UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. CHARTER COMMUNICATIONS, INC., TIME WARNER CABLE INC, ADVANCE/NEWHOUSE PARTNERSHIP, and BRIGHT HOUSE NETWORKS, LLC, *Defendants.*	Civil Action No. 1:16-cv-00759 (RCL)

COMPETITIVE IMPACT STATEMENT

The United States of America ("United States"), pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I. NATURE AND PURPOSE OF THE PROCEEDING

On May 23, 2015, Charter Communications, Inc. ("Charter") and Time Warner Cable, Inc. ("TWC"), two of the largest cable companies in the United States, agreed to merge in a deal valued at over $78 billion. In addition, Charter and Advance/ Newhouse Partnership, which owns Bright House Networks, LLC ("BHN"), announced that Charter would acquire BHN for $10.4 billion, conditional on the sale of TWC to Charter. As a result of these transactions, the combined company, referred to as "New Charter," will become one of the largest providers of pay television service in the United States.

The United States filed a civil antitrust Complaint on April 25, 2016, seeking to enjoin the proposed transactions because their likely effect would be to lessen competition substantially in numerous local markets for the timely distribution of professional, full-length video programming to residential customers ("video programming distribution") throughout the United States in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. Specifically, the Complaint alleges that the proposed merger would increase the ability and incentive of New Charter to use its leverage with video programmers to limit the access of online video distributors ("OVDs") to important content. These OVDs are increasingly offering meaningful competition to cable companies like Charter, and the loss of competition caused by the proposed merger likely would result in lower-quality services, fewer choices, and higher prices for consumers, as well as reduced investment and less innovation in this dynamic industry.

At the same time the Complaint was filed, the United States also filed a Stipulation and proposed Final Judgment, which are designed to eliminate the anticompetitive effects of the proposed merger. Under the proposed Final Judgment, which is explained more fully below, the Defendants will be prohibited from using their bargaining leverage with video programmers to inhibit the flow of video content to OVDs. The proposed Final Judgment will provide a prompt, certain, and effective remedy for consumers by preventing New Charter from using its leverage over programmers to harm competition. The United States and the Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment, and to punish and remedy violations thereof.

The proposed merger was also subject to review and approval by the Federal

Communications Commission ("FCC").[1] On May 5, 2016, the FCC adopted an order approving the transactions subject to certain conditions discussed below, and that order was released publicly on May 10, 2016. The Department and the FCC coordinated closely in their reviews of the proposed merger. The FCC's remedy is independent of the proposed Final Judgment and not subject to review in this proceeding.

II. DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION

A. The Defendants and the Proposed Merger

Charter is the third-largest cable company in the United States, and the sixth-largest multichannel video programming distributor ("MVPD") overall. Charter owns cable systems across 28 states, serving approximately 4.8 million residential broadband customers and 4.2 million residential video customers. Charter reported total revenues of around $9.1 billion in 2014, approximately $4.4 billion of which were derived from Charter's video business.

TWC is the second-largest cable company in the United States (behind only Comcast Corp.), and the fourth-largest MVPD in the country. TWC's cable systems serve approximately 11.7 million residential broadband and 10.8 million residential video customers in 30 states. TWC reported total revenues of approximately $22.8 billion in 2014, around $10.4 billion of which were derived from TWC's video business.

BHN is the sixth-largest incumbent cable company in the United States and the ninth-largest MVPD overall. It owns cable systems serving approximately 2 million video customers across six states, the majority of whom are located in the Orlando and Tampa-St. Petersburg, Florida areas. BHN is a wholly-owned subsidiary of Advance/Newhouse Partnership. Although

[1] Under the Communications Act, the FCC has jurisdiction to determine whether mergers involving the transfer of a telecommunications license are in the "public interest, convenience, and necessity." 47 U.S.C. § 310(d).

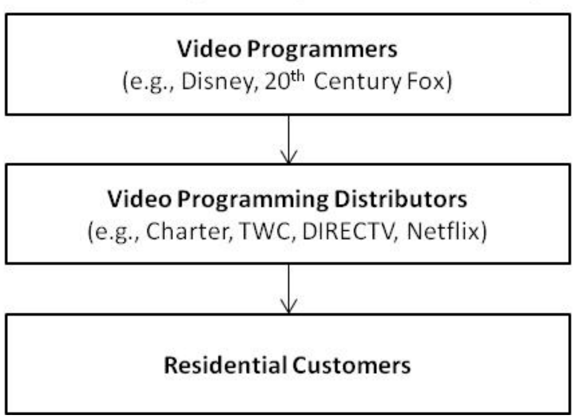
the Advance/Newhouse Partnership retains the authority to manage BHN, it has entered into agreements by which TWC performs certain functions for BHN, including the procurement of cable programming. In 2014, BHN generated total revenues of around $3.7 billion, approximately $1.5 billion of which were derived from its video business.

The proposed transactions combining Charter, TWC, and BHN into New Charter, as initially agreed to by the Defendants on May 23, 2015, would lessen competition substantially in numerous local markets for video programming distribution. These transactions are the subject of the Complaint and proposed Final Judgment filed by the United States on April 25, 2016.

B. <u>The Structure of the Video Programming Distribution Industry</u>

The video programming distribution industry operates at two distinct levels. At the "upstream" level, video programmers license their content to video programming distributors – both OVDs and traditional MVPDs including Charter, TWC, and BHN. At the "downstream" level, the video programming distributors then sell subscriptions to various packages of that content and deliver the content to residential customers.

The Video Programming Distribution Industry



1. Video Programmers

Video programmers produce themselves, or acquire from other copyright holders, a collection of professional, full-length programs and movies. These video programmers then typically aggregate this content into branded networks (*e.g.*, NBC or The History Channel) that provide a 24-hour schedule that is attractive to consumers. Large video programmers often own multiple individual networks. For instance, The Walt Disney Company owns the ABC broadcast network as well as many cable networks such as ESPN and The Disney Channel.

In order to acquire the rights to distribute each network, video programming distributors pay the video programmer a license fee, generally on a per-subscriber basis. These license fees are an important revenue stream for video programmers. Most of the remainder of their revenues comes from fees for advertisements placed on their networks.

Video programmers rely on video programming distributors – both MVPDs and OVDs – to reach consumers. Unless a video programmer obtains carriage in the packages of video programming distributors that reach a sufficient number of consumers, the programmers will be unable to earn enough revenue in licensing or to attract enough advertising revenue to generate a return on their investments in content. For this reason, video programmers prefer to have as many video programming distributors as possible carry their networks, and particularly seek out the largest MVPDs that reach the most customers. If the programmer is unable to agree on acceptable terms with a particular distributor, the programmer's content will not be available to that distributor's customers. This potential consequence gives the largest MVPDs significant bargaining leverage in their negotiations with programmers.

2. Multichannel Video Programming Distributors

Traditional video programming distributors include incumbent cable companies such as Charter and TWC; direct broadcast satellite ("DBS") providers such as DirecTV and DISH Network; telephone companies ("telcos") that offer video services such as Verizon and AT&T;

and overbuilders such as Google Fiber and RCN.[2] These distributors are referred to collectively as MVPDs. MVPDs typically offer hundreds of channels of professional video programming to residential customers for a monthly subscription fee.

3. Online Video Programming Distributors

OVDs are relatively recent entrants into the video programming distribution market. They deliver a variety of live and/or on-demand video programming over the Internet, whether streamed to Internet-connected televisions or other devices, or downloaded for later viewing. OVDs today include services like Netflix, Hulu, Amazon Prime Instant Video, and Sling TV, although, as discussed in more detail below, their content selection and business models vary greatly. Unlike MVPDs, OVDs do not own distribution facilities and are dependent upon broadband Internet access service providers, including incumbent cable companies such as Charter and TWC, for the delivery of their content to viewers.

C. The Relevant Market and Market Concentration

The Complaint alleges that video programming distribution constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. § 18. The market for video programming distribution includes both traditional MVPDs and their newer OVD rivals.

Consumers purchase video programming distribution services from among those distributors that can offer such services directly to their home. The DBS operators, DirecTV and DISH, can reach almost any customer in the continental United States who has an unobstructed line of sight to their satellites. OVDs are available to any consumer with an Internet service sufficient to deliver video of an acceptable quality. In contrast, wireline-based distributors such

[2] Overbuilders are providers who have constructed an additional wired network to residential consumers for offering video and broadband service (*i.e.*, they have "built over" the cable and phone company networks).

as cable companies and telcos generally must obtain a franchise from local, municipal, or state authorities in order to construct and operate a wireline network in a specific area, and then build lines to homes in that area. A consumer cannot purchase video programming distribution services from a wireline distributor operating outside its franchise area because the distributor does not have the facilities to reach the consumer's home. Thus, although the set of video programming distributors able to offer service to individual consumers' residences is generally the same within each local community, the set can differ from one local community to another.

According to the Complaint, each local community whose residents face the same competitive choices in video programming distribution comprises a geographic market and section of the country under Section 7 of the Clayton Act, 15 U.S.C. § 18. The geographic markets relevant to this action are the numerous local markets throughout the United States where either Charter, TWC, or BHN is the incumbent cable operator – an area encompassing 48 million U.S. television households located across 41 states. However, because OVDs typically offer services nationwide, the Complaint alleges that anticompetitive effects of the proposed merger likely extend to the entire United States.

The incumbent cable companies are often the largest video distribution provider in their respective local territories; the Defendants' market shares, for example, exceed 50 percent in many local markets in which they operate. The DBS providers, DirecTV and DISH Network, account for an average of about one third of video programming subscribers combined in any given local market. The telcos, including AT&T and Verizon, have market shares as high as 40 percent in the communities they have entered, but they are only available in limited areas and account for about 10 percent of video programming customers nationwide. Overbuilders such as Google Fiber can also have moderately high shares in particular local markets, but their services are only available in a small number of areas and they account for fewer than two percent of nationwide video programming distribution subscribers.

Although OVDs have acquired a significant number of customers over the last several years, most of these customers also purchase traditional MVPD subscriptions. As a result, OVDs currently have a small share of video programming distribution market revenues – likely around 5%.

D. Emerging Competition from OVDs in the Relevant Market

1. OVD Business Models and Participants

OVDs have developed a number of different business models for delivering content to consumers. Several OVDs, including Netflix, Amazon Prime Instant Video, and Hulu Plus, offer "subscription video on demand" ("SVOD") services where consumers typically obtain access to a wide library of movies, past-season television shows, and original content for a subscription fee.[3] In addition, some individual cable programmers, such as CBS and HBO, have begun offering their content directly to consumers on an SVOD basis. For example, HBO's service, branded HBO NOW, provides subscribers who pay a monthly fee with access to the same HBO content over the Internet that they would receive through a subscription to HBO as part of an MVPD package.

In contrast to these SVOD providers, a few OVDs have recently begun offering MVPD-like bundles of live, scheduled content to consumers over the Internet. In early 2015, DISH launched Sling TV, a monthly subscription service that provides customers access to many of the same cable networks that are available through traditional MVPDs. Sony has launched a similar service called PlayStation Vue. Unlike SVODs, these "virtual" MVPDs ("vMVPDs") provide

[3] Hulu also offers current-season content from various television networks on an ad-supported basis for no subscription fee.

customers the ability to watch live sports and news programming, as well as other scheduled entertainment programming, at the same time it is available on traditional MVPDs.

2. The Effects of OVD Development on Traditional MVPDs

As OVDs have developed new business models and obtained a wider array of attractive video content, they have started to become closer substitutes for traditional MVPD services. Although many consumers treat OVD services as a complement to traditional MVPD service – for example, purchasing services from an SVOD like Netflix to access past season content and Netflix's original content but subscribing to an MVPD for live and current-season content – some are already using OVDs as substitutes for at least a portion of their video consumption. These consumers buy smaller content packages from traditional MVPDs, decline to take certain premium channels, or purchase fewer VOD offerings, and instead substitute content from OVDs, a practice known as "cord-shaving." In addition, a small, but growing number of MVPD customers are "cutting the cable cord" completely, using one or more OVDs as a replacement for their MVPD service. Finally, some younger consumers are emerging as "cord nevers" who do not seek out an MVPD subscription in the first place.

Absent interference from the established MVPDs, OVDs are likely to continue to grow, and to become stronger competitors to MVPDs. Moreover, to the extent that OVDs continue to develop services that more closely resemble those offered by traditional MVPDs, such as the live programming offered by vMVPDs or the current season content offered by certain SVODs, traditional MVPDs will likely face greater substitution to OVD services. To this end, the Defendants' internal documents show that they have typically been comparatively less concerned about competition from certain SVOD providers, like Netflix, that do not offer live or current-season programming, and more concerned by the threat posed by vMVPDs like Sling TV and SVODs like HBO NOW that offer current season content.

3. Traditional MVPDs' Responses to the Growth of OVDs

The Defendants and many other MVPDs recognize the threat that the growth of OVDs pose to their video distribution businesses. Numerous internal documents reflect the Defendants' assessment that OVDs are growing quickly and pose a competitive threat to traditional forms of video programming distribution. MVPDs have responded to this growth in various ways. To keep their customers from migrating some or all of their viewing to OVDs, many MVPDs, including the Defendants, have introduced new and less expensive packages with smaller numbers of channels, increased the amount of content available on an on-demand basis, and made content available to subscribers on devices other than traditional cable set-top boxes. At the same time, however, some MVPDs have sought to restrain nascent OVD competition directly by exercising their leverage over video programmers to restrict video programmers' ability to license content to OVDs. As alleged in the Complaint, and explained in more detail below, TWC has been an industry leader in seeking such restrictions, and the formation of New Charter will create an entity with an increased ability and incentive to do so.

E. <u>The Anticompetitive Effects of the Proposed Merger</u>

Although Defendants do not compete to provide video distribution services to consumers in the same local geographic markets, the Clayton Act is also concerned with mergers that threaten to reduce the number or quality of choices available to consumers by increasing the merging parties' incentive or ability to engage in conduct that would foreclose competition.[4] For

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[4] *See Brown Shoe Co. v. United States*, 370 U.S. 294, 317 (1962) (noting that the Clayton Act intended to make illegal "not only [] mergers between actual competitors, but also [] vertical and conglomerate mergers whose effect may tend to lessen competition in any line of commerce in any section of the country."); *FTC v. Procter & Gamble Co.*, 386 U.S. 568, 577 (1967) ("All

example, a merger may create, or substantially enhance, the ability or incentive of the merged firm to protect its market power by denying or raising the price of an input to the firm's rivals.

As alleged in the Complaint, New Charter will be significantly larger than each of the Defendants individually, and thus will have a greater incentive and ability to use its bargaining power with video programmers to protect its market power in the local markets for video programming distribution. Specifically, following the merger, New Charter will be the one of the largest MVPDs in the country, with over 17 million subscribers in 41 states, and will therefore be a critical distribution channel for video programmers. The Complaint alleges that this greater scale will give New Charter more leverage to demand that programmers agree to limit their distribution to OVDs, enabling the merged firm to increase barriers to entry for OVDs or otherwise make OVDs less competitive.

The Complaint also alleges that New Charter will have increased incentive to engage in such behavior because it will stand to lose substantially more profits than Charter, TWC, and BHN individually if OVDs take business from traditional MVPDs, and it will internalize more of the benefits of harming OVDs. The Defendants' specific means for foreclosing OVDs – ADM clauses and other restrictive contracting provisions – are discussed in more detail below.

1. TWC Is the Industry Leader in Imposing ADMs and Other Restrictive Programming Clauses that Limit Video Programmers' Rights to License to OVDs

Video programmers sign lengthy licensing agreements with distributors that establish the terms on which the distributors will carry the programmers' networks. Sometimes, these licensing agreements include restrictions on the other distributors to whom the programmer may license content, or on other ways the programmer may make the content available to consumers.

mergers are within the reach of § 7, and all must be tested by the same standard, whether they are classified as horizontal, vertical, conglomerate.").

One type of restriction is often referred to in the industry as an “alternative distribution means” (“ADM”) clause. ADM clauses take many forms, and in some cases can have significant consequences for programmers’ ability to license to OVDs. For example, some ADMs prohibit a video programmer from licensing content to OVDs for an extended period of time after the content is first aired on traditional MVPDs – permanently blocking OVDs from being able to offer current-season content from those programmers. Other ADMs prohibit the programmer from licensing content to OVDs unless the OVDs meet a number of strict (and sometimes elaborate) criteria that can be difficult to satisfy.[5]

TWC has been the most aggressive MVPD at seeking and obtaining restrictive ADM clauses in recent years. The Department’s review of hundreds of programming contracts and ordinary course business documents revealed that TWC has obtained numerous ADMs that limit distribution to paid OVDs. Other distributors, by contrast, have rarely, if ever, sought or obtained such clauses, or have only obtained ADMs that are much less restrictive. TWC’s success in seeking and obtaining ADMs is likely attributable in part to its bargaining leverage over video programmers; although such programmers might disfavor such restrictions because they require the programmer to forsake opportunities to earn revenues from OVDs, they are more likely to agree to a large MVPD such as TWC’s demand to include them because they do not want to lose access to TWC’s millions of cable subscribers.

The Department’s investigation further suggested that TWC may be the most aggressive at obtaining such clauses because, other than Comcast, TWC has more to lose from the expansion of OVDs than any other traditional MVPD. Although Comcast also has substantial

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[5] For instance, an ADM in one MVPD’s contract with a video programmer prohibited the programmer from licensing to any OVD unless that OVD offered a package that included thirty-five channels, including at least two channels each from three out of a list of six large video programmers.

video profits at risk, it is prohibited from entering into or enforcing any provisions that restrict distribution to OVDs under the terms of a consent decree entered in *United States v. Comcast Corp.*[6] By contrast, distributors with fewer subscribers than TWC have less to lose from the expansion of OVDs, and, in some cases, may actually support OVD expansion because they make little or no profit margin on their video distribution businesses and would prefer to improve the attractiveness of their broadband Internet access services. Meanwhile, the two DBS providers, DISH and DirecTV, have historically been comparable to TWC in size, but because of their different distribution technology and their customer demographics, may perceive a lower threat from OVDs. In fact, DISH is offering an OVD service of its own – Sling TV – and DirecTV recently announced plans to offer a similar OVD service.

2. The Proposed Transaction Increases New Charter's Ability and Incentive to Obtain ADMs and Other Restrictive Programming Clauses

The number and scope of the ADMs that TWC obtained prior to the merger suggests that TWC believes that these ADM clauses are worth whatever consideration it must provide video programmers in return. After the merger, New Charter, with over 17 million video subscribers in 41 states, will have even more leverage than TWC to demand that programmers agree to ADMs. Given the importance of New Charter as a distribution channel, programmers will be less likely to risk losing access to New Charter's considerable subscriber base – which is almost 60 percent larger than TWC alone – and will be more likely to accept to New Charter's demands. Moreover, since New Charter will have far more profits at risk from increased OVD competition than Charter, TWC, or BHN standing alone, it will be willing to provide greater consideration to programmers to obtain such clauses. As a result, New Charter can be expected to seek and

[6] *See* Final Judgment, *United States et al. v. Comcast et al.*, Civil Action No. 1:11cv-00106, 2011-2 Trade Cas. (CCH) ¶77,585, 2011 WL 5402137 (D.D.C. Sept. 1, 2011), *available at* https://www.justice.gov/atr/case-document/file/492196/download.

obtain ADMs with more programmers than TWC has to date, and the ADMs are likely to be more restrictive than TWC's current ADM provisions. As alleged in the Complaint, such ADMs could negatively affect OVDs' business models and undermine their ability to provide robust video offerings that compete with the offerings of traditional MVPDs. The weakening of OVD competition will result in lower-quality services, fewer consumer choices, and higher prices.

4. Entry Is Unlikely to Reverse the Anticompetitive Effects of the Proposed Merger

Successful entry into the traditional video programming distribution business is difficult and requires an enormous upfront investment to create a distribution infrastructure. As alleged in the Complaint, additional entry into wireline or DBS distribution is not likely to be significant for the next several years. Telcos have been willing to incur some of the enormous costs to modify their existing telephone infrastructure to distribute video, and will continue to do so, but only in certain areas. Other new providers, such as Google Fiber, are also expanding services, but the time and expense required to build to each new area makes expansion slow. Therefore, traditional MVPDs' market shares are likely to be fairly stable over the next several years.

OVDs represent the most likely prospect for successful and significant competitive entry into the existing video programming distribution market. However, in addition to the other barriers they face, OVDs must obtain access to a sufficient amount of content to become viable distribution businesses, and the proposed merger will likely increase that barrier to entry even further.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment ensures that New Charter will not impede competition by using programming contracts to prevent the flow of content to OVDs. The proposed Final

Judgment thereby protects consumers by eliminating the likely anticompetitive effects of the proposed merger alleged in the Complaint.

A. The Proposed Final Judgment Prohibits Defendants from Limiting Distribution to OVDs through Restrictive Licensing Practices

As discussed above, certain types of contract provisions, such as ADMs, can have the purpose and effect of limiting distribution to OVDs. However, not all provisions that limit distribution are anticompetitive. Reflecting this reality, Sections IV.A and IV.B of the proposed Final Judgment set forth broad prohibitions on restrictive contracting practices, while Section IV.C delineates a narrowly tailored set of exceptions. Taken together, these provisions ensure that New Charter cannot use restrictive contract terms to harm the development of OVDs, but preserve programmers' incentives to produce quality programming and New Charter's ability to compete with other distributors to obtain marquee content.

Section IV.A of the proposed Final Judgment prohibits New Charter from entering into or enforcing agreements that forbid, limit, or create incentives to limit the provision of video programming to OVDs. This language prevents New Charter from enforcing the ADM provisions in current TWC contracts, or from entering into new provisions.

Section IV.B provides additional detail as to the types of terms that could create "incentives to limit" distribution to OVDs. The Department's investigation revealed that TWC has obtained ADM provisions for the purpose of attempting to limit distribution to OVDs. However, once those agreements are prohibited, New Charter could substitute ADMs with more subtle types of contract provisions that do not directly limit distribution to OVDs, but make it financially unattractive for video programmers to license content to OVDs. For instance, absent relief, New Charter could enter into an agreement that permits a video programmer to license content to an OVD, but specifies that so licensing will entitle New Charter to a massive license fee discount. To prevent evasion of the ban on ADMs, Section IV.B.1 clarifies that such "penalty" provisions that create incentives to limit distribution to OVDs are not permitted.

Alternatively, New Charter could enter into certain kinds of "most favored nation" ("MFN") provisions that are designed to create incentives to limit distribution to OVDs. Although MFN provisions are ubiquitous in the industry – for example, many MVPDs use MFN provisions entitling the MVPD to the lowest license fee that the programmer offers to any other MVPD – the Department's investigation revealed that some MVPDs were utilizing certain provisions that, while referred to as "MFNs," actually require much more than equal treatment. Specifically, some provisions, commonly referred to as "unconditional MFNs" or "cherry-picking MFNs," require that a programmer provide an MVPD the most favorable term the programmer has offered to any other distributor, even if that other distributor agreed to additional payment or other conditions in exchange for receiving that term.[7] As a result of an unconditional MFN, the programmer may be reluctant to license the additional content to the other distributor in the first place.

Although unconditional MFNs are uncommon today, and the Defendants have only a few such provisions in their current contracts, the Department was concerned that New Charter could replace ADMs with unconditional MFNs in an effort to circumvent the proposed Final Judgment. For example, New Charter might obtain an unconditional MFN from a programmer that would entitle New Charter to receive at no additional cost any content a programmer makes available to

[7] For example, a programmer may enter into an agreement with Distributor A that provides Distributor A with extra content (for instance, additional video-on-demand rights) in exchange for an extra payment. If the programmer has an unconditional MFN with Distributor B, the programmer may then be required to provide the additional video-on-demand rights to Distributor B *without Distributor B having to make the extra payment*. By contrast, a more typical – and less problematic – MFN would entitle Distributor B to the additional content only if Distributor B agreed to pay the same additional fee paid by Distributor A.

an OVD, regardless of payments or other conditions with which the OVD must comply. In such case, by providing programming to an OVD, the programmer might face significant economic disadvantages in the form of losing the opportunity to monetize the content through distribution by New Charter. As a result, unconditional MFNs could create significant disincentives for programmers to license content to OVDs. For these reasons, Section IV.B.2 of the proposed Final Judgment prohibits New Charter from entering into or enforcing unconditional MFNs against programmers for distributing their content to OVDs.[8]

Section IV.C of the proposed Final Judgment establishes three narrow exceptions to the broad prohibitions in Sections IV.A and IV.B. First, New Charter may prohibit the programmer from making content available on the Internet for free for 30 days after its initial airing, if New Charter has paid a fee for the video programming. The Department's investigation revealed that such limitations on free distribution are ubiquitous in the industry, and the Department has discovered no evidence that such provisions are harmful to competition.

Second, New Charter may enter into an agreement in which the programmer provides content exclusively to New Charter, and to no other MVPD or OVD. Although uncommon, a few programmers wish to make some of their content available to only one distributor. This relationship then incentivizes the distributor to vigorously market the content, and thus can be procompetitive in some circumstances. The proposed Final Judgment ensures that New Charter can continue to compete with other distributors to obtain these kinds of exclusives. As long as the exclusivity applies to *all* other video programming distributors, and does not narrowly

[8] Specifically, Section IV.B.2.i provides that New Charter may not require a programmer to provide New Charter the same terms offered to an OVD unless New Charter also accepts any conditions that are integrally related, logically linked, or directly tied to those terms. The language chosen for this provision mirrors language that is common in conditional MFN provisions throughout the industry. Also consistent with other conditional MFNs in the industry, Section IV.B.2.ii states that Charter need not comply with related terms and conditions if it is unable to do so for technological or regulatory reasons.

prohibit distribution only to OVDs, the Department has no basis to believe such provisions will always or usually be harmful.[9]

Third, New Charter may condition carriage of programming on its cable system on terms which require it to receive as favorable material terms as other MVPDs or OVDs, except to the extent such terms would be inconsistent with the purpose of the proposed Final Judgment. That is, New Charter may enter into the kinds of ordinary conditional MFNs that are ubiquitous in the industry, such as a provision which entitles New Charter to the lowest license fee paid by any other distributor. This provision explicitly does not override Section IV.B.2's ban on the application of unconditional MFNs to OVD distribution. Importantly, New Charter may not use MFNs as a back door to obtain provisions which are otherwise "inconsistent with the purpose of Sections A and B." For instance, even if another distributor obtains a provision which "create[s] incentives to limit" a programmer's provision of programming to an OVD, New Charter cannot use an MFN to add that other distributor's provision to New Charter's own contract.

2. The Proposed Final Judgment Prohibits Defendants from Discriminating Against, Retaliating Against, or Punishing Video Programmers

Section IV.D of the proposed Final Judgment prohibits Defendants from discriminating against, retaliating against, or punishing any Video Programmer for providing programming to any OVD. This provision ensures that even though Defendants are no longer permitted to contractually prohibit or deter video programmers from licensing content to OVDs, the Defendants are not able to instead deter such licensing through threats or punishment. Section IV.D also prohibits Defendants from discriminating against, retaliating against, or punishing any video programmer for invoking any provisions of the proposed Final Judgment or any FCC rule

[9] The Department retains the authority to challenge under Sections 1 or 2 of the Sherman Act any exclusive agreement in the future that the evidence demonstrates unreasonably restrains trade or creates or enhances monopoly power. *See* Proposed Final Judgment at § VII (No Limitation of Government Rights).

or order, or for furnishing information to the Department concerning Defendants' compliance with the proposed Final Judgment.

Negotiations between video programmers and MVPDs are often contentious, high-stakes affairs, and it is common for one or both sides to the negotiation to threaten to walk away, or even to temporarily terminate the relationship (sometimes called a "blackout" or "going dark") in order to secure a better deal. The proposed Final Judgment is not concerned with such negotiating tactics and therefore clarifies that "[p]ursuing a more advantageous deal with a Video Programmer does not constitute discrimination, retaliation, or punishment." Rather, Section IV.D is designed to prevent situations where New Charter intentionally decides to forgo an agreement with a programmer that would otherwise be economical for New Charter in order to obtain the long-term benefits of deterring video programmers from licensing content to OVDs or cooperating with the Department or the FCC.

3. Provision of Defendants' FCC Interconnection Reports

Although the Department's Complaint focuses on the likely competitive harm resulting from New Charter's imposition of ADMs and other contractual restrictions on video programmers, the Department also investigated the potential for the proposed merger to increase the price New Charter will charge Internet content companies, including OVDs, for access to its broadband subscribers. OVDs rely on broadband connections provided by other companies to reach their customers, and the Defendants are also major providers of Internet access service. Therefore, the Department examined whether the merger could increase both the incentive and ability of New Charter to use its control over the interconnection to New Charter's broadband Internet service provider network to try and disadvantage online video competitors.

The FCC's order approving the merger imposes an obligation on New Charter to make interconnection available on a non-discriminatory, settlement-free basis to any Internet content provider, transit provider, or content delivery network ("CDN") who meets certain basic criteria. Although this policy only directly protects those sending large volumes of traffic, even smaller sources who do not qualify for direct interconnection ought to find ample bandwidth available at competitive prices because large transit and CDN providers will be guaranteed access, and could resell that capacity. Thus, the Department expects that the FCC's order will prevent any merger-related harm to Internet content companies, including OVDs. In light of the FCC's remedy, the Department did not target interconnection in its Complaint and elected not to pursue duplicative relief with respect to interconnection in the proposed Final Judgment. However, in order to assist the Department in monitoring future developments with regard to interconnection and in taking whatever action might be appropriate to prevent anticompetitive conduct, Section IV.E requires New Charter to provide the Department with copies of the regular reports that New Charter furnishes to the FCC pursuant to the FCC's order.

D. Term of the Proposed Final Judgment

Section VIII of the proposed Final Judgment provides that the Final Judgment will expire seven years from the date of entry. The Department believes this time period is long enough to ensure that New Charter cannot harm OVD competitors at a crucial point in their development while accounting for the rapidly evolving nature of the video distribution market. After five years, Section VIII permits Charter to request that the Department reevaluate whether the Final Judgment remains necessary to protect competition. If at such time the Department concludes that the market has evolved such that the protections of the decree are no longer necessary, it will recommend to the Court that the Final Judgment be terminated.

IV. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the *Federal Register*, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the United States, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court. In addition, comments will be posted on the U.S. Department of Justice, Antitrust Division's internet website and, under certain circumstances, published in the *Federal Register*. Written comments should be submitted to:

Scott A. Scheele
Chief, Telecommunications and Media Enforcement Section
Antitrust Division
United States Department of Justice
450 Fifth Street, N.W., Suite 7000
Washington, DC 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, seeking preliminary and permanent injunctions against Defendants' transactions and proceeding to a full trial on the merits. The United States is satisfied, however, that the relief in the proposed Final Judgment will preserve competition for the provision of video programming distribution services in the United States. Thus, the proposed Final Judgment would protect competition as effectively as would any remedy available through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

VII. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The Clayton Act, as amended by the APPA, requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *see generally United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v, U.S. Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable.").[10]

As the United States Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree

[10] The 2004 amendments substituted "shall" for "may" in directing relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns*, 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc*., 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp*., 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).[11] In determining whether a proposed settlement is in the public interest, a district court "must accord deference to the government's predictions about the efficacy of its remedies, and may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that a court should not reject the proposed remedies because it believes others are preferable); *Microsoft*, 56 F.3d at 1461 (noting the need for courts to be "deferential to the government's predictions as to the effect of the proposed remedies"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003)

[11] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"). *See generally Microsoft*, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

(noting that the court should grant due respect to the United States' prediction as to the effect of proposed remedies, its perception of the market structure, and its views of the nature of the case).

Courts have greater flexibility in approving proposed consent decrees than in crafting their own decrees following a finding of liability in a litigated matter. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting *United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975)), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (noting that room must be made for the government to grant concessions in the negotiation process for settlements (citing *Microsoft*, 56 F.3d at 1461); *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy). To meet this standard, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17.

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("the 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459-60. As this Court confirmed in *SBC Communications*, courts "cannot look beyond the complaint in making the public interest determination unless the complaint is drafted so narrowly as to make a mockery of judicial power." *SBC Commc'ns*, 489 F. Supp. 2d at 15.

In its 2004 amendments, Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement, adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). The language wrote into the statute what Congress intended when it enacted the Tunney Act in 1974, as Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). Rather, the procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11.[12]

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[12] *See United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) (noting that the "Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to comments alone"); *United States v. Mid-Am. Dairymen, Inc.*, No. 73-CV-681-W-1, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980, *22 (W.D.

A court can make its public interest determination based on the competitive impact statement and response to public comments alone. *U.S. Airways*, 38 F. Supp. 3d at 76.

VIII. DETERMINATIVE DOCUMENTS

Appendix B to the FCC's Memorandum Opinion and Order, *In re Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations*, FCC MB Docket No. 15-149 (adopted May 5, 2016; released May 10, 2016), was the only determinative document or material within the meaning of the APPA considered by the Department in formulating the proposed Final Judgment. This document is available on the FCC's website at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-59A1.pdf, and will also be made available on the Antitrust Division's website at https://www.justice.gov/atr/case/us-v-charter-communications-inc-et-al.

Dated: May 10, 2016

Respectfully submitted,

/s/

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Mo. 1977) ("Absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances."); S. Rep. No. 93-298, at 6 (1973) ("Where the public interest can be meaningfully evaluated simply on the basis of briefs and oral arguments, that is the approach that should be utilized.").