

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

<p>In the matter of Joint Application of Charter Communications, Inc.; Charter Fiberlink CACCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a pro forma transfer of control of Charter Fiberlink CA-CCO, LLC (U6878C).</p>	<p style="text-align:center">Application 15-07-009 (Filed July 2, 2015)</p>
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**COMMENTS OF DISH NETWORK CORPORATION ON PROPOSED
DECISION GRANTING APPLICATION TO TRANSFER CONTROL SUBJECT
TO CONDITIONS**

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I. Introduction and Summary

In accordance with Rule 14.3 of the California Public Utility Commission (“CPUC” or “Commission”), DISH Network Corporation (“DISH”) submits these comments in response to the Proposed Decision Granting Application to Transfer Control Subject to Conditions (“Proposed Decision” or “PD”) in the above-referenced transaction.¹ As DISH has explained, Charter, TWC and BHN have not demonstrated, based on their Application, that this merger would serve the public interest.²

The PD recognizes that the relevant standard of review is whether or not the transaction is in the public interest. Among other things, the PD notes that the Applicants have “stated that the allegedly beneficial effects of the Transaction on broadband deployment and affordability are key reasons that we should approve the Application” and thus evidence supporting that claim is part of the public interest analysis.³ However, the PD fails to recognize the substantial harms that would result from this transaction and incorrectly concludes that the conditions proposed can offset any public interest harms. Therefore, the PD’s conclusion that the transaction will serve the public interest if approved is in error, particularly in light of the broadband consolidation at issue in this proposed merger. The PD concludes that the market for high-speed broadband is already highly concentrated, and therefore “[t]he merger of smaller monopolists into a bigger monopoly does little to worsen the situation of customers.”⁴ The PD errs on this front, especially

¹ See Proposed Decision Granting Application to Transfer Control Subject to Conditions (Apr. 12, 2016), available at <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M159/K735/159735252.PDF> (“Proposed Decision”).

² See Opening Brief of DISH Network Corporation (Mar. 1, 2016) (“DISH Opening Brief”).

³ Proposed Decision at 20.

⁴ *Id.* at 52.

when it concludes that “we cannot say that [customers] are materially worse off as a result of the merger.”⁵

II. The Transaction Threatens Serious Harms

As DISH has explained,⁶ among other harms, this transaction would exacerbate the consolidation of the broadband market both nationally and in California, leaving customers substantially worse off than had the merger not occurred. This transaction will create a duopoly in the market for high-speed broadband service, as it will result in two broadband providers – New Charter and Comcast – controlling at *least* 70% and possibly as high as 90% of the nation’s high-speed broadband homes between them. New Charter and Comcast’s control of the high-speed broadband market would allow the companies to coordinate efforts through collusion or parallel conduct to reduce competition, while raising prices for consumers. The impact of this transaction would be especially acute for broadband deployment in California, given that New Charter would be the dominant broadband provider in California (particularly in 10 Southern California counties), and approximately 70 percent of those households will have no alternative high-speed broadband provider.

As a result of this transaction, New Charter will have an increased incentive to harm new and emerging OTT services – like DISH’s Sling TV service – that compete with the combined company’s video offerings. Due to its increased size and scale, New Charter will have a number of tools at its disposal to harm these competing services, including, among other things, the following, which are harms that are either inadequately addressed, or wholly unaddressed, by the PD:

⁵ *Id.* at 53.

⁶ *See* DISH Opening Brief.

Bundled Pricing. New Charter will be able to undermine streaming services by manipulating the pricing of its broadband offerings to discourage or even prohibit customers from taking a standalone broadband product. By subsidizing its video service with broadband revenue, New Charter could price a combined broadband and video offering so as to induce customers to purchase New Charter's bundle of services instead of buying broadband from New Charter and video service from an OVD. New Charter could also limit consumer access to a standalone broadband product, or simply fail to offer a standalone broadband service entirely. To remedy these harms, which remain entirely unaddressed by the PD, DISH requests that the Commission require New Charter to adhere to the terms of the proposed standalone broadband condition, attached as Appendix A.

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

Interference With, or Discrimination Against, OVDs. New Charter will be able to harm competing OVD services on the public Internet portion of its broadband pipe. The Applicants argue that New Charter will be restrained from hurting OVDs by the existing open Internet rules and its commitment to observe a subset of these rules for three years, even if they are reversed by the courts during this time. But neither the subset of rules cherry-picked by the Applicants, nor even the open Internet rules in place today, would be adequate to rein in the behavior of New

Charter. Much of the harmful conduct whose potential the transaction will unleash is not subject to bright-line rules, but only to general conduct standards. Disputes arising under them will inevitably take time to resolve. Even if the OVD or consumer is vindicated, a promise not to do it again is not a substitute for not having the opportunity to do it in the first place, particularly since OVDs are fragile during their infancy. The proposed three-year commitment to comply with the terms of the FCC's Open Internet Order is thus insufficient to remedy these harms.

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

The harms that would result from the use of any of the tactics described above could deal a significant blow to, if not destroy, competitors and their ability to serve consumers, all to the detriment of the public interest.

III. The Conditions Proposed are Inadequate

The PD's proposed conditions do little to mitigate New Charter's ability to engage in the anticompetitive actions discussed above. They are therefore inadequate, both in substance and duration, to offset the serious harms of this transaction. If the CPUC decides to approve the merger, it must impose workable remedies for all of the harms presented by this transaction, including the threats posed by the anti-competitive methods discussed herein. In addition, any remedies adopted must last long enough to cure the harms posed, and that time period must be no less than seven years in duration, consistent with the terms proposed by the Federal

Communications Commission⁷ and Department Of Justice.⁸ In addition, any such remedies must be subject to meaningful enforcement and oversight by the Commission, including through an expedited complaint resolution process and an appointed compliance monitor, among other things.

IV. Conclusion

Charter's proposed acquisition of Time Warner Cable and Bright House Networks threatens serious harms for consumers, competition and innovation. The PD errs in failing to recognize the significant public interest harms of this transaction, and the conditions proposed are inadequate to remedy these harms. Should the transaction be permitted to proceed, the CPUC must impose meaningful conditions to address the harms presented consistent with the discussion herein.

Respectfully submitted,

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⁷ See Statement of FCC Chairman Tom Wheeler on Recommendation Concerning Charter/Time Warner Cable/Bright House Networks (Apr. 25, 2016), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0425/DOC-339028A1.pdf.

⁸ See Proposed Final Judgment, United States of America v. Charter Communications, Inc., Time Warner Cable Inc, Advance/Newhouse Partnership, and Bright House Networks LLC, Civil Action No.: 16-cv-00759 (Filed Apr. 25, 2016), *available at* <https://www.justice.gov/opa/file/844806/download>.

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Appendix A
Proposed Standalone Broadband Condition

Definitions

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

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

Condition

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

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

condition, including the number of standalone Broadband Internet Access Service lines provisioned; (b) the standalone Broadband Internet Access Service speeds and pricing being offered to customers in its top 30 markets; (c) the Broadband Internet Access Service speeds and pricing being offered as part of each package of one or more Company products and/or services in its top 30 markets as well as the package price; and (d) the prices and speeds at which competitors offer standalone Broadband Internet Access Service (to the extent known by Company) in its top 30 markets.