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)

RESPONSE OF PLAINTIFF UNITED STATES TO
PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby files the single public comment received concerning the proposed Final Judgment in this case and the United States's response to the comment. After careful consideration of the submitted comment, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this Response have been published in the *Federal Register* pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

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. On April 25, 2015, the United States filed a civil antitrust Complaint seeking to enjoin Charter from acquiring TWC and BHN. The United States alleged in the Complaint that the proposed acquisition likely would substantially lessen competition 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.

Simultaneously with the filing of the Complaint, the United States filed a proposed Final Judgment that would settle the case. On May 10, 2016, the United States filed a Competitive Impact Statement ("CIS") that explains how the proposed Final Judgment is designed to remedy the likely anticompetitive effects of the proposed acquisition. As required by the Tunney Act, the United States published the proposed Final Judgment and CIS in the *Federal Register* on May 17, 2016. *See* 81 Fed. Reg. 30550. In addition, the United States ensured that a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments, were published in *The Washington Post* for seven days from May 13 through 19, 2016. The 60-day period for public comments ended on July 18, 2016. The United States received one comment, which is described below and attached as Exhibit 1.

II. THE INVESTIGATION AND THE PROPOSED SETTLEMENT

The proposed Final Judgment is the culmination of more than ten months of investigation by the Antitrust Division of the United States Department of Justice ("Department"). The Department opened an investigation soon after the transactions were announced, and conducted a comprehensive review of the potential implications of the transactions. The Department

interviewed dozens of companies and individuals involved in the industry, obtained deposition testimony, required Defendants to provide the Department with extensive data and responses to numerous interrogatories, and collected millions of business documents from the Defendants and relevant third parties. The Department also consulted extensively with the Federal Communications Commission, which was conducting a separate statutory review of the acquisitions, to ensure that the agencies conducted their reviews in a coordinated and complementary fashion and created remedies that were both comprehensive and consistent.

Although Charter, TWC, and BHN do not compete to offer residential services in the same local geographic areas, the Department's investigation found that the proposed acquisitions were likely to substantially lessen competition because they would increase Charter's incentive and ability to use its bargaining leverage to make it more difficult for online video distributors to compete effectively. In particular, the Department alleged in its Complaint that the merger would give Charter greater incentive and ability to use restrictive clauses in its contracts with video programmers to prevent online video distributors from obtaining important video programming content.

The proposed Final Judgment is designed to address the anticompetitive effects identified in the Complaint by prohibiting Charter from entering into or enforcing certain restrictive contract provisions that may be likely to substantially lessen competition. In addition, Charter is prohibited from retaliating against video programmers for licensing content to online providers that compete with Charter. Charter is also required to provide certain regular reports to the Department, so that the Department can monitor whether a separate remedy imposed by the

Federal Communications Commission is successfully preventing Charter from using its bargaining leverage over internet interconnection to harm online video providers.

III. STANDARD OF JUDICIAL REVIEW

The Tunney Act requires that proposed consent judgments in antitrust cases brought by the United States be subject to a 60-day public 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
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> (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). 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 also United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 10-11 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. InBev N.V./S.A.*, No. 08-cv-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (discussing nature of review of consent judgment under the Tunney Act; inquiry is limited to "whether the government's determination that the proposed remedies will cure the antitrust

violations alleged in the complaint was reasonable, and whether the mechanisms to enforce the final judgment are clear and manageable").

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the Complaint, whether the decree is sufficiently clear, whether the 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) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)). Instead, 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 in "*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).

In determining whether a proposed settlement is in the public interest, "the court 'must accord deference to the government's predictions about the efficacy of its remedies.'" *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 76 (D.D.C. 2014) (quoting *SBC Commc'ns*, 489 F. Supp. at 17). *See also Microsoft*, 56 F.3d at 1461 (noting that the government is entitled to deference as to its "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) (noting that the court should

grant due respect to the United States' "prediction as to the effect of the proposed remedies, its perception of the market structure, and its views of the nature of the case"); *United States v. Morgan Stanley*, 881 F. Supp. 2d 563, 567-68 (S.D.N.Y. 2012) (explaining that the government is entitled to deference in choice of remedies).

Courts "may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17. Rather, the ultimate question is 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.'" *Microsoft*, 56 F.3d at 1461. Accordingly, 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; *see also United States v. Apple, Inc.* 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012). And, 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 the public interest." *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (citations and internal quotations omitted); *see also 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).

In its 2004 amendments to the Tunney Act,[1] Congress made clear its intent to preserve the practical benefits of using 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

[1] 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).

evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). 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 the Tunney Act proceedings." *SBC Commc'ns*, 489 F. Supp. 2d at 11; *see also United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) ("[T]he Tunney Act expressly allows the court to make its public interest determination on the basis of the competitive impact statement and response to public comments alone."); *US Airways*, 38 F. Supp. 3d at 76 (same).

IV. SUMMARY OF PUBLIC COMMENT AND RESPONSE OF THE UNITED STATES

During the 60-day comment period, the United States received one comment from Amy R. Bloomfield, a Charter customer in North Carolina. Ms. Bloomfield generally describes her poor experience as a Charter customer. Ms. Bloomfield opposes the merger because "Time Warner [Cable] is a decent company; Charter is not."

The United States appreciates receiving Ms. Bloomfield's comment. Over the course of its ten-month investigation, the United States carefully considered the competitive effects of Charter's proposed acquisitions of TWC and BHN, including any possible effects on customer service. As a result of its investigation, the United States concluded that these acquisitions were likely to reduce competition only insofar as they increased the incentive and ability of Charter to foreclose competition from nascent online video providers. Therefore, the Department's Complaint only addressed that issue. It is well-settled that comments, such as Ms. Bloomfield's comment, that are unrelated to the concerns identified in the complaint are beyond the scope of this Court's Tunney Act review. *See, e.g.*, *SBC Commc'ns*, 489 F. Supp. 2d at 14 (holding that "a district court is not permitted to 'reach beyond the complaint to evaluate claims that the

government did *not* make and to inquire as to why they were not made'") (quoting *Microsoft*, 56 F.3d at 1459) (emphasis in original); *see also US Airways*, 38 F. Supp. 3d at 76. Accordingly, Ms. Bloomfield's comment does not provide a basis for rejecting the proposed Final Judgment.

V. CONCLUSION

After reviewing the public comment, the United States continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comment and this response are published in the *Federal Register*.

Dated: August 16, 2016

Respectfully submitted,

/s/

Robert Lepore
United States Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 7000
Washington, DC 20530
Tel.: (202) 532-4928
E-mail: robert.lepore@usdoj.gov