three board members of each of

¹⁰⁷ New Charter, Starz, Discovery, Liberty Broadband, Advance/Newhouse Partnership or Programming Partnership, etc.

¹⁰⁸ Exhibit WG-1, Blum-Smith Reply Testimony at 20:13-16, citing Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership For Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149, *Opposition to Petitions to Deny and Response to Comments of Applicants* (Nov. 2, 2015) at 48, 50.

¹⁰⁹ *Id.* at 21:1-14, citing Charter Communications, Inc., 2014 Annual Report (Form 10-K) at 25 (Feb. 24, 2015), available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjcxNzA2fENoaWxkSUQ9LTF8VHlwZT0z&t=1> (emphasis in original).

¹¹⁰ *Id.* at 21:16-21, citing Charter October 16 FCC Response at 107.

Liberty Media, Liberty Global and Liberty Interactive, all companies whose boards are chaired by John Malone. Discovery also acknowledges the potential conflict of interest for these individuals where the interests of the companies might diverge.¹¹¹ Discovery highlights John Malone’s specific voting power with respect to corporate matters, noting that “by virtue of their respective holdings, Mr. Malone and Advance/Newhouse [Programming Partnership] each have significant influence over the outcome of any corporate transaction or other matter submitted to our stockholders.”¹¹² In reviewing the News Corp.-Hughes and Liberty Media-DirecTV transactions, the FCC found that fiduciary duty and corporate governance rules do not sufficiently protect against vertical harms.¹¹³ This finding is supported by Discovery’s disclosure of the potential for fiduciary conflicts of interest by the members of the board who are responsible both to Discovery and to Advance/Newhouse Programming Partnership or a Liberty company.¹¹⁴ Additionally, because this transaction combines Charter and Bright House, it aligns the distribution interests of John Malone and Advance/Newhouse Partnership, which will also

¹¹¹ *Id.* at 21:22-22:1, citing Discovery 2014 Annual Report at 22-23.

¹¹² *Id.* at 22:1-5, citing Discovery 2014 Annual Report at 24.

¹¹³ *Id.* at 22:5-7, citing *News Corp.-Hughes Order*, 19 FCC Rcd. at 520, ¶ 100; *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3301, ¶ 78.

¹¹⁴ *Id.* at 22, n.87, citing Discovery 2014 Annual Report at 22-23 (“**We have directors that are also related persons of Advance/Newhouse Programming Partnership (“Advance/Newhouse”) and that overlap with those of the Liberty Entities, which may lead to conflicting interests for those tasked with the fiduciary duties of our board....** These ownership interests and/or business positions could create, or appear to create, potential conflicts of interest when these individuals are faced with decisions that could have different implications for us, Advance/Newhouse and/or the Liberty Entities. For example, there may be the potential for a conflict of interest when we, on the one hand, or an Advance/Newhouse and/or the Liberty Entity, on the other hand, look at acquisitions and other corporate opportunities that may be suitable for the other.

The members of our board of directors have fiduciary duties to us and our stockholders. Likewise, those persons who serve in similar capacities at Advance/Newhouse or a Liberty Entity have fiduciary duties to those companies. Therefore, such persons may have conflicts of interest or the appearance of conflicts of interest with respect to matters involving or affecting both respective companies, and there can be no assurance that the terms of any transactions will be as favorable to us or our subsidiaries as would be the case in the absence of a conflict of interest.”)(emphasis in original).

become a shareowner of New Charter,¹¹⁵ and increases the incentive to use control of Discovery to benefit New Charter.

The influence of John Malone throughout these various companies is documented and persuasive. John Malone is also known to be a self-styled “coordinator” of the cable industry, and has expressed the opinion that there should be greater solidarity among cable companies to fight the competitive pressure of OVDs.¹¹⁶ Given John Malone’s stated views, discussed further below, and the documented connections between Charter and various content companies, it is clear that the companies involved in this transaction could coordinate to harm unaffiliated OVDs.

As noted above, review of these aspects of New Charter’s corporate structure is within the scope of this proceeding because these features provide additional impetus and means to harm online video and broadband competition. The FCC has recognized this increased incentive as a general characteristic of vertically-integrated entities based on detailed economic analysis carried out in prior proceedings. The FCC has noted that “the incentive to engage in anticompetitive pricing or withholding strategies implicitly exists where there is vertical integration.”¹¹⁷ The FCC has also found that “vertical transactions also have the potential for anticompetitive effects,” including “the incentive and ability to: (1) discriminate against particular rivals in either the upstream or downstream markets (e.g., by foreclosing rivals from inputs or customers); or (2) raise the costs to rivals generally in either of the markets.”¹¹⁸ In addition, the FCC has found that vertically integrated MVPD-ISPs with control over content

¹¹⁵ *Id.* at 22:10-12, citing FCC Application at 13. In exchange for its interest in Bright House Networks, Advance/Newhouse Partnership will receive a combination of cash and partnership units.

¹¹⁶ Liana B. Baker, *U.S. cable companies should create Netflix Rival: Malone*, Reuters (Oct. 10, 2015), <http://www.reuters.com/article/2013/10/10/us-liberty-netflix-idUSBRE9990OC20131010>; Vanity Fair, *Chairmen of Discovery and Liberty Media Stay Tuned on Television – Full Conversation*, (Oct. 8, 2015), <http://video.vanityfair.com/watch/chairmen-discovery-liberty-media-stay-tuned-on-television> (“Vanity Fair Interview”).

¹¹⁷ *Liberty Media-DIRECTV Order*, 23 FCC Rcd. at 3301, ¶ 79.

¹¹⁸ *News Corp.-Hughes Order*, 19 FCC Rcd. at 508, ¶ 71.

have the incentive and ability to harm competition from OVDs, and that both the incentive and ability increase along with growth in size as a distributor.¹¹⁹ New Charter will have increased incentive and ability to engage in strategies that may include refusal to license affiliated programming to OVD competitors or licensing only on noncompetitive terms, either of which makes OVD competitors less attractive to customers.¹²⁰ It is evident from disclosures by Joint Applicants and related programming companies to both the FCC and SEC that John Malone has the ability to exercise influence over New Charter, Starz and Discovery. FCC review of prior transactions has also made clear that vertical integration raises anticompetitive concerns and that such concerns may be present even when the vertical relationship comes through the ownership interests of individuals, which will be the case for New Charter.

e. New Charter will have increased ability to harm OVDs

The increase in MVPD and ISP customers combined with the programming relationships through John Malone will increase New Charter's ability to carry out harm to OVDs through a variety of mechanisms. These mechanisms could include pricing strategies that increase the cost of substituting online video for traditional MVPD service, control of points of OVD access to New Charter customers through control of the last mile or the MVPD user interface, or utilizing control of affiliated content to increase OVDs' costs or make them less attractive substitutes. The FCC and CPUC have each recognized such strategies as levers for ISPs to discriminate against unaffiliated content or services.¹²¹

¹¹⁹ Exhibit WG-1, Bum-Smith Reply Testimony at 16:19-17:3, citing Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licenses, *Memorandum Opinion and Order*, MB Docket No. 10-56, 26 FCC Rcd. 4238, 4268-4269, ¶ 78 (2011); Comcast-NBCU Competitive Impact Statement at ¶¶ D(4) and D(1).

¹²⁰ *Id.* at 17:3-9.

¹²¹ *Id.* at 11:14-12:2, citing the FCC's reviews of the AT&T-DirecTV and Comcast-NBCU transactions and the CPUC's review of the Comcast-TWC transaction.

WGAW's testimony documents the potential impact on the online video market of various forms of anticompetitive pricing practices. For instance, discounting the cost of the broadband product when it is bundled with MVPD service can function as a disincentive to substitute a combination of broadband and online video for pay-tv service.¹²² An affordable standalone broadband product enables online video substitution, and could therefore pose a threat to New Charter, which could respond by increasing the cost of standalone broadband and decreasing the cost of pay-tv service or of a pay-tv and broadband bundle. Similarly, the practice of imposing data caps, which are also known as "data thresholds" or "usage-based billing," restricts the amount of data that a customer may consume before incurring additional charges for his or her broadband service.¹²³ This is an effective tool for combatting the competitive pressure of OVDs because it can substantially increase the cost to consumers of substituting a more flexible combination of broadband and online video services for the ever-increasing monthly cable bill.¹²⁴ The cost of the additional data needed by a customer who would substitute all of his or her traditional TV viewing hours with online video would make a capped Internet service prohibitively expensive, potentially adding an extra \$110 to \$120 per month for two users who wanted to consume an average month of television viewing online under a usage-based billing plan such as those used by AT&T and Comcast.¹²⁵ The practice of "zero-rating," or exempting specific services' traffic from counting towards a customer's data cap, enables more targeted discrimination against OVDs not exempt from the cap, allowing ISPs to pick winners and losers among OVDs or to favor affiliated OVD services.¹²⁶ This practice can potentially function as a

¹²² *Id.* at 12:3-9.

¹²³ *Id.* at 12:10-12.

¹²⁴ *Id.* at 12:12-13:5; Exhibit ORA-1, Selwyn Reply Testimony at 85:14-87:15.

¹²⁵ Exhibit WG-1, Blum-Smith Reply Testimony at 12:16-13:5.

¹²⁶ *Id.* at 13:8-10; Exhibit JA-4, Scott Morton Opening Testimony, Exhibit B at 48, ¶ 128 (defining zero-rating as "discriminatory exemptions from a data cap" and acknowledging the harmfulness of such practices). *See also* Exhibit ORA-1, Selwyn Reply Testimony at 35:5-13.

loophole in the FCC’s Open Internet rules, enabling the type of interference with edge providers that the rules were intended to prevent.¹²⁷

New Charter’s proprietary video interface, though framed as a benefit of the merger and evidence of New Charter’s incentive to support OVDs, provides another point of control over the OVD market. As Dr. Scott Morton describes, the Spectrum Guide user interface (or “electronic programming guide”) allows subscribers to “access...OVD programming directly from [the Guide] rather than via a separate Internet session.”¹²⁸ However, as WGAW and ORA’s witnesses note, this video interface allows New Charter to act as a gatekeeper of online content, extending the company’s traditional control over content distribution to the online market.¹²⁹ Dr. Scott Morton argues that this type of integration or partnership with OVDs does not constitute gatekeeping because OVDs have the ability to bypass the interface through a regular broadband connection.¹³⁰ However, it will still be a significant disadvantage to an OVD if it cannot reach customers through New Charter’s platform. The fact that Joint Applicants tout New Charter’s user interface as a venue where OVD content will sit alongside MVPD content supports this.

As detailed above, New Charter will have the ability to exert control over programmers Starz and Discovery through the connections of John Malone. This will enable New Charter to utilize withholding strategies, refusal to license affiliated content to OVDs, or licensing content only on non-competitive terms, in order to make OVD competitors less attractive.¹³¹ Any of these paths—pricing, control of the video interface or control of content—would enable New Charter to discriminate against or between OVDs, to the detriment of OVD competition and

¹²⁷ The FCC’s 2015 Open Internet Order specifically declined to address the issue of data caps. *2015 Open Internet Order*, 30 FCC Rcd. at 5668-9, ¶ 153.

¹²⁸ Exhibit JA-4, Scott Morton Opening Testimony, Exhibit A at 11, ¶ 32.

¹²⁹ Exhibit WG-1, Blum-Smith Reply Testimony at 13:15-14:3; Exhibit ORA-1, Selwyn Reply Testimony at 28:18-21.

¹³⁰ Exhibit JA-5, Scott Morton Rebuttal Testimony, Exhibit A, ¶ 28.

¹³¹ Exhibit WG-1, Blum-Smith Reply Testimony at 16:13-17-9.

broadband development. New Charter has made certain time-limited commitments to refrain from several of these practices, which will be discussed in further detail below.

f. New Charter will have increased incentive and ability to collude with Comcast

As described above, this transaction increases the incentive and ability for New Charter to engage in practices that would harm the online video market, which is a key driver of broadband investment. However, the consolidation of three providers into one also increases the potential for coordinated action by New Charter and the other leading firm nationally and in California—Comcast. These two firms will dominate the high-speed broadband market, controlling between 70%¹³² and 90%¹³³ of high-speed broadband connections nationwide and covering more than 80% of the population of California.¹³⁴ This will give the two firms significant power over the OVD market, enabling coordination to benefit the firms' common interests. Many of the mechanisms described above through which New Charter might act anti-competitively towards OVDs could also be utilized in tandem with Comcast, for an amplified effect.

For instance, Comcast is known to be a leading proponent of data caps and usage-based billing, and has recently announced a large expansion in the number of customers who are subject to its usage-based billing practices.¹³⁵ In this proceeding, Charter has touted its current lack of usage-based billing practices, but Charter's Acceptable Use Policy for Internet service included data caps from 2009 until shortly before the announcement of this transaction.¹³⁶ This illustrates the ease with which such billing practices may be imposed, removed or changed as is politically expedient. Joint Applicants have committed to refrain from usage-based billing for

¹³² Brodtkin, *supra* note 24.

¹³³ DISH FCC Petition to Deny at 26-27, n.95.

¹³⁴ Exhibit WG-1, Blum-Smith Reply Testimony at 4:4-6.

¹³⁵ *Id.* at 14:9-11.

¹³⁶ *Id.* at 14:12-15.

three years following the close of this transaction,¹³⁷ but after that point, if Comcast has decided to widely implement such pricing, which appears likely, New Charter would be able to easily do the same. The effect of this coordination would be to increase the price for high-speed broadband service nationwide and to discourage full utilization of its capabilities, particularly of online video as a potential substitute for MVPD service.¹³⁸

Joint Applicants have provided no plausible arguments as to why this type of coordination would not be possible, other than to repeat that New Charter, unlike Comcast, would have no incentive to harm OVDs. However, as has been thoroughly illustrated above, this argument is specious; both companies will have the incentive to protect their MVPD business from the threat of OVD competition. Dr. Scott Morton argues that there will be no collusive mechanism for such coordinated harm to be carried out¹³⁹ but offers no explanation for why the type of coordinated anticompetitive pricing described here would be precluded. Explicit “collusion” may not even be necessary given the level of marketplace control.¹⁴⁰ The companies could coordinate actions, in concert or in succession, simply by observing each other’s actions, through press reporting, for example. One company’s action to hinder OVD access to its subscriber base in the form of pricing or restricting OVD access to the video interface or any of the other anticompetitive actions described above could be replicated by the other, threatening OVD access to the majority of the state and the nation’s broadband subscribers.

As DISH has noted before the FCC, the DC Circuit Court has identified this type of coordination as particularly nefarious specifically because it is much harder to prevent or control through existing antitrust laws, and so a goal of merger review policy must be to prevent the

¹³⁷ FCC Application at 18.

¹³⁸ Exhibit WG-1, Blum-Smith Reply Testimony at 14:15-19.

¹³⁹ Exhibit JA-5, Scott Morton Rebuttal Testimony, Exhibit A, ¶ 86.

¹⁴⁰ DISH FCC Petition to Deny at 29-30.

market structures in which such coordination could occur.¹⁴¹ To that end, U.S. antitrust agencies have previously challenged mergers that would have created such duopolies.¹⁴²

Dr. Scott Morton claims a “lack of any history of collusion” as evidence that such actions will not occur. However, the interconnection dispute with Netflix in 2014, which involved both Time Warner Cable and Comcast, illustrates the impact of major ISPs acting at the same time to interfere with their respective customers’ OVD experience. In this dispute, the customers of AT&T, Comcast, Centurylink, Time Warner Cable and Verizon experienced “sustained performance degradation” related to Internet traffic passing through points of interconnection with various backbone ISPs, as a result of business relationships between the ISPs.¹⁴³ The major ISPs involved in this dispute included the two main telco overbuilders and collectively provided service to the majority of the nation, leaving customers with little recourse, and resulting in Netflix conceding to paid interconnection deals with four of the involved ISPs.¹⁴⁴ This illustrates the potential ability of a few large ISPs to coordinate in order to disadvantage unaffiliated OVDs, an ability which will increase significantly if this transaction is approved.

In particular, as WGAW testimony illustrates, coordination through anticompetitive pricing or gatekeeper control of the video interface would be consistent with suggestions made by John Malone. Mr. Malone has been a vocal advocate of cable industry consolidation, while

¹⁴¹ *Id.* at 30-31, citing *F.T.C. v. Heinz Co.*, 246 F.3d 708, 725 (D.C. Cir. 2001).

¹⁴² *Id.* at 31, citing *United States v. H&R Block et al.*, No. 1:11-cv-00948, at 5 (D.D.C. Nov. 10, 2011) and *United States v. Anheuser-Busch InBEV SA/NV et al.*, No. 1:13-cv-00127 (D.D.C. Jan 31, 2013).

¹⁴³ M-Lab Consortium, ISP Interconnection and its Impact on Consumer Internet Performance, at 4 (Oct. 28, 2014), available at http://www.measurementlab.net/static/observatory/M-Lab_Interconnection_Study_US.pdf.

¹⁴⁴ Drew Fitzgerald, *Netflix Reaches Interconnection Deal With Verizon*, The Wall Street Journal (Apr. 28, 2014), <http://www.wsj.com/articles/SB10001424052702304163604579530321917846620>; Steve Kovach, *Netflix Is Now Paying AT&T So Your Videos Stream Faster*, Business Insider (July 29, 2014), <http://www.businessinsider.com/netflix-att-sign-interconnection-deal-2014-7>; Stacey Higginbotham, *Netflix is now paying Time Warner Cable for direct access and faster streams*, GigaOm (Aug. 19, 2014), <https://gigaom.com/2014/08/19/netflix-is-now-paying-time-warner-cable-for-direct-access-and-faster-streams/>.

Charter has been a prominent actor in consolidation attempts.¹⁴⁵ He has also taken the position that the cable industry should unify its strategies to combat the competitive pressure of online video, suggesting in 2013 that cable operators band together and create a national OTT rival to Netflix.¹⁴⁶ More recently, John Malone has suggested that the MVPD industry should coordinate adoption of a unified on-demand TV Everywhere product in order to compete against OVDs. In a recent interview, when asked what he would do if he could coordinate with the rest of the cable industry without DOJ interference Mr. Malone responded,

I would say, why don't we get together with Comcast and have a common...platform that includes all of our cable stuff and HBO and Starz and Showtime and all the broadcasters, and let's do it off of one technical platform and let's offer that to all the other guys, all our brethren in the cable industry.¹⁴⁷

This proposal echoes the design and capabilities of Charter's cloud-based Spectrum Guide, which could be adopted by other MVPDs. As John Malone's statement notes, this type of coordination in the national market would benefit all MVPDs because it would position an MVPD interface as the dominant means to access OVD content, allowing MVPDs to increase their control over the development of the OVD market in order to ensure that online video does not displace pay-tv service.¹⁴⁸ In the same interview, John Malone attested to his prominent and influential role in the cable industry, responding to a question about his plans for the industry by saying, "I am an investor, I do not control these things, I invest in them. But, I try to coordinate their behavior if I can."¹⁴⁹

The documented lack of local competition increases the likelihood of success of both unilateral and coordinated harms. In California, more than two-thirds of the combined Comcast-

¹⁴⁵ Exhibit WG-1, Blum-Smith Reply Testimony at 15:1-4.

¹⁴⁶ *Id.* at 15:4-7.

¹⁴⁷ *Id.* at 15:9-13, citing Vanity Fair Interview.

¹⁴⁸ *Id.* at 15:13-16.

¹⁴⁹ *Id.* at 15:18-16:1, citing Vanity Fair Interview.

New Charter territory will have one choice of broadband provider at speeds of 25 Mbps or higher;¹⁵⁰ similar conditions will hold for the rest of the country. New Charter or New Charter with Comcast will be able to take anticompetitive action without fear of losing customers in most territories, and customers and OVDs will have little recourse. With control of high-speed broadband in the majority of the state and the country, New Charter and Comcast will be able to guide the development of high-speed broadband and online video in a direction that limits competition.¹⁵¹

VII. TRANSACTION WILL NEGATIVELY IMPACT STATE AND LOCAL ECONOMIES

As described above, this transaction will cause significant harm to upstream content markets and to broadband development because it will increase the ability and incentive of the merged company to discriminate against unaffiliated OVDs. These harms will redound to the state and local economies that have benefitted from the growth of the online video market.

As WGAW's testimony details, the entertainment industry contributed 164,000 jobs and \$76.9 billion in output to California's economic activity in 2013.¹⁵² In Los Angeles, the entertainment industry accounts for 132,700 jobs and nearly \$14 billion in labor income.¹⁵³ Though these jobs have historically been in film and television, the growth of the online video market has resulted in new jobs and income for content creators. This economic growth has resulted both from the original series created for online distribution and from the online reuse of

¹⁵⁰ *Id.* at 4:1-9.

¹⁵¹ *Id.* at 16:7-12.

¹⁵² *Id.* at 23:16-17, citing Los Angeles County Economic Development Corporation, 2014 Otis Report on the Creative Economy: California at 43 (Apr. 2015), available at http://www.otis.edu/sites/default/files/2015_Otis_Report_on_the_Creative_Economy_CA.pdf.

¹⁵³ *Id.* at 23:17-18, citing Los Angeles County Economic Development Corporation, 2014 Otis Report on the Creative Economy: Los Angeles Region at 52 (Mar. 2015), available at http://www.otis.edu/sites/default/files/2014_Otis-Report-on-the-Creative-Economy-of-the-Los-Angeles-Region.pdf.

content created for traditional television or film distribution. WGAW members have earned close to \$90 million from online (or “new media”) reuse of television and film projects since 2009.¹⁵⁴

The local production activity associated with online video series has helped to counter the decline in feature films and television dramas filming in California. The state legislature acknowledged this when it adopted AB 1839 in an effort to combat runaway production. AB 1839 more than tripled the amount of California’s annual film incentive subsidies to \$330 million and expanded eligibility for the program to include projects made for Internet distribution.¹⁵⁵ The most recent round of television projects to receive incentive funding included Netflix series *13 Reasons Why*.¹⁵⁶ 2014 saw total “shoot days” for web-based TV projects up 19.3% over the category’s five-year average, and 121% since 2010.¹⁵⁷ In first three quarters of 2015, shoot days for web-based TV series grew 18.7% over the prior year, contributing to a total increase in television shoot days of 5.6%.¹⁵⁸ Online series that film locally include Hulu’s *East Los High*, *Resident Advisors* and *Casual*, Amazon’s *Bosch*, *Hand of God*, *Gortimer Gibbons* and *Transparent*, Crackle’s *Chosen* and the fourth season of *Arrested Development*, which Netflix picked up after the series was cancelled by Fox. The local investment from these series is substantial; series such as Amazon’s *Bosch* may carry an estimated budget of \$2.5 million per episode.¹⁵⁹ WGAW’s analysis shows that for the past three years, 45% or more of the live-action scripted series produced for online distribution each year filmed in California.¹⁶⁰ News reporting has identified job growth from online video as a contributing factor for Hollywood’s highest

¹⁵⁴ *Id.* at 23:21-24:2.

¹⁵⁵ *Id.* at 24:4-8.

¹⁵⁶ *Id.* at 24:8-10.

¹⁵⁷ *Id.* at 24:10-11, citing Film LA, *Filming On-Location in Los Angeles, 2010-2014* at 21 (2015), available at http://www.filmla.com/data_reports.php.

¹⁵⁸ *Id.* at 24:11-14, citing Press Release, Film LA, *Los Angeles Filming Levels Leap for Location-Based Scripted TV* (Oct. 6, 2015), available at http://www.filmla.com/news_releases.php?year=2015.

¹⁵⁹ *Id.* at 24:16-25:1.

¹⁶⁰ *Id.* at 25 (Table 3) and Exhibit B.

employment level in a decade.¹⁶¹ These economic developments, which have benefitted the state and Los Angeles, will be threatened by the transaction because of the harm it poses to the online video market.

VIII. TRANSACTION WILL NEGATIVELY AFFECT BROADBAND AFFORDABILITY

This transaction involves a number of implications that will result in harm to broadband affordability. As an initial matter, the removal of BHN and TWC from the California marketplace will result in the loss of some lower-priced broadband tiers, and will reduce the ability of consumers and the Commission to measure service quality, policies and practices of the companies against each other. It will preclude future overbuilding by any of the three companies, particularly Charter and TWC, into the other's service territories. However, the harm to upstream content markets which will result from New Charter's increased incentive and ability to harm OVD competition, and the significant increase in debt required to finance the merger will both have negative effects on broadband investment and affordability.

As noted above, there is a severe lack of direct local broadband competition in New Charter's territory nationally and in California. The limited overbuilding by fiber and other competitors has resulted in an alternative provider offering 25 Mbps or higher broadband service in just 30% of the statewide population in New Charter's service area. WGAW's analysis shows that approximately 70% of the New Charter footprint will have only competition from DSL or copper providers,¹⁶² meaning the vast majority of New Charter customers continue to lack a competitive alternative. Without direct competition, one remaining resource is benchmark

¹⁶¹ *Id.* at 25:2-4.

¹⁶² *Id.*, Exhibit A, Summary Tables – State Level (New Charter).

competition, or the ability to compare offerings across adjacent service areas.¹⁶³ Both the respective companies' customers and the CPUC can compare the service quality, offerings, prices and policies of each of the three companies, but the transaction will eliminate these benchmarks. As a result, New Charter will be able to more definitively set standards for Internet service in California.¹⁶⁴ As an illustration, in the course of this transaction Joint Applicants have offered to continue offering TWC's 300 Mbps broadband tier in TWC's existing service area.¹⁶⁵ This is only a standard that New Charter can be held to because there are currently three companies, rather than one.

In Los Angeles, where Charter and TWC service areas abut (even overlapping in a number of census blocks), the transaction will eliminate the possibility that either company would overbuild into the other's adjacent service area, precluding direct competition that would enhance broadband affordability. Studies have also found that an increase in the size of a geographic cluster served by a single cable operator significantly decreases the likelihood that an overbuilder will enter the incumbent provider's service area.¹⁶⁶ This means that the larger regional cluster served by New Charter alone will make its footprint less attractive to other potential overbuilders. The lack of local competition and benchmark competition for broadband customers in New Charter's service area continuing into the foreseeable future means that New

¹⁶³ *Id.* at 28:18-19, 29 n.110, citing Applications for Consent to the Assignment and/or Transfer of Control of Licenses from Adelphia Communications Corporation, Assignors, to Time Warner Cable Inc., Assignees et. al., *Memorandum Opinion and Order*, MB Docket No. 05-192, 21 FCC Rcd. 8203, 8243, ¶ 83 (2006) (noting, "We do, however, agree with Free Press that adjacent service areas can provide a useful benchmark for consumers to compare price and service.").

¹⁶⁴ *Id.* at 28:19-29:3.

¹⁶⁵ Exhibit JA-1, Falk Errata Opening Testimony at 19:6-8.

¹⁶⁶ Exhibit WG-1, Blum-Smith Reply Testimony at 29:5-7, citing Hal J. Singer, *Does Clustering by Incumbent Cable MSOs Deter Entry by Overbuilders?*, Social Science Research Network at 4 (May 2003).

Charter will have little or no competitive pressure that might limit it from increasing consumer prices, directly harming affordability.¹⁶⁷

The imposition of Charter's pricing policies also represents a loss of more affordable broadband tiers for California consumers. Joint Applicants have specified that New Charter will "soon bring base speed tiers from 15 Mbps to Charter's current standard minimum of 60 or 100 Mbps at uniform pricing in TWC and BHN service territories."¹⁶⁸ Though Joint Applicants tout this as a merger benefit, it is in fact a loss of lower speed but more affordable options that are currently available to TWC customers. In TWC's upgraded service areas, it currently offers a 50 Mbps connection for \$39.99 per month (\$34.99 if purchased online), 10 Mbps for \$29.99 per month, and 3 Mbps for \$14.99. Charter's standalone Internet begins at 60 Mbps for \$39.99 per month, meaning that the transaction will remove at least two more affordable options from the California market.¹⁶⁹

New Charter's low-income broadband offering is not an adequate substitute for these lower priced alternatives. Though Joint Applicants' witness Adam Falk touts the program for offering speeds faster than other existing low-income programs, a 30 Mbps connection for \$14.99 per month,¹⁷⁰ the program is designed to limit availability in order to prevent significant numbers of existing customers from obtaining access to more affordable Internet service. The program is limited to families that include students who participate in the National School Lunch Program, and seniors 65 and older who receive Supplemental Security Income program benefits. In addition, enrollees are restricted from having been a Charter/TWC/BHN broadband subscriber

¹⁶⁷ *Id.* at 29:7-10.

¹⁶⁸ *Id.* at 29:11-15, citing CPUC Application at 24.

¹⁶⁹ *Id.* at 29:17-30:2.

¹⁷⁰ Exhibit JA-2, Falk Supplemental Testimony at 4:5-6.

within 60 days of enrolling.¹⁷¹ This program is designed to *prevent* the majority of low-income individuals from accessing it, as CETF’s witness notes that there are twice as many people who live in households without children as in households with children.¹⁷² In addition, the prohibition on being an existing broadband customer is a significant barrier to enrollment, reducing the efficacy of such a program for addressing broadband affordability. Meanwhile, prices may well *increase* for the customers who do not qualify for the low-income program as they lose access to TWC’s lower priced tiers. Though TWC’s lower-priced offerings are also lower in speed, they are available to anyone and are advertised on TWC’s website, widening their comparative impact.¹⁷³ We would suggest that broadband competition provides a better path to affordability than a narrowly tailored program offered in the context of a merger.

In addition, because the transaction will result in New Charter and Comcast having a monopoly on the vast majority of the high-speed broadband market in California and nationally, it will increase the likelihood that California consumers will become subject to data caps following the end of Joint Applicants’ three-year commitment to withhold such practices from New Charter’s service.¹⁷⁴ Comcast has established itself as the largest proponent of usage-based billing, and following the transaction, it seems likely that New Charter would follow suit as soon as any transactional commitment expired, resulting in less affordable broadband for consumers.

In addition to these harms to broadband affordability through the loss of broadband competition and lower-priced services, the harm that this transaction poses to upstream content markets will have a dampening effect on broadband affordability and deployment. This is

¹⁷¹ *Id.* at 2:11-13 & n.4

¹⁷² Exhibit CETF-1, McPeak Testimony at 11:7-8.

¹⁷³ Exhibit WG-1, Blum-Smith Reply Testimony at 30:10-14.

¹⁷⁴ *Id.* at 30:15-31:2.

because of the well-documented fact that the online video market and the broadband market complement each other in the “virtuous cycle.”

As WGAW has thoroughly documented, the proliferation of options for online content viewing poses a threat to MVPDs, and because this transaction will result in New Charter becoming the second-largest ISP and third-largest MVPD, the transaction will increase the incentive and ability of the merged entity to limit the attractiveness of unaffiliated online content and providers.¹⁷⁵ New Charter could, for instance, increase prices for standalone broadband service in comparison to MVPD or bundled service. This action would be targeted at reducing competition from OVDs and would have a direct impact on broadband affordability, as well as impacting broadband investment because it is driven by the proliferation of online content. The FCC summarized this effect in its 2015 Open Internet Order, explaining, “Practices that have anti-competitive effects in the market for applications, services, content, or devices would likely unreasonably interfere with or unreasonably disadvantage edge providers’ ability to reach consumers in ways that would have a dampening effect on innovation, interrupting the virtuous cycle.”¹⁷⁶

Dr. Scott Morton has responded to this argument merely by reiterating that New Charter will have no incentive or leverage to foreclose or disadvantage OVDs.¹⁷⁷ However, WGAW’s testimony has thoroughly documented that the opposite is true. In addition, Joint Applicants’ offered commitments acknowledge that the actions they offer to refrain from are anti-competitive.

An additional aspect of this transaction increases the incentive for the merged entity to raise its prices. As Dr. Selwyn establishes, this transaction is a leveraged buyout, involving the

¹⁷⁵ *Id.* at 31:20-32:2.

¹⁷⁶ *Id.* at 32:2-10, citing *2015 Open Internet Order*, 30 FCC Rcd. at 5662, ¶ 140.

¹⁷⁷ Exhibit JA-5, Scott Morton Rebuttal Testimony, Exhibit A, ¶¶ 43-44.

assumption of large amounts of new debt by an entity composed of companies who are already substantially indebted. New Charter will conclude this transaction with a total of \$58.05 billion in debt, including the \$23.8 billion in new debt financing that Charter is raising for purposes of the transaction. The leverage ratio of the merged company will be 4.5x, a substantial increase from the pre-merger separate entities, particularly TWC.¹⁷⁸ The priority of the new company will be servicing its debt in order to satisfy creditors and shareholders, an obligation that will take precedence over the needs of customers. This places any investment or build-out commitments New Charter may promise in doubt, but also provides an added incentive to raise prices in order to ensure debt payments. Dr. Selwyn suggests that Joint Applicants' projected increase in EBITDA as a result of the merger could be the result of price increases for non-competitive services.¹⁷⁹ Other entities reviewing this deal have identified this issue as a significant concern. For instance, the New York Public Service Commission Staff recommendation noted that "The Petitioners' request for authorization under PSL § 101 for the issuance of debt connected to the proposed transaction represents the single most significant potential detriment."¹⁸⁰

IX. TRANSACTION LACKS SUFFICIENT MITIGATION MEASURES

In considering the sum total of the transaction's effect on the public interest, Cal. Pub. Util. Code directs the Commission to consider whether the transaction will "provide mitigation measures to prevent significant adverse consequences which may result."¹⁸¹ These requirements direct the Commission to thoroughly evaluate this transaction's potential for harm, and then

¹⁷⁸ Exhibit ORA-1, Selwyn Reply Testimony at 13:12-16, 14:2-6, 16:11-26.

¹⁷⁹ *Id.* at 20:14-22:25.

¹⁸⁰ Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements, Case 15-M-0388 at the New York Public Service Commission, *Redacted Comments of the New York State Department of Public Service* (Sept. 16, 2015) at 36.

¹⁸¹ Cal. Pub. Util. Code §854(c)(8).

assess whether the transaction includes specific proposals which would counterbalance or preclude such harms.

WGAW has presented the Commission with evidence of significant harms that will result from this transaction, including a reduction in broadband affordability and deployment as well as broadband competition, anti-competitive harm to the online video market, and harms to state and local economies that have benefited from the growth in online video. Joint Applicants have provided information before this Commission on certain time-limited voluntary commitments which are intended to address the harm to online video and broadband affordability. However, these commitments are inadequate to either prevent or outweigh the adverse effects of the transaction.

The commitments Joint Applicants have made related to broadband and online video include promises not to impose data caps or to charge consumers for use of specific third-party Internet applications in the pricing of New Charter's residential broadband product.¹⁸² Joint Applicants have also committed to adhere to a portion of the FCC's 2015 Open Internet Rules, in agreeing to not "block or throttle Internet traffic or engage in paid prioritization." These commitments are offered for a period of three years from the transaction's close.¹⁸³

These commitments address certain means of discrimination through pricing and last-mile interference for an extremely limited time period, but leave open other levers for harm both within those areas and elsewhere. New Charter will have an increased ability and incentive to discriminate against online content through control of various aspects of broadband delivery including pricing and control of the last mile, but also through video interfaces and content licensing. None of Joint Applicants' commitments attempt to address these latter two

¹⁸² Exhibit WG-1, Blum-Smith Reply Testimony at 26:3-5, citing FCC Application at 18-19 and Exhibit JA-1, Falk Errata Opening Testimony at 19:16-19.

¹⁸³ Exhibit JA-4, Scott Morton Opening Testimony, Exhibit B at 47-48, ¶ 128.

discriminatory mechanisms.¹⁸⁴ Nor do they commit to maintaining an affordable standalone broadband product, leaving open the possibility of New Charter raising the price for broadband or standalone broadband in comparison to pay-tv or bundled service, in order to make online video a less appealing alternative to its pay-tv service.¹⁸⁵

Neither can the Commission and the public rely solely on the FCC’s Open Internet rules for protection against the adverse consequences of the transaction. These rules were established because of the FCC’s determination that ISPs have incentive to threaten Internet openness and that their actions in response to this incentive could inhibit future broadband deployment.¹⁸⁶ The rules, therefore, govern certain ISP behaviors identified as harmful to the open Internet, including blocking, throttling or demanding paid prioritization for transmission of content.¹⁸⁷ However, the Open Internet rules forbear from regulating rates and decline to address the question of data caps.¹⁸⁸ In addition, they offer no protections against price discrimination, use of affiliated programming or use of video interfaces to extend gatekeeper control. Finally, the rules state that they are not intended to act as a substitute for robust competition or for antitrust enforcement, and cannot be relied upon for those purposes.¹⁸⁹ Joint Applicants are also not offering to commit to the entirety of the rules, only to the bright-line ban on blocking, throttling and paid prioritization. They are not offering to commit to the FCC’s “general conduct” rule against unreasonable interference or disadvantage. This provision was included in the rules to provide a “catch-all standard” that would help to fill gaps left by the bright-line prohibitions.¹⁹⁰

¹⁸⁴ *Id.* at 26:16-18.

¹⁸⁵ *Id.* at 26:18-27:2.

¹⁸⁶ *2015 Open Internet Order*, 30 FCC Rcd. at 5604, ¶¶ 7-8.

¹⁸⁷ *Id.* at 5607-8, ¶¶ 14-19.

¹⁸⁸ *Id.* at 5612, ¶ 37 and 5668-9, ¶ 153.

¹⁸⁹ Exhibit WG-1, Blum-Smith Reply Testimony at 27:3-7, citing *2015 Open Internet Order*, 30 FCC Rcd. at 5693, ¶ 203.

¹⁹⁰ *Id.* at 27:7-10, citing *2015 Open Internet Order*, 30 FCC Rcd. at 5609, ¶ 21 (“The bright-line bans on blocking, throttling, and paid prioritization will go a long way to preserve the virtuous cycle. But not all the way. Gatekeeper

In essence, Joint Applicants offer limited protections for a finite period against a subset of the levers for interference that have currently been identified, leaving gaps that would allow both known methods of interference and future methods that cannot yet be anticipated.¹⁹¹

Similarly, Joint Applicants and the John Malone-connected programmers Starz and Discovery have suggested before the FCC that the FCC's program access rules would preclude the vertical harms WGAW has identified, such as withholding affiliated programming from rivals. In fact, these rules do not provide adequate protection because they are intended to protect against vertically-integrated MVPDs and affiliated programming networks' hindrance of other MVPDs' access to the affiliated programming, and do not protect OVDs against such anticompetitive actions.¹⁹²

The brief duration of the broadband-related commitments also significantly limits their efficacy. Joint Applicants deny this reality; Dr. Scott Morton argues that "current trends suggest...broadband competition will limit any anticompetitive conduct in future years. As broadband choices for consumers grow over the next three years, a household that faces degraded or slow OVD access will likely be able to switch to a competing broadband provider that delivers the desired service" and claims that competition sufficient to limit anticompetitive conduct exists today.¹⁹³ However, as we have noted above, the latter assertion is not true; the lack of high-speed broadband alternatives currently means that New Charter could use data caps or other mechanisms to disadvantage online video and two-thirds to 70% of its customers would have nowhere else to turn.¹⁹⁴ The former claim is also unreasonable; WGAW and ORA's

power can be exercised through a variety of technical and economic means, and without a catch-all standard, it would be that, as Benjamin Franklin said, 'a little neglect may breed great mischief.')(internal citation omitted).

¹⁹¹ *Id.* at 27:10-13.

¹⁹² *Id.* at 28:8-12, citing 47 C.F.R. § 76.1000 *et seq.*

¹⁹³ Exhibit JA-4, Scott Morton Opening Testimony, Exhibit B at 49, ¶¶ 133, 136.

¹⁹⁴ Exhibit WG-1, Blum-Smith Reply Testimony at 3:16-4:9; Exhibit ORA-1, Selwyn Reply Testimony at 125 (Table 20), 126:1-3.

testimony affirms that the lack of current competition combined with the high upfront cost of overbuilding indicates that the situation in three years when the proposed conditions will expire is not likely to be meaningfully changed.¹⁹⁵ Municipal broadband providers and Google Fiber provide competition to incumbents where their service is offered, but have tiny footprints when compared to established providers.¹⁹⁶ The most prominent overbuilders are AT&T and Verizon, but their expansion over the past decade has failed to provide adequate competition for the vast majority of the nation.¹⁹⁷ It is highly unlikely that three additional years will be sufficient to ensure a competitive broadband landscape. On the other hand, all of the abilities and incentives that the merged entity will have to discriminate against online video competition will remain in place in three years.

In short, neither existing regulations nor the narrowly tailored and time-limited commitments Joint Applicants have offered can sufficiently protect against the adverse consequences that this transaction poses to the online video market and to broadband generally. At the same time, many of the “benefits” of the transaction identified by the Joint Applicants and their witnesses are speculative. Joint Applicants continue to make no promises regarding specific pass-through to consumers of savings on prices, and offer no specific build-out commitments for the state of California.¹⁹⁸ In addition, though Joint Applicants have identified various aspects of Charter’s “consumer-friendly” broadband service as transaction-specific benefits, such as its lack of early termination fees and its standalone offerings,¹⁹⁹ there has been no tangible commitment to continue these practices.

¹⁹⁵ Exhibit WG-1, Blum-Smith Reply Testimony at 27:18-20; Exhibit ORA-1, Selwyn Reply Testimony at 127:21-130:2.

¹⁹⁶ Exhibit WG-1, Blum-Smith Reply Testimony at 27:10-28:1.

¹⁹⁷ *Id.* at 28:1-5; Exhibit ORA-1, Selwyn Reply Testimony at 127:21-130:2.

¹⁹⁸ Exhibit GI-1, Chen Reply Testimony at 5:11-16.

¹⁹⁹ FCC Application at 22; Exhibit JA-1, Falk Errata Opening Testimony at 19:11-12.

X. CONDITIONS

WGAW believes that the CPUC should deny this transaction. As it is presented, the transaction does not serve the public interests of California. The transaction poses significant harm to broadband affordability by removing TWC's lower-cost Internet options from the market, increasing the chances of broadband price increases through reduced affordability of standalone broadband or imposition of data caps, and by precluding potential overbuilding and benchmark competition. In addition, the transaction will harm competition in broadband distribution markets and upstream content markets which support state and local economies and broadband affordability, deployment and investment. Should the CPUC choose to approve the transactions, it must enact strong, enforceable conditions in order to mitigate these many adverse outcomes. In order to ensure compliance, New Charter should furnish annual, public reports to the CPUC and make such reports available online.

a. Broadband pricing

WGAW has outlined a number of ways that this merger will worsen broadband affordability, both directly, in the loss of TWC's lower-cost options, and indirectly, in the increased incentive for New Charter to raise broadband prices through various mechanisms in order to discourage online video substitution and protect its pay-tv revenues. In order to protect California consumers, New Charter must commit to protections for broadband affordability:

- New Charter must honor TWC's existing pricing and service offerings, without material changes for three years following the close of the transaction. As Greenlining's witness Ms. Chen notes, this is consistent with conditions required by the New York Public Service Commission.²⁰⁰

²⁰⁰ Exhibit GI-1, Chen Reply Testimony at 9:10-12; Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain

- New Charter must offer a standalone broadband product for \$30 per month for ten years, with a speed of at least 25 Mbps. The speed should increase based on any modifications to the FCC’s threshold for “advanced telecommunications services” or CPUC discretion.
- New Charter must extend its commitment not to impose data caps or usage-based billing on its Internet service or to charge consumers for use of specific applications for ten years.

Joint Applicants claim that New Charter would have no incentive to increase broadband pricing through these various mechanisms, meaning that a commitment not to do so should not be a significant hardship.

b. Low-income Broadband Program

WGAW acknowledges the benefit to certain low-income consumers of New Charter’s proposed low-income broadband program, which would provide 30 Mbps Internet connections for \$14.99 per month to families with children in the NSLP and low-income seniors. However, as noted above, this program is designed in a way that minimizes its impact on the low-income population by excluding a large segment of that population and by restricting enrollment among current customers. In order to assure the benefit to California consumers of such a program, the following adjustments should be made:

- New Charter should expand eligibility in the program so that any low-income household meeting the criteria of income lower than 300% of the federal poverty level or including persons with disabilities is eligible to enroll.

Financing Arrangements, Case 15-M-0388 at the New York Public Service Commission, *Order Granting Joint Petition Subject to Conditions* (Jan. 8, 2016) at 60.

- New Charter should reduce barriers to enrollment that limit participation in the program by removing the requirement that enrollees not be current customers of Charter, TWC or BHN, and should consider additional debt forgiveness. In addition, WGAW agrees with Ms. Chen’s suggestion that New Charter should include at least one avenue for registration that does not require a social security number.²⁰¹

The CPUC should also set concrete enrollment benchmarks, such as requiring New Charter to enroll at least 40% of eligible households within two years of the close of the transaction.

c. Open Internet protections

The current commitment to adhere only to a portion of the FCC’s 2015 Open Internet rules for a period of just three years is insufficient to protect the neutral treatment of content on the Internet. Though the FCC’s rules current prohibit various forms of discrimination, Joint Applicants have offered an Open Internet condition because a number of Internet providers (Joint Applicants included) are currently suing in order to have those rules overturned, meaning that the future of the rules is uncertain. Therefore, New Charter should be required to extend its commitment to an Open Internet by committing to adhere to the entirety of the rules for a period of ten years.

d. Broadband expansion

While Joint Applicants have claimed broadband expansion and investment to upgrade speeds as a benefit of the proposed transaction, they have provided no specifics regarding the benefit to Californians. As a condition of approval, the CPUC should require that New Charter

²⁰¹ Exhibit GI-1, Chen Reply Testimony at 7:22-8:2.

build at least 150,000 of its promised one million line extensions in the state of California.²⁰² In addition, to ensure the widespread availability of high-speed services, the CPUC should require that New Charter offer speeds of at least 100 Mbps in 100% of its service territory in California, which would also be consistent with the New York Public Service Commission commitments.²⁰³

e. Platform neutrality protection

To enhance Joint Applicants' commitment that New Charter will not charge customers for access to any specific application or service, the CPUC should require that New Charter maintain neutrality on its set-top boxes and user interface, and commit not to prioritize any specific OVD services through those mechanisms. In the Comcast-TWC proceeding, the Proposed Decision acknowledged a similar issue regarding Comcast's ability to use authentication restrictions in order to prevent its customers from accessing certain online services on certain devices.²⁰⁴

XI. CONCLUSION

Charter's takeover of TWC and Bright House fails to meet the public interest goals of the state of California. It has significant negative implications for the reasonable and timely deployment of advanced telecommunications services in the state, as well as for the affordability and accessibility of those services. By consolidating control in the national market for broadband distribution, the transaction will cause significant harm to upstream content markets that support broadband investment, deployment and affordability. This will also have a disproportionate effect in California, the home of the entertainment industry, where state and local economies have benefited from the growth of these upstream content markets. In addition, the loss of TWC

²⁰² The New York Public Service Commission required Joint Applicants to commit to building out 145,000 line extensions in New York. Exhibit GI-1, Chen Reply Testimony at 5:9-11.

²⁰³ *Id.* at 5:16-17.

²⁰⁴ Comcast-TWC PD at 78.

and BHN from the state will preclude future competition between the Joint Applicants, either in the form of overbuilding or future out-of-footprint competition as virtual MVPDs, as well as reducing benchmark competition. Joint Applicants continue to deny or refuse to acknowledge most of these harms, and have provided no evidence that harms would be outweighed by the “benefits” of the transaction, or adequately prevented by the proffered commitments, failing to meet their burden of proof. The facts of this case suggest that a denial is appropriate and is within the Commission’s jurisdiction based on the definition of the public interest established by the Public Utilities Code of the State and associated case law. WGAW respectfully requests that the Commission deny the Applications for transfer. If the Commission chooses to approve the transactions, WGAW asks that strong, enforceable conditions be required in order to protect the public interest of the state of California.

Respectfully submitted,

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