Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of Charter Communications, Inc.,	)	MB Docket No. 15-149
Time Warner Cable, Inc., and	)	
Advance/Newhouse Partnership	)	
For Consent to Transfer Control of	)	
Licenses and Authorizations	)	
	)	
	)	

COMMENTS OF NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE

I. INTRODUCTION

In their application before the Commission, Charter Communications, Time Warner Cable, and Bright House Networks ("Applicants") propose a multifaceted transaction that would establish a major new player in the pay TV and broadband markets. The merger of the nation's fourth, seventh, and tenth largest multichannel video programming distributors would create a new entity ("New Charter") whose dominance as a video and broadband provider would be rivaled only by Comcast. While the applicants argue that New Charter would serve as a competitive check on Comcast's market power, New America's Open Technology Institute ("OTI") urges the Commission to closely examine whether this transaction would actually foster an oligopoly in the pay TV and broadband markets.

OTI is particularly concerned about the impact this transaction might have on broadband Internet service, a market in which consumers already endure limited choice and high prices. The applicants have preconditioned the transaction with a relatively robust foundation of commitments, including consumer-friendly practices related to data caps and interconnection. Many aspects of Charter's proposal improve upon Comcast's failed bid to acquire Time Warner Cable, but that alone does not warrant approval of the pending transaction. New Charter must be more than just marginally better than Comcast. At a minimum, the applicants must clearly demonstrate that New Charter would benefit the public interest in ways that are merger-specific and long-term.

Importantly, Comcast's 2014 application to acquire Time Warner Cable should *not* be the benchmark against which this or any other merger is assessed. That transaction, which was abandoned earlier this year amid intense scrutiny by regulators, consumers, and small businesses, would have created an ISP of unprecedented scale and power. The fact that New Charter's market share would be relatively smaller does not support a conclusion that the pending transaction should be approved or reviewed less rigorously. Few, if any, potential transactions could match the scope of the threat that Comcast/Time Warner Cable posed to consumers and innovation. OTI strongly urges the Commission to apply the same level of scrutiny to the pending transaction as it did to the Comcast/Time Warner Cable transaction.

Accordingly, OTI files these comments in the above-referenced docket to discuss several concerns that must be rigorously examined in the Commission's review, including the adequacy of New Charter's proposed Open Internet commitments and the effect of the transaction on broadband affordability.

II. NEW CHARTER'S OPEN INTERNET COMMITMENTS ARE INSUFFICIENT

The Commission must rigorously examine the effect this merger would have on New Charter's incentives and abilities as a last-mile broadband provider. OTI is particularly concerned that the transaction would give New Charter sufficient scale to engage in the kind of interconnection disputes that have recently harmed millions of consumers.

Measurement Lab, a research consortium that includes OTI, has observed multiple episodes of prolonged network congestion on the nation's largest ISPs—including Time Warner Cable—that suggest certain interconnection points are being strategically manipulated to extract access fees from transit companies and edge providers.[1] The impact of these interconnection disputes on consumers has been devastating: millions of people did not get the broadband service they paid for, in some cases experiencing connections so degraded that they were essentially unusable for several months. In the wake of these episodes, the Commission recognized the need for interconnection oversight in both the Open Internet Order[2] and its review of the AT&T/DirecTV transaction.[3]

---

[1] *See* "ISP Interconnection and its Impact on Consumer Internet Performance," Measurement Lab (Oct. 28, 2014), *available at* http://www.measurementlab.net/static/observatory/M-Lab_Interconnection_Study_US.pdf; *see also* "Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes," Open Technology Institute (Nov. 2014), *available at* https://static.newamerica.org/attachments/386-beyond-frustrated-the-sweeping-consumer-harms-as-a-result-of-isp-disputes/OTI_Beyond_Frustrated_Final.pdf.

[2] *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report & Order, FCC 15-24 (rel. Mar. 12, 2015) ("2015 Open Internet Order") at ¶ 203.

[3] *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Memorandum Opinion & Order, FCC 15-94 (rel. Jul. 28, 2015), at ¶ 7, 214-219, 396.

The danger of unchecked last-mile power should be an imperative consideration in the Commission's review of the pending transaction. Chairman Wheeler acknowledged this danger in a speech last year:

> Communications policy has always agreed on one important concept: the exercise of uncontrolled last-mile power is not in the public interest. This has not changed as a result of new technology. When network operators have unrestrained last mile power, public policy can step in to protect consumers and innovators. When cable companies, for instance, were accused of using their control over the last-mile distribution of video programing to harm competition by keeping content from others, Congress stopped that practice in the 1992 Cable Act. There are two important lessons from this: First, last-mile power cannot be a lever for gaining an unfair advantage. Second, rules of the road can provide guidance to all players and, by restraining future actions that would harm the public interest, incent more investment and more innovation.[4]

Interconnection congestion—particularly that which is deliberately created to gain negotiating leverage—threatens to undo the virtuous cycle of innovation that has made the Internet a major engine of economic growth and job creation. An ISP's abuse of its gatekeeper power is a particular risk to online video, as Assistant Attorney General Bill Baer recently explained:

> So many consumers' only option for high-speed internet service is the cable company – the same cable company that also derives significant revenues from its cable television business. This means 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. [5]

---

[4] Remarks of FCC Chairman Tom Wheeler, *The Facts and Future of Broadband Competition* (Sept. 4, 2014), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-329161A1.pdf

[5] Remarks of Assistant Attorney General William Baer at the Future of Video Competition and Regulation Conference, *Video Competition: Opportunities and Challenges* (Oct. 9, 2015), *available at* http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-keynote-address-future-video-competition

Charter notes that it routinely upgrades its interconnection points and will continue to do so as New Charter. Indeed, there is no evidence that Charter's network has suffered from prolonged interconnection-related congestion. However, Old Charter's interconnection practices are not necessarily predictive of New Charter's behavior. OTI's analysis of recent interconnection congestion found that only the nation's largest ISPs experienced problems, suggesting that this blunt tool only works for ISPs that are sufficiently large. Charter likely lacks the scale necessary to be successful in a prolonged interconnection dispute with a transit provider. Time Warner Cable, on the other hand, has sufficient scale and a history of interconnection disputes; New Charter would have even greater scale and, potentially, greater incentive to engage in harmful interconnection practices.

The applicants deserve credit for taking unprecedented steps to address these concerns. They have proposed a voluntary commitment to interconnect on nondiscriminatory terms that goes farther than anything to which Time Warner Cable, AT&T, or Comcast has been willing to publicly commit. However, the duration of the proposed condition is too short; three years is not enough time to ensure that Old Charter's nondiscriminatory interconnection practices carry over to New Charter. Furthermore, there is no evidence that New Charter's increased ability and incentive to engage in harmful interconnection practices will no longer exist in 2019. At a minimum, New Charter should commit to a longer duration of its interconnection policy. Additionally, New Charter should not be allowed to enter into exclusive arrangements that require interconnecting parties to send all of their traffic directly to New Charter. Interconnecting parties should not be forced into exclusivity arrangements that foreclose their ability to route their traffic through alternate routes if they choose to do so. The Commission must also ensure that New Charter's interconnection policy benefits not just large edge providers and transit companies, but also smaller startups and future innovation that could compete with established Internet companies. The Commission's inquiry into the applicants' interconnection practices should be guided by the dual goals of (1) preserving the Internet's virtuous cycle of innovation and (2) protecting consumers from congestion-related harm.

New Charter must also commit to robust transparency. Most interconnection agreements are subject to nondisclosure agreements, making compliance with voluntary commitments and the Open Internet Order difficult to verify. There can be no meaningful public interest benefit to the applicants' proposal if it does not include public disclosure of interconnection agreements, capacity, and utilization. The transparency framework recently adopted by the Commission in the AT&T/DirecTV transaction[6] should be the floor, but by no means the ceiling, for New Charter's transparency regime.

The applicants have also committed to abide by the Open Internet Order, including the case-by-case adjudication of interconnection disputes. While OTI strongly supports the Open Internet Order's robust enforcement, we do not believe the applicants' promise to adhere to existing law constitutes a public interest benefit. The Open Internet Order is the law of the land, not a bargaining chip. The applicants should abide by the Order irrespective to the outcome of the pending transaction.

III. NEW CHARTER'S PRICING STRATEGIES AND CONSUMER OFFERINGS MUST BE CLOSELY SCRUTINIZED

The Commission must also closely scrutinize the affordability of the broadband services that New Charter would offer consumers. Cost remains a major barrier to broadband access and adoption throughout America, contributing to a pernicious digital divide that has left millions of

[6] *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 14-90, Memorandum Opinion & Order, FCC 15-94 (rel. Jul. 28, 2015), at ¶ 7, 214-219, 396.

Americans disconnected from the benefits of Internet access. New Charter's enhanced market power could leave consumers vulnerable to price increases and anticompetitive pricing strategies. To address this concern, Charter has offered to expand the low-income broadband plan currently offered by Bright House Networks. A discounted broadband service in the pending transaction would be consistent with the precedents established by the Commission's reviews of Comcast's 2011 acquisition of NBC-Universal and, more recently, AT&T's 2015 acquisition of DirecTV. Both transactions resulted in commitments to offer discounted standalone broadband service to qualifying consumers. While OTI strongly supports efforts to expand the broadband options available to low-income Americans, we urge the Commission to examine whether the proposed service is a merger-specific benefit that Charter could not reasonably offer customers without acquiring Time Warner Cable and Bright House Networks.

We also urge the Commission to ensure that the proposed service complements and enhances the ongoing effort to modernize the Lifeline program.[7] Accordingly, New Charter should commit to making the service available to all individuals who would be eligible for a broadband subsidy under whatever eligibility framework the Commission ultimately adopts for Lifeline. A plan that is only available to a subset of low-income households, such as those with children that qualify for federal lunch assistance, would not yield a public interest benefit that is substantial enough to warrant the Commission's approval of the pending transaction. Additionally, New Charter's plan should be priced at a level that is fully covered by the Commission's proposed Lifeline subsidy of $9.25 for broadband service. If the provisioning of such service is not possible at or below a monthly cost of $9.25, Charter must demonstrate this to

[7] *In the Matter of Lifeline and Link Up Reform and Modernization*, WC Docket No. 11-42, *Second Further Notice of Proposed Rulemaking*, FCC 15-71 (rel. Jun. 22, 2015).

the Commission with robust and clear evidence. Absent pricing synergies with Lifeline, New Charter's low-income broadband plan may not offer a sufficiently strong public interest benefit.

IV. CONCLUSION

In the current market, any transaction that concentrates MVPD and ISP market power demands the Commission's highest level of scrutiny. As a steadfast proponent of broadband access and adoption, OTI is particularly concerned about the impact of this transaction on the market for broadband services. We urge the Commission to closely examine the effects of this merger on consumers and innovation, including a thorough review of whether the purported public interest benefits are merger-specific and sufficiently long-term in duration. Importantly, the Commission must ensure that this transaction protects the Open Internet; failure to do so would severely undercut any potential public interest benefit, and any merger that fails to meet this threshold should be rejected. We look forward to continuing to work with the Commission and the applicants as the review of this transaction proceeds.

Respectfully Submitted,

/s/ Joshua Stager

Joshua Stager
Sarah J. Morris

Open Technology Institute
New America Foundation
1899 L Street NW, Suite 400
Washington, DC 20036

Filed: October 13, 2015