

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY1

BACKGROUND3

I. THE DATA CAPS AND USAGE-BASED PRICING CONDITION SHOULD TERMINATE IN 2021 AS THE FCC CONTEMPLATED.....9

 A. The OVD Marketplace Is Flourishing and the Reason for Imposing the DC/UBP Condition No Longer Exists.....9

 B. Charter and Other Broadband Providers Have Facilitated OVD Success by Increasing Broadband Speeds and Incorporating OVDs Directly onto Their Video Service Platforms.....19

 C. Reasonable Data Caps Imposed by Other Broadband Providers Have Not Impeded the OVD Marketplace.21

 D. There Is No Need to Retain the DC/UBP Condition for Another Two Years.23

II. THE INTERCONNECTION CONDITION SHOULD ALSO SUNSET.23

 A. The OVD Marketplace Is Flourishing and Thus Any Justification for Imposing the Interconnection Condition No Longer Exists.23

 B. Other Broadband Providers Have Entered into Voluntary Interconnection Agreements, and OVDs Have Flourished.....24

 C. The Interconnection Condition Results in the Burdensome and Inefficient Allocation of Resources, and Is Thus Contrary to the Public Interest.26

CONCLUSION.....28

INTRODUCTION AND SUMMARY

In May 2016, the Federal Communications Commission (“FCC” or “Commission”) approved the merger of Charter Communications, Inc., Time Warner Cable Inc., and Bright House Networks, LLC (collectively, “Charter” or “Company”).¹ In doing so, the Commission adopted conditions designed to mitigate concerns that Charter could “hamper or prevent its current and future online video rivals from expanding, becoming more competitive, or starting-up in the first place.”² At the same time, the FCC acknowledged that changes in the market could render the conditions unnecessary, recognizing that its own “ability to predict New Charter’s future market power based on the current record diminishes the farther into the future we look.”³ With these limitations in mind, the FCC included in the Merger Order a framework for ending the Data Caps/Usage-Based Pricing condition (“DC/UBP Condition”)⁴ and the Interconnection condition (“Interconnection Condition”) (collectively, the “Conditions”)⁵ after five years, in 2021.⁶ In light of dramatic changes in the online video marketplace and the nature of the internet service market, the FCC should conclude that ending these two conditions in 2021 as it contemplated is in the public interest.

The online video marketplace has become extremely competitive. As set forth in great detail below, Online Video Distributors (“OVDs”) have seen record-shattering growth and

¹ See *In re Applications of Charter Communications, Inc., Time Warner Cable Inc., And Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 31 FCC Rcd 6327 (2016) (“*Merger Order*”).

² *Id.* at 6329 ¶ 5.

³ *Id.* at 6369 ¶ 85.

⁴ See *id.* at 6543-44, App’x B, Section IV.

⁵ See *id.* at 6540-42, App’x B, Section III.

⁶ See *id.* at 6558, App’x B, Section XII.

increased strength across all performance indicators, including number of subscribers, amount of content available, number of platforms, streaming hours, and revenue.⁷ In fact, the online video distribution marketplace is almost unrecognizable compared to what existed in 2016. Today, video consumers reign supreme, demonstrating seemingly insatiable interest in video options, mixing, matching, and switching content and providers and platforms, to curate a video experience tailored to their individual needs.

Moreover, to ensure an efficient allocation of resources to accommodate the explosive growth in broadband usage, many internet providers—who, unlike Charter, are *not* restricted in how they offer broadband service—have incorporated data caps. Seven of the top ten broadband providers in the country—including Comcast, AT&T, Cox, and Altice⁸—have incorporated data caps or some form of data usage policy in their offerings. Yet the use of data caps by these companies has not stifled the growth of OVD services. In fact, the opposite is true: OVD services are thriving and growing at an unprecedented rate. In other words, the market is working.

The flourishing OVD marketplace also justifies allowing the Interconnection Condition to sunset in 2021. With no such Interconnection Condition imposed upon them, broadband providers other than Charter have voluntarily entered into interconnection agreements with OVDs in ways that have not inhibited OVD growth in any way; quite the opposite. In light of the dramatic changes that have occurred in the video marketplace since the FCC adopted its merger conditions, and in accordance with the FCC’s framework and timeline for these conditions, Charter respectfully requests that the Commission follow the process set forth in the

⁷ See *infra*. pp. 9-19.

⁸ See *infra*. pp. 21-23.

Merger Order and end the Conditions on the fifth anniversary of the merger’s closing date—May 18, 2021.

BACKGROUND

Transaction Application and Approval. On June 25, 2015, Charter Communications, Inc., Time Warner Cable Inc., and Bright House Networks, LLC (then owned by Advance/Newhouse Partnership) applied to the Commission to merge their broadband, video, and voice services into a single company.⁹ In addition to delivering substantial public interest benefits,¹⁰ the parties explained that the merger would not create competitive harms because Charter would have no incentive to harm OVDs, even though they also offer video services, as Charter’s future depended far more on the success of its broadband service than its video service.¹¹ On May 4, 2016, the Commission approved the application,¹² subject to certain conditions.¹³

Since the transaction closed, and consistent with its consumer-focused approach, Charter has continued to make major investments in its network, products, employees, and the communities it serves:

⁹ See *Merger Order*, 31 FCC Rcd at 6329 ¶ 1 & n.1.

¹⁰ Public Interest Statement at 2-7, MB Docket No. 15-149 (June 25, 2015).

¹¹ *Id.* at 5-6.

¹² *Merger Order*, 31 FCC Rcd at 6329 ¶ 5.

¹³ *Id.* at 6329 ¶ 1. Among other things, the Commission required Charter to build out its broadband networks to reach an additional 2 million mass-market customer locations and enroll at least 525,000 low-income households in a discounted broadband plan within five years of the merger’s closing date. *Id.* at 6544-47, App’x B, Section V; *id.* at 6547-49, App’x B, Section VI. The Commission also required Charter to continue supporting consumer-owned devices for accessing video programming, develop a cybersecurity plan to manage security risks while the three parties integrated their operations, and submit regular reports to an independent compliance officer (“ICO”) to monitor the Company’s compliance with the Commission’s conditions. *Id.* at 6549-57, App’x B, Sections VII-IX. As discussed, Charter has a great record of compliance with these conditions. See *infra* pp. 4-8.

Expanding Access to and Investing in Infrastructure, Technology, and Products

- **Investment in Network Technology and Infrastructure:** Over the last five years, Charter invested nearly \$40 billion in new technology, training, tools, trucks, new call centers, network upgrades, buildings, labs, product development, set-top boxes, Wi-Fi routers, and modems.¹⁴ Charter monitors and maintains over 750,000 miles of physical network infrastructure across 41 states, completing more than 40,000 service calls and installations daily.¹⁵
- **Faster Broadband:** Charter has increased access to Spectrum Internet Gig across virtually its entire network, while also increasing minimum download speeds to 200 Mbps across 60% of homes and businesses across its footprint—and to 100 Mbps nearly everywhere else.¹⁶
- **Expanded Broadband Access for Eligible Seniors and Low-Income Families:** Charter has increased access to high speed broadband through Spectrum Internet Assist,¹⁷ its industry-leading, low-cost broadband product, exceeding the reach target set by the Commission.
- **Expanded Access in Rural Areas:** From 2018-2019 alone, Charter extended its network to provide broadband to more than 1.5 million additional homes and businesses across its footprint—including 30% in rural areas.¹⁸
- **Increased Video Content, Access, and Integration:**
 - **Spectrum TV[®] App:** The App offers access to the full TV lineup and up to 50,000 on-demand shows and movies using mobile and connected devices, like Apple TV, Roku, Xbox One, or Samsung Smart TVs.¹⁹

¹⁴ *Investing in American Infrastructure*, Charter, <https://policy.charter.com/priority/investing-in-american-infrastructure/> (last visited June 16, 2020) (“Charter Policy Website”).

¹⁵ *About*, Charter, <https://corporate.charter.com/about-charter> (last visited June 16, 2020); Press Release, Charter Communications, Inc., *COVID-19 Update: Charter Continues to Keep Customers Connected* (June 3, 2020), <https://corporate.charter.com/newsroom/covid-19-update-charter-continues-to-keep-customers-connected> (“Charter COVID-19 Press Release”).

¹⁶ Charter Policy Website.

¹⁷ *Spectrum Internet Assist*, Spectrum, <https://www.spectrum.com/browse/content/spectrum-internet-assist.html> (last visited June 16, 2020).

¹⁸ Charter Policy (@CharterGov), Twitter (June 11, 2020, 7:29 PM), <https://twitter.com/chartergov/status/1271223112743469058>.

¹⁹ *TV Channel Apps*, Spectrum Support, <https://www.spectrum.net/support/tv/tv-channel-apps> (last visited June 16, 2020).

- **OVD Integration:** Charter integrated Netflix into its video user interface²⁰ and is exploring plans to integrate additional OVD services in the future.²¹ Charter has also made it easier for customers to access channel-specific apps, like ESPN and HBO GO, using Spectrum account credentials for easy access.²²
- **Spectrum Originals:** Spectrum Originals provides premium original series exclusively to Spectrum video subscribers on-demand and ad-free.²³
- **Spectrum News:** Charter has made significant investments in over 30 24/7 local Spectrum News networks that deliver hyper-local news, weather, politics, sports, and more.
- **Launching Spectrum Mobile:** Charter recently launched Spectrum Mobile™, a high-value service delivering fast and reliable access, which has become the fastest-growing mobile provider in the nation.²⁴
- **Investing in Great Service:** From opening the company's first bilingual call center to returning work to the United States from overseas, Charter is committed to providing its customers with excellent service. Additionally, to help ease the time burden on customers, Charter increased customer self-installation to over 90% of sales and offers an extensive online self-service portal and one-hour appointment windows.²⁵

Investing in Its Workforce

- **Increasing Wages:** In 2019, Charter announced a fully implemented \$15 minimum wage, which increased wages for 14,000 employees.²⁶ Just over a year later, Charter

²⁰ *Netflix on Spectrum Guide*, Spectrum Support, <https://www.spectrum.net/support/tv/netflix-spectrum-guide> (last visited June 16, 2020).

²¹ See, e.g., Amrita Khalid, *Charter Will Integrate Hulu and Disney+ Into its Set-Top Boxes*, Engadget (Aug. 14, 2019), <https://www.engadget.com/2019/08/14/disney-and-charter-have-reached-a-multi-year-distribution-deal>.

²² *TV Channel Apps*, Spectrum Support, <https://www.spectrum.net/support/tv/tv-channel-apps> (last visited June 15, 2020).

²³ See *About Spectrum Originals*, Spectrum Originals, <https://spectrumoriginals.com/about> (last visited June 15, 2020).

²⁴ *Spectrum Mobile*, Charter, <https://www.spectrum.com/mobile> (last visited June 17, 2020).

²⁵ Mike Robuck, *Due to COVID-19, Charter Cranks Up Self-Installs in Q1*, Fierce Telecom (May 1, 2020), <https://www.fiercetelecom.com/operators/du-to-covid-19-charter-cranks-up-self-installs-q1>.

²⁶ *One Year Later: How Charter's \$15 Minimum Wage Has Made Us a Stronger Company*, Charter Blog (Jan. 16, 2019), <https://policy.charter.com/blog/one-year-later-charters-15-minimum-wage-made-us-stronger-company/>.

announced it would increase its minimum wage such that all current and future hourly employees will have a starting wage of \$20 per hour *or more* in 2022.²⁷

- **Great Benefits:** All of Charter’s 95,000 employees—including hourly workers—receive paid time off, including sick time. Employees are offered comprehensive health benefits, retirement security through a 401(k) plan with an exceptional employer match, free and discounted internet and TV services, and opportunities for advancement.²⁸
- **Broadband Apprenticeship Program:** Charter’s U.S. Department of Labor-certified apprenticeship program includes thousands of hours of on-the-job training and classroom instruction that aligns with the career progression for broadband technicians.²⁹
- **Diversity and Inclusion:** Charter’s workforce is comprised of 47% people of color and 10% veterans, reflecting the range of diversity in the markets it serves.³⁰
 - **Diversity and Inclusion Team:** Led by the Chief Diversity Officer, the Diversity and Inclusion team works across the organization, along with partners and in communities to incorporate diversity and inclusion into everything Charter does.³¹
 - **Business Resource Groups:** Charter launched five Business Resource Groups (“BRGs”)—focused on disability, LGBTQ, multicultural, veterans, and women—which offer networking, mentorship, and skill-building opportunities.³²

Investing in the Communities Charter Serves

- **Spectrum Community Impact Initiatives**
 - **Spectrum Internet Assist:** Charter has expanded high speed broadband access for eligible seniors and low-income families through Spectrum Internet Assist, its industry-leading, low-cost broadband product, as mentioned previously.³³

²⁷ *Why Charter is Raising Our Minimum Wage to \$20 an Hour*, Charter Blog (Apr. 2, 2020), <https://policy.charter.com/blog/charter-raising-minimum-wage-20-hour/>.

²⁸ *Compensation and Benefits*, Spectrum, <https://jobs.spectrum.com/compensation-and-benefits> (last visited June 16, 2020).

²⁹ *Building a Highly Skilled and Diverse Workforce*, Charter, <https://policy.charter.com/priority/building-a-highly-skilled-and-diverse-workforce/> (last visited June 16, 2020).

³⁰ *Id.*

³¹ *See Diversity & Inclusion*, Charter, <https://corporate.charter.com/diversity-inclusion> (last visited June 16, 2020).

³² Internal Charter Data.

³³ *See supra* note 17.

- **Spectrum Digital Education** grants provide computers, digital education classes, and technology labs that have helped increase digital literacy for thousands across the country.³⁴
 - **Spectrum Housing Assist** has provided critical home repairs for more than 41,000 homes.³⁵
 - Employees with a sustained personal connection to a local nonprofit can nominate that organization for a donation through the **Spectrum Employee Community Grant** program,³⁶ which has awarded \$250,000 to more than 120 organizations.³⁷
 - Charter’s **Spectrum Community Investment Loan Fund** is making low-interest loans available to small, often diversely owned businesses whose goods and services help meet core needs in underserved communities across Charter’s footprint. This year, the Loan Fund has invested \$13 million, including the recently announced partnership with the National Urban League and National Action Network that will increase access to much-needed low-interest capital for minority-owned businesses, which have been disproportionately devastated by the COVID-19 pandemic.³⁸
- **Disaster and Crisis Support and Relief:** From helping people stay connected during natural disasters to rebuilding and restoring service afterward, Charter is committed to supporting the communities where its customers and employees live and work, especially in their times of need.
 - **Hurricanes and Other Natural Disasters:** Charter undertakes extensive coordination and preparation efforts to ensure the Company is well-equipped to assist customers before, during, and after natural disasters, including by rebuilding and restoring impacted services as quickly as possible once it is safe for employees to do so and by contributing to housing-related disaster relief

³⁴ See *Spectrum Digital Education Grant*, Charter, <https://corporate.charter.com/digital-education/grants> (last visited June 16, 2020).

³⁵ *Spectrum Housing Assist*, Charter, <https://corporate.charter.com/housing-assist> (last visited June 16, 2020).

³⁶ Press Release, Charter Communications, Inc., *Charter Launches Spectrum Employee Community Grants* (July 31, 2019), <https://corporate.charter.com/newsroom/charter-launches-spectrum-employee-community-grants>.

³⁷ Internal Charter Data.

³⁸ Press Release, Charter Communications, Inc., *Charter Invests \$10 Million with National Urban League and National Action Network to Assist Black-Owned Small Businesses in Underserved Communities* (June 11, 2020), <https://corporate.charter.com/newsroom/charter-invests-10-million-dollars-with-national-urban-league-and-national-action-network-to-assist-black-owned-small-businesses-in-underserved-communities>.

efforts. Charter committed more than \$4 million in total to relief efforts following Hurricanes Harvey, Irma, and Florence.³⁹

- **COVID-19 Pandemic:** During the COVID-19 pandemic, Charter has helped to ease the strain on millions of Americans during a challenging time, including by connecting hundreds of thousands of students, teachers, and their families to 100 Mbps or 200 Mbps broadband service for 60 days at no cost to them; suspending collections and not charging late fees or terminating service for residential or small business customers; opening Wi-Fi hotspots for public use; donating \$12 million in airtime to run public service announcements; and opening Spectrum News websites to increase access to high-quality local news and information.⁴⁰ To energize America's small businesses as they begin reopening their doors and helping restart the economy, Charter has provided a month of free services to new business customers.⁴¹

In addition to these many accomplishments to date, Charter is continuing to increase access to high-quality products and services for more people in more places and continuing to support the communities it serves.

Relevant Conditions. Two Conditions are at issue in this Petition. First, Charter is prohibited from imposing data caps and usage-based pricing mechanisms.⁴² Second, Charter is required to offer to interconnect its IP network to any qualifying entity free of charge and on

³⁹ See, e.g., *Supporting Communities Before, During and After Hurricane Florence*, Charter Blog (Sept. 15, 2018), <https://policy.charter.com/blog/supporting-communities-hurricane-florence/>; Press Release, Charter Communications, Inc., *Charter Communications Pledges to Support Hurricane Irma Relief Efforts* (Sept. 15, 2017), <https://corporate.charter.com/newsroom/Charter-Communications-Pledges-to-Support-Hurricane-Irma-Relief-Efforts>; Press Release, Charter Communications, Inc., *Charter Communications Commits \$1.35 Million to Hurricane Harvey Relief Efforts* (Sept. 1, 2017), <https://corporate.charter.com/newsroom/Charter-Communications-Commits-1.35-Million-To-Hurricane-Harvey-Relief-Efforts>.

⁴⁰ See, e.g., *Charter's Continuing Support of Our Employees and the Communities We Serve*, Charter Blog (Mar. 13, 2020), <https://policy.charter.com/blog/charter-offer-free-access-spectrum-broadband-wifi-60-days-new-k-12-college-student-households/>; Charter COVID-19 Press Release; *Charter COVID-19 Update*, Charter (Apr. 23, 2020), <https://corporate.charter.com/newsroom/charter-covid-19-update>.

⁴¹ Press Release, Charter Communications, Inc., *Charter Boosts Small Businesses With Free Month of Services for New SMB Customers as the Economy Reopens* (May 18, 2020), <https://corporate.charter.com/newsroom/charter-boosts-small-businesses-with-free-month-of-services-for-new-smb-customers-as-the-economy-reopens>.

⁴² *Merger Order*, 31 FCC Rcd at 6543-44, App'x B, Section IV.

standardized terms.⁴³ Recognizing that the market was changing rapidly and in ways that could render the Conditions unnecessary, the Commission provided a mechanism for these Conditions to be in place for five instead of seven years.⁴⁴ The market has, in fact, changed quickly and dramatically since the Conditions were imposed. Charter therefore requests that the FCC end the DC/UBP and Interconnection Conditions on May 18, 2021, in accordance with the *Merger Order*'s outlined framework for doing so.

I. THE DATA CAPS AND USAGE-BASED PRICING CONDITION SHOULD TERMINATE IN 2021 AS THE FCC CONTEMPLATED.

A. The OVD Marketplace Is Flourishing and the Reason for Imposing the DC/UBP Condition No Longer Exists.

At the time the *Merger Order* was adopted in 2016, the FCC was concerned that Charter could “hamper or prevent its current and future online video rivals from expanding, becoming more competitive, or starting-up in the first place.”⁴⁵ The FCC therefore imposed the DC/UBP condition to protect “subscribers from paying fees designed to make online video consumption more expensive leading subscribers to stick with a traditional pay-TV bundle.”⁴⁶ At the same time, however, the FCC acknowledged that a flourishing OVD marketplace could at some point render this Condition unnecessary⁴⁷ and conceded that its own ability to predict the future diminished the farther into the future it looked.⁴⁸

⁴³ *Id.* at 6540-42, App’x B, Section III; *id.* at 6559-62, Attachment 1.

⁴⁴ *Id.* at 6540, App’x B, Section III(2)(a); *id.* at 6543, App’x B, Section VI(2); *id.* at 6558 App’x B, Section XII.

⁴⁵ *Id.* at 6329 ¶ 5.

⁴⁶ *Id.* at 6330 ¶ 9.

⁴⁷ *Id.* at 6370 ¶ 86.

⁴⁸ *Id.*

Four years later, the OVD marketplace is flourishing, significantly impacting the traditional multichannel video programming distributor market and rendering the DC/UBP Condition completely unnecessary. In fact, titans of the video industry, such as Disney and HBO, have begun shifting their programmatic efforts to focus on online delivery.⁴⁹ As Netflix has communicated to its investors, “Because the entertainment market is so broad, multiple firms can be successful. For example, ABC and NBC have historically competed for viewers, attention, and content but have also successfully co-existed for many decades. Similarly, in the streaming entertainment world, HBO is now growing faster than in years past, while our business is also expanding. Many people will subscribe to both HBO and Netflix since we have different exclusive content. The transition to streaming entertainment, with its greater consumer satisfaction, will mean growth for many services.”⁵⁰

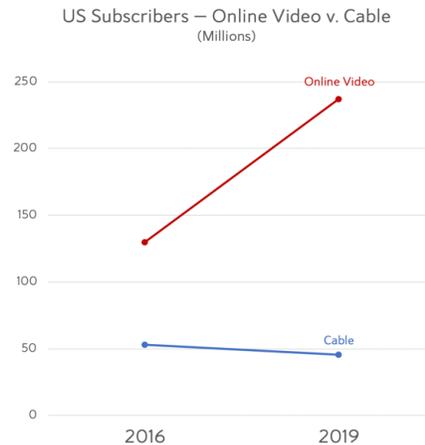
By every metric imaginable, OVDs are seeing record-breaking growth and gains across all performance indicators, including in the number of subscribers, the number of OVD platforms, streaming hours, revenue, and the amount and success of original content on these platforms.

OVD Subscribership Is Growing. The numbers paint a vivid picture of robust competition:

⁴⁹ See, e.g., Dade Hayes, *Disney Injects Hulu and Even Disney+ Into Its Upfront Message to Advertisers*, Deadline (June 5, 2020), <https://deadline.com/2020/06/disney-injects-streaming-hulu-disney-plus-into-upfront-message-to-advertisers-1202951075/>; see *infra* note 67.

⁵⁰ *Long-Term View*, Netflix, <https://www.netflixinvestor.com/ir-overview/long-term-view/default.aspx> (last visited June 10, 2020).

- In 2019, the number of online video subscriptions in the United States increased to 237.2 million, up 82% since 2016.⁵¹ Meanwhile, U.S. cable companies closed 2019 with a combined 45.8 million video subscribers, down 13% since 2016.⁵²



- An astounding 91% of consumers in the U.S. now subscribe to a paid streaming video service, with 96% of 18-34 year-olds subscribing.⁵³
- 93% of U.S. consumers stated that “they will either increase or keep their existing streaming services.”⁵⁴
- Since the merger was announced, subscriber growth has been staggering,⁵⁵ with many OVDs having seen triple-digit increases: Hulu has grown 238%,⁵⁶ Amazon Prime has grown 124%,⁵⁷ Netflix is up 136% worldwide,⁵⁸ and HBO Now has grown 900%.⁵⁹

⁵¹ Motion Picture Ass’n, 2017 THEME Report, 5, https://www.mpa-emea.org/wp-content/uploads/2018/05/MPAA-THEME-Report-2017_Final.pdf; Motion Picture Ass’n, 2019 THEME Report, 39, <https://www.motionpictures.org/wp-content/uploads/2020/03/MPA-THEME-2019.pdf>.

⁵² *In re Communications Marketplace Report*, Report, 33 FCC Rcd 12,558, 12,598 ¶ 53 figure B-1 (2018); Press Releases, Leichtman Research Group, Inc., *Major Pay-TV Providers Lost About 4,915,000 Subscribers in 2019* (Mar. 3, 2020).

⁵³ See Anthony Ha, *Streaming Accounts for Nearly One-Fifth of Total US TV Watching, According to Nielsen*, TechCrunch (Feb. 11 2020), <https://techcrunch.com/2020/02/11/nielsen-streaming-wars-total-audience-report/>.

⁵⁴ Ben Munson, *Netflix, YouTube Combine for Over Half of Streaming Time on TVs*, FierceVideo (Feb. 11, 2020), <https://www.fiercevideo.com/video/netflix-youtube-combine-for-over-half-streaming-time-tvs>.

⁵⁵ See, e.g., Amy Watson, *Sling TV: number of subscribers 2013-2019*, Statista (Feb. 20, 2020), <https://www.statista.com/statistics/539242/sling-tv-subscribers/>; Todd Spangler, *Apple TV Plus May Have More Than 33 Million Users But ‘Vast Majority’ Aren’t Paying for it, Researcher Says*, Variety (Jan. 24, 2020), <https://variety.com/2020/digital/news/apple-tv-plus-33-million-users-free-year-subscribers-12034786>

	2015	2019	Growth
Netflix Worldwide	70,839,000	167,090,000	136%
Netflix US	43,401,000	61,043,000	41%
Hulu	9,000,000	30,400,000	238%
Amazon Prime	50,000,000	112,000,000	124%
Sling TV	623,000	2,592,000	316%
HBO Now	800,000	8,000,000	900%
Apple TV+	Non-Existent	33,600,000	-
Disney+	Non-Existent	26,500,000	-
ESPN+	Non-Existent	6,600,000	-

The Number of OVD Platforms Is Growing. In 2016, the FCC believed that OVDs were still finding their place in the market.⁶⁰ But today, high quality video streaming options are widely available, with new offerings coming online at an increasingly fast pace. There are now over 140 online video services that cater to the U.S. market.⁶¹ The history of OVD launches over time illustrates the breadth and depth of the OVD marketplace.

83/; The Walt Disney Co., Q1 FY20 Earnings Conference Call, at 4-5 (Feb. 4, 2020), <https://thewaltdisneycompany.com/app/uploads/2020/02/q1-fy20-earnings-transcript.pdf>.

⁵⁶ See, e.g., Jacob Kastrenakes, *Hulu Hits 9 Million Subscribers as TV and Mobile Viewing Takes Off*, Verge (Apr. 29, 2015), <https://www.theverge.com/2015/4/29/8513147/hulu-9-million-subscribers>; Cynthia Littleton, *Disney Plus Reaches 28.6 Million Subscribers, Hulu Hits 30.4 Million*, Variety (Feb. 4, 2020), <https://variety.com/2020/tv/news/disney-plus-reaches-26-5-million-subscribers-1203492187>.

⁵⁷ Don Reisinger, *Amazon Prime's Numbers (and Influence) Continue to Grow*, Fortune (Jan. 16, 2020), <https://fortune.com/2020/01/16/amazon-prime-subscriptions>.

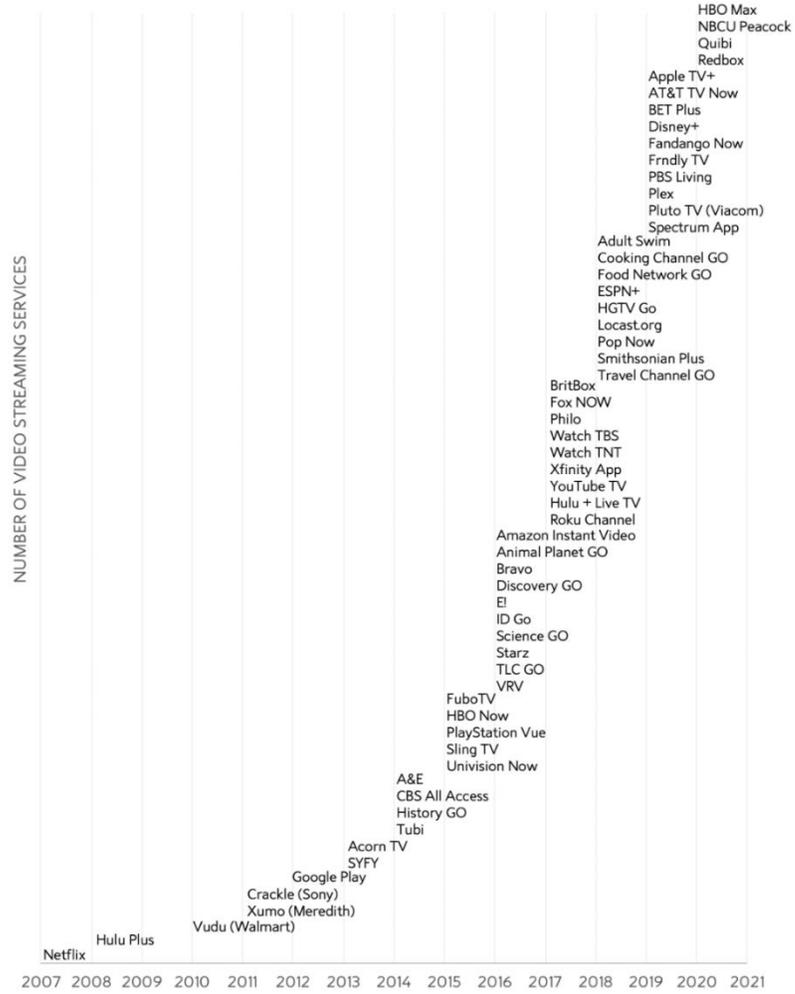
⁵⁸ See *Investor Events: Fourth Quarter 2017 Earnings Interview (Financial Statements)*, Netflix, <https://www.netflixinvestor.com/investor-news-and-events/investor-events/default.aspx> (last visited June 12, 2020); *Fourth Quarter 2019 Earnings Interview (Financial Statements)*, Netflix, <https://ir.charter.com/events-and-webcasts> (last visited June 12, 2020).

⁵⁹ Emily Steel, *HBO Now Has 800,000 Paid Streaming Subscribers, Time Warner Says*, N.Y. Times (Feb. 10, 2016), <https://www.nytimes.com/2016/02/11/business/media/hbo-now-has-800000-paid-streaming-subscribers-time-warner-says.html>; Julia Alexander, *Can HBO Now survive HBO Max?*, Verge (Sept. 27, 2019), <https://www.theverge.com/2019/9/27/20881734/hbo-now-max-streaming-wars-friends-big-bang-theory-warnermedia-netflix-disney-apple>.

⁶⁰ See *Merger Order*, 31 FCC Rcd at 6370 ¶ 86.

⁶¹ See 2019 THEME Report at 38.

VIDEO STREAMING LAUNCHES OVER TIME



Super Bowl viewing options illustrate this growth on a more granular level. As the single most popular and important program on television, the Super Bowl can safely be viewed as a bellwether for the state of the video industry. In 2015, there were *three* ways to watch the big game. In 2020, there were *fifteen*.

SUPER BOWL VIEWING OPTIONS⁶²

2015	2020
NBC TV Broadcast NBCSports.com NFL Mobile App	FOX TV Broadcast FoxSports.com NFL App Fox Sports App Fox Now App Fox Deportes App Yahoo Sports App AT&T TV Now Hulu + Live TV YouTube TV DirecTV Now Sling TV FuboTV Vidgo Locast

Recent OVD offerings launched with the backing of some of the largest and most well-regarded companies in the industry confirm the influence OVDs now wield.⁶³ For example, two of the most anticipated new video services, Disney+ and Apple TV+, launched in late 2019. These OVD services have rapidly acquired subscribers: in April 2020, The Walt Disney Company announced that Disney+ had grown to more than 50 million subscribers in just five

⁶² See Monica Chin, *Super Bowl 2020: How to watch the big game online*, Verge (Feb 2, 2020), <https://www.theverge.com/entertainment/2020/2/2/21084036/super-bowl-2020-how-to-watch-date-online-time-free-streaming-tv>; James Brady, *Super Bowl 2015 international broadcasts: How to watch Patriots-Seahawks abroad*, SBNation (Jan. 31, 2015), <https://www.sbnation.com/nfl/2015/1/31/7953849/superbowl-49-international-tv-schedule-radio-streaming>.

⁶³ See, e.g., *In re Restoring Internet Freedom Order*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 414-15 ¶ 171 (2018), *vacated by Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (“*Restoring Internet Freedom Order*”) (“[T]here is ample evidence that major edge providers, including Netflix, YouTube, and other large OVDs, are some of the ‘most-loved’ brands in the world.”).

months—a feat that took Netflix seven years to achieve.⁶⁴ This is more than triple the total number of Charter’s video customers.⁶⁵ Apple TV+ is estimated to now have 33.6 million subscribers, which it achieved by providing a free year of service to customers of its hardware products.⁶⁶ HBO also recently launched HBO Max, which includes both traditional HBO content and WarnerMedia content.⁶⁷

Streaming of OVD Content Is Increasing Exponentially. Corresponding with the increase in subscribership and platforms, the amount of video streamed over the internet is also increasing dramatically.

- Roku—America’s top streaming platform by hours streamed—offers an illustration of the success of the broader video streaming industry. In the last few years, Roku’s yearly streaming hours increased 633% from 5.5 to 40.3 billion, and Roku’s active accounts have grown from over 9 million⁶⁸ to 36.9 million in three years,⁶⁹ an increase of 310%.

⁶⁴ Todd Haselton, *Disney Shares Jump as Disney+ Subscriptions Pass 50 Million*, CNBC (updated Apr. 9, 2020), <https://www.cnbc.com/2020/04/08/disney-plus-hits-50-million-subscribers-almost-double-from-february.html>.

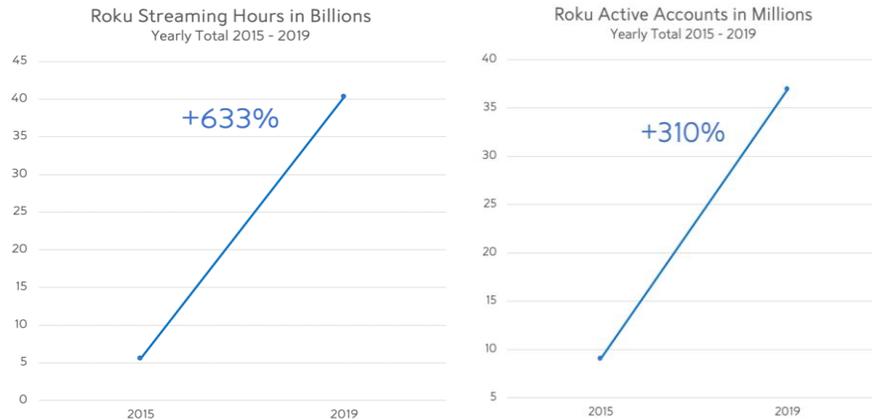
⁶⁵ See News Release, Charter Communications, Inc., *Charter Announces First Quarter 2020 Results* (May 1, 2020), <https://ir.charter.com/static-files/8fcc568f-9121-4781-b5a8-c946b310f36f>.

⁶⁶ Erich Schwartzel et al., *Amazon Prime Video Gives Amateur How-To’s, Conspiracy Theories a Stage*, Wall St. J. (Jan. 24, 2020), <https://www.wsj.com/articles/amazons-video-library-has-grown-big-on-amateur-content-11579792605>; *Get Apple TV+ Free for One Year*, Apple, <https://offers.apple.tvapp.apple/> (last visited June 10, 2020).

⁶⁷ Anthony Ha, *HBO Max Launches Today; Here’s What You Need to Know*, TechCrunch (May 27, 2020), <https://techcrunch.com/2020/05/27/hbo-max-launches-today-heres-what-you-need-to-know/>.

⁶⁸ See Anthony, *A Look at 2015 at Roku: A Great Year for Streaming*, RokuBlog (Dec. 30, 2015), <https://blog.roku.com/a-look-at-2015-at-roku-a-great-year-for-streaming>.

⁶⁹ See Jeff Baumgartner, *Roku Ends 2019 with 36.9M ‘Active’ Accounts, Still Can’t Catch Amazon Fire TV*, LightReading (Feb. 13, 2020), <https://www.lightreading.com/cable-video/roku-ends-2019-with-369m-active-accounts-still-cant-catch-amazon-fire-tv-/d/d-id/757494>. Not surprisingly, given the above statistics, Roku stock has increased in value by 755% in just over two years.



- YouTube announced in May 2019 that it now reaches more 18- to 49-year olds in an average week than all cable television networks combined and that its watch time (for all ages) on television screens alone tops 250 million hours per day.⁷⁰
- OVD content viewing increased 24% from 2017 to 2018, reaching 182.1 billion views/transactions. OVD content viewing through connected television devices increased by 21% from 2018 to 2019.⁷¹
- Consumers in OTT-capable homes are now spending 19% of their television time watching streaming content.⁷²

OVDs Are Offering, Producing, and Controlling Vast Amounts of Content. As a further marker of their success and power, OVD companies have also been successful in offering vast amounts of content to their subscribers, including by spending billions of dollars developing original streaming content. The amount and variety of content available on OVD platforms is impressive:

- Netflix catalogs 47,000 TV episodes and 4,000 titles in the U.S. alone;
- Amazon Prime Video includes more than 12,000 titles; and

⁷⁰ See *2019 Broadcast Stage Highlights: Primetime Is Now Personal*, YouTube Official Blog (May 2, 2019), <https://youtube.googleblog.com/2019/05/2019-brandcast-stage-highlights.html>.

⁷¹ See *Nielsen Shares Its Latest Streaming Insights At VidCon 2019*, Nielsen (July 16, 2019), <https://www.nielsen.com/us/en/news-center/2019/nielsen-shares-latest-streaming-insights-vidcon-2019/>.

⁷² See *Playback Time: Which Consumer Attitudes Will Shape The Streaming Wars?*, Nielsen (Feb. 11, 2020), <https://www.nielsen.com/us/en/insights/article/2020/playback-time-which-consumer-attitudes-will-shape-the-streaming-wars/>.

- At launch, Disney+ included 7,500 episodes and 500 movies.⁷³

Equally if not more impressive is the investment OVD providers are making in original content:

- Apple invested \$6 billion in content ahead of the launch of Apple TV+;⁷⁴
- Netflix poured as much as \$15 billion into total content in 2019;⁷⁵
- Disney said it expects it will spend about \$1 billion in 2020 on original content for the platform and \$2 billion by 2024;⁷⁶ and
- Amazon Prime commissioned more original series than Netflix for the first time ever this year;⁷⁷

OVDs have helped drive up the total number of original scripted series—streaming and non-streaming—dramatically. In 2009, there were an estimated 210 scripted television series on the air.⁷⁸ In 2019, there were an all-time record of 532 scripted television series—an increase of 52% since 2013, the year “House of Cards” debuted on Netflix and streaming started to become a habit for many viewers. When broken out by platform, the growth in original scripted series on OVDs is staggering: more than 567% in five years.⁷⁹

⁷³ Todd Spangler, *Disney+ Content Lineup Will Be Less Than 20% of Netflix’s but Disney Has Higher-Rated Titles*, *Variety* (Apr. 22, 2019), <https://variety.com/2019/digital/news/disney-netflix-streaming-content-comparison-1203193967/>.

⁷⁴ Anna Nicolaou & Tim Bradshaw, *Apple Splashes \$6bn on New Shows in Streaming Wars*, *Fin. Times* (Aug. 19, 2019), <https://www.ft.com/content/4f7f4326-c2bf-11e9-a8e9-296ca66511c9>.

⁷⁵ John Koblin, *Peak TV Hits a New Peak, With 532 Scripted Shows*, *N.Y. Times* (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/business/media/tv-shows-2020.html>.

⁷⁶ Sarah Whitten, *Disney+ Streaming Service will be Available Starting Nov. 12 for \$6.99 a Month*, *CNBC* (updated Apr. 12, 2019), <https://www.cnn.com/2019/04/11/disney-plus-will-be-available-starting-november-12-for-6point99-a-month.html>.

⁷⁷ Olivia Deane, *Amazon Commissioning Overtakes Netflix for the First Time*, *Ampere Analysis* (Feb. 5, 2020), <https://www.ampereanalysis.com/insight/amazon-commissioning-overtakes-netflix-for-the-first-time>.

⁷⁸ Nathan McAlone, *This Chart Shows How the Number of TV Shows Being Made has Exploded in the Last Few Years*, *Business Insider* (Oct. 31, 2016), <https://www.businessinsider.com/tv-show-growth-2002-2015-2016-10>.

⁷⁹ John Koblin, *Peak TV Hits a New Peak, With 532 Scripted Shows*, *N.Y. Times* (Jan. 9, 2020), <https://www.nytimes.com/2020/01/09/business/media/tv-shows-2020.html>.

In addition to pure volume, the quality of OVD content is impressive. OVD providers now boast some of the most popular and critically acclaimed video content, and are increasingly winning Golden Globes, Emmy's, and Oscars. Netflix received 34 Golden Globe and 24 Oscar nominations in 2020, the most of any movie studio.⁸⁰ 2019's Emmy Awards were dominated by HBO, Amazon, and Netflix, and just as tellingly the major OTT platforms all spent heavily on commercial advertising during the show.⁸¹ A small sampling of the content that has received awards from the Oscars, Golden Globes, and Emmys includes:

- Netflix: *Marriage Story*, *Roma*, *The Crown*, *House Of Cards*, *Stranger Things*, *Orange is the New Black*, *Bloodline*, *GLOW*;
- Amazon: *The Marvelous Mrs. Maisel*, *Fleabag*, *Transparent*;
- Hulu: *The Handmaid's Tale*, *The Act*; and
- Apple TV+: *The Morning Show* (won two Golden Globe nominations its first season).⁸²

Finally, the reach of OVD content completes the picture of a successful video sector. In fact, Nielsen data shows that the weekly growth in reach for internet-connected devices grew more than 15 times faster than that of linear television in the first quarter of the year.⁸³

- Netflix's *Tiger King* reached a U.S. audience of 34.3 million unique viewers within the first 10 days of its release, more than six times the size of the finale audience for NBC's *The Office*.⁸⁴ *Tiger King* was also the most-tweeted TV show over that time period.⁸⁵

⁸⁰ See Rick Marshall, *Netflix Dominates 2020 Oscar Nominations, but Surprises and Snubs Persist*, Digital Trends (Jan. 13, 2020), <https://www.digitaltrends.com/movies/2020-oscar-nominations-surprises-snubs>; See Ellen Gamerman and John Jurgensen, *Netflix Dominates Golden Globe Nominations*, Wall Street J. (Dec. 10, 2019), <https://www.wsj.com/articles/golden-globe-nominations-pit-streamers-against-studios-11575896199>.

⁸¹ See Julia Alexander, *HBO Won Emmys Night, But The Future Belongs To Streaming Platforms*, Verge (Sept. 23, 2019), <https://www.theverge.com/2019/9/23/20879545/emmy-awards-2019-winners-amazon-netflix-apple-disney-hbo-commercials-streaming-wars>.

⁸² See *supra* notes 80 & 81.

⁸³ See Dan Robbins, *Media Consumption While Sheltering at Home: Streaming, AVOD, TVOD*, Roku (2020), <https://advertising.roku.com/Insights/Media-Consumption-While-Sheltering-at-Home-Streami>.

- In the first 10 days of viewing, Netflix’s *Stranger Things* saw 31.2 million unique viewers for season two and 36.3 million for season three.⁸⁶
- Disney+’s *The Mandalorian* garnered nearly 40 million “demand expressions” in its debut week.⁸⁷

B. Charter and Other Broadband Providers Have Facilitated OVD Success by Increasing Broadband Speeds and Incorporating OVDs Directly onto Their Video Service Platforms.

Broadband providers have responded to the growth of OVDs by investing in their networks aggressively to increase the speeds they offer customers.⁸⁸ Since 2016, Charter has invested over \$34 billion in infrastructure and technology, including DOCSIS 3.1, to retain its status as an industry leader in fixed wireline speeds, and has increased its maximum download speeds to nearly 1 Gbps across virtually its entire footprint with *minimum* download speeds of at least 100 Mbps nationwide and at least 200 Mbps in 60% of its footprint. Charter’s ongoing investment to increase broadband speeds is not a response to any government mandate, but is

⁸⁴ *The Office’ Finale Draws Season High of 5.7 Million Viewers*, Reuters (May 17, 2013), <https://www.reuters.com/article/entertainment-us-theoffice-ratings/the-office-finale-draws-season-high-of-5-7-million-viewers-idUSBRE94G0UJ20130517>.

⁸⁵ Todd Spangler, *‘Tiger King’ Nabbed Over 34 Million U.S. Viewers in First 10 Days, Nielsen Says (EXCLUSIVE)*, Variety (Apr. 8, 2020), <https://variety.com/2020/digital/news/tiger-king-nielsen-viewership-data-stranger-things-1234573602/>.

⁸⁶ *Id.*

⁸⁷ See Todd Spangler, *‘The Mandalorian’ Demand Surges in Debut Week But Trails ‘Stranger Things,’ DC’s ‘Titans’*, Variety (Nov. 19, 2020), <https://variety.com/2019/digital/news/the-mandalorian-demand-premiere-stranger-things-titans-1203409008/>.

⁸⁸ See Industry Analysis Division, Office of Economics & Analytics, *Internet Access Services: Status as of December 31, 2017* at 5-6 (Aug. 2019), <https://docs.fcc.gov/public/attachments/DOC-359342A1.pdf> (charting the growth in connection speeds from December 2014 through December 2017); cf. *New York v. Deutsche Telekom AG*, No. 19 Civ. 5434, ___ F. Supp. 3d ___, 2020 WL 635499, at *5 (S.D.N.Y. Feb. 11, 2020) (finding that consumers choose mobile wireless providers based on, among other things, “the speeds and consistency of coverage provided by those networks”). See also *In re Applications of T-Mobile US, Inc., and Sprint Corporation For Consent To Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, Declaratory Ruling, and Order of Proposed Modification, 34 FCC Rcd 10,578, 10,580-81 ¶ 3 (2019) (“*T-Mobile Order*”).

instead largely in response to the customer demand for access to OVD content.⁸⁹ This is not the behavior of a company that is trying to inhibit the growth of OVDs.

Other companies have followed suit. Mobile providers such as T-Mobile and Sprint have committed to deploying 5G service to cover 97% of the U.S. population within three years of the closing of their merger.⁹⁰ Providers of all stripes will inevitably follow suit in the coming years to meet consumer demand for the highest speed broadband connections.

In addition to increasing speeds, Charter and other cable operators have embraced OVDs such as Netflix to make access to third-party content easier for customers. Charter has integrated Netflix into its Spectrum Guide interface,⁹¹ and is actively considering doing the same for other OVDs.⁹² Comcast has taken a similar approach by incorporating Netflix subscriptions into its video programming packages,⁹³ as have Cox and Altice.⁹⁴

Again, these steps by Charter and other cable providers are not due to any government mandate; they are just good business. The vast majority of Charter's broadband customers (and a healthy majority of its video subscribers) subscribe to one or more OVD services like Netflix,

⁸⁹ See *Merger Order*, 31 FCC Rcd at 6506-07 ¶ 388 (requiring Charter to complete build-out services with download speeds of 60 Mbps only).

⁹⁰ *T-Mobile Order*, 34 FCC Rcd at 10,589 ¶ 26.

⁹¹ See *supra* note 20.

⁹² See *supra* note 21.

⁹³ See Todd Spangler, *Comcast Will Start Bundling Netflix Into Xfinity TV Packages*, *Variety* (Apr. 13, 2018), <https://variety.com/2018/digital/news/comcast-netflix-bundle-xfinity-tv-packages-1202752477/>.

⁹⁴ See Ryan Randazzo, *Netflix Now Available Through Cox Communications Cable Service*, *USA Today* (Dec. 1, 2017), <https://www.usatoday.com/story/money/business/consumers/2017/12/01/netflix-now-available-through-cox-communications-cable-service/913528001/>; Jeff Baumgartner, *Altice USA Integrates Netflix Across Optimum Footprint on New Platform*, *Multichannel News* (Mar. 29, 2018), <https://www.multichannel.com/news/altice-usa-integrates-netflix-across-optimum-footprint-new-platform-417779>.

Amazon Prime Video, and Hulu.⁹⁵ As these numbers show, the success of OVDs has transformed the video experience for consumers, who now have the ability to choose what content they receive and what platforms they get it on, creating a line-up that matches their particular needs and interests. Disrupting access to this highly valued content would only hurt Charter’s broadband business. As the Commission has consistently recognized, the value of broadband networks depends in large part on their ability to offer seamless access to the content that consumers crave.⁹⁶

C. Reasonable Data Caps Imposed by Other Broadband Providers Have Not Impeded the OVD Marketplace.

Today, of the six largest broadband providers that together serve approximately 83% of the market, all but one that is free to do so has adopted some type of data cap or similar data usage policies to help manage their networks.⁹⁷ They are able to do so because, unlike Charter, they are not subject to a condition that artificially and unilaterally restricts the packages available to their customers. For instance, their websites reveal that Comcast, Cox, Altice, AT&T U-Verse, and Verizon Fios each have data cap or similar data usage policies.

- Comcast’s website says if subscribers consume more than 1 TB of data each month, they pay \$10 for each additional 50 GB of data used, while a subscriber’s total monthly charges are capped at \$200.⁹⁸ Comcast also offers its subscribers who regularly use more

⁹⁵ Internal Charter Data.

⁹⁶ See *Restoring Internet Freedom Order*, 33 FCC Rcd at 414-15 ¶ 171.

⁹⁷ See Press Releases, *Leichtman Research Group, Inc., Top Broadband Providers Surpass 100 Million Subscribers* (Nov. 12, 2019), <https://www.leichtmanresearch.com/top-broadband-providers-surpass-100-million-subscribers/>; *infra* notes 98-103; *Internet Service Disclosure*, CenturyLink, <https://www.centurylink.com/aboutus/legal/internet-service-disclosure/full-version.html> (last visited June 17, 2020); *Mediacom Internet Service Plan Offerings*, Mediacom, <https://mediacomcable.com/legal/additional-terms-and-conditions/> (last visited June 17, 2020).

⁹⁸ See *What is the Terabyte Internet Data Usage Plan*, Comcast Xfinity, <https://www.xfinity.com/support/articles/data-usage-what-is-the-terabyte-data-usage-plan> (last visited June 10, 2020). Importantly, a 1 TB plan of this sort would be more than enough to meet the needs of the vast majority of Charter’s subscribers, who never even approach 500 GB in any given month. As Comcast explains, “[a] terabyte is a massive amount of

than 1 TB of data each month an Unlimited Data Option for an additional \$50 per month.⁹⁹

- Cox Communications' website also describes its 1 TB data usage plan, with the option of purchasing an unlimited plan or 500 GB of extra data for an additional monthly charge.¹⁰⁰
- Altice's Suddenlink website offers its subscribers a variety of different internet service plans, including some with data caps.¹⁰¹
- AT&T's U-Verse website offers a suite of broadband service plans to its subscribers, allowing them to select between plans with various monthly data allowances as well as an unlimited plan.¹⁰²
- Verizon's Fios website also offers broadband plans that are more tailored to consumers with average internet consumption needs, though it has opted for a different approach that includes prepaid offerings.¹⁰³
- Mobile broadband providers also regularly include data caps into their broadband offerings.¹⁰⁴

data.” *Id.* With a terabyte of data each month, Comcast notes that its subscribers can stream between 600 and 700 hours of HD video, play online games for more than 12,000 hours, stream more than 15,000 hours of music, or upload and download more than 60,000 hi-res photos. There are no more than 744 hours in a month, so it stands to reason that 1 TB should be more than adequate for most users.

⁹⁹ *Id.*

¹⁰⁰ *What You Can do with 1 TB of Data?*, Cox Communications, <https://www.cox.com/residential/education-center/internet/data-usage.html> (last visited June 10, 2020); *Unlimited and 500 GB Additional Data Plans*, Cox Communications, <https://www.cox.com/residential/support/unlimited-and-500-gb-additional-data-plans.html> (last visited June 10, 2020).

¹⁰¹ *See Data Plans: Frequently Asked Questions*, Suddenlink, <https://www.suddenlink.com/data-plans> (last visited June 16, 2020).

¹⁰² *See Home Internet Data Usage Information*, AT&T, <https://www.att.com/support/article/u-verse-high-speed-internet/KM1010099> (last visited June 10, 2020).

¹⁰³ Press Release, Verizon, *Verizon Introduces First Ever Fios Prepaid Triple Play with Pay-as-You-Go Fios TV, Internet and Home Phone* (Mar. 6, 2017), <https://www.verizon.com/about/news/verizon-introduces-first-ever-fios-prepaid-triple-play-pay-you-go-fios-tv-internet-and-home>.

¹⁰⁴ *See, e.g.*, Bevin Fletcher, *AT&T Updates Unlimited Plans, Top Tier Sports 5G-Ready Data Cap*, FierceWireless (Oct. 31, 2019), <https://www.fiercewireless.com/operators/at-t-refreshes-unlimited-plans-top-tier-sports-5g-ready-data-cap>; Todd Haselton, *Your Phone's Unlimited Data Plan Isn't Really Unlimited – This is What You Really Get*, CNBC.com (July 14, 2018), <https://www.cnbc.com/2018/07/13/unlimited-data-plan-caps-verizon-att-tmobile-sprint.html>.

Critically, the use of data caps by these major broadband providers has not hindered the OVD marketplace. As demonstrated above, OVDs are thriving and consumers have never had more online video choices.

D. There Is No Need to Retain the DC/UBP Condition for Another Two Years.

The examples above reveal that broadband providers need to be able to manage their networks in a way that ensures that moderate and heavy users of broadband alike can receive the speeds, and data plans, that are best for them. As data usage skyrockets, the DC/UBP Condition artificially hamstring Charter's ability to allocate the costs of maintaining its network in a way that is efficient and fair for all of its customers—above-average, average, and light users alike. Charter should be afforded the same flexibility as other broadband providers to respond to developments in the market.

In short, tremendous changes in the marketplace have rendered the DC/UBP Condition no longer necessary, and thus ending it in 2021 would be in the public interest.

II. THE INTERCONNECTION CONDITION SHOULD ALSO SUNSET.

A. The OVD Marketplace Is Flourishing and Thus Any Justification for Imposing the Interconnection Condition No Longer Exists.

In 2016, the Interconnection Condition was imposed due to FCC concern that Charter would otherwise “gain the ability to harm online video distributors” by increasing interconnection costs for OVDs.¹⁰⁵ However, as outlined above, in the years since the Conditions were imposed, OVDs are even more numerous,¹⁰⁶ more popular,¹⁰⁷ and more

¹⁰⁵ *Merger Order*, 31 FCC Rcd at 6540, App'x B, Section III.

¹⁰⁶ *See supra* Section I.A.

¹⁰⁷ *See supra* Section I.A.; *see also Restoring Internet Freedom Order*, 33 FCC Rcd at 415 ¶ 171 (“[T]here is ample evidence that major edge providers, including Netflix, YouTube, and other large OVDs, are some of the “most-loved” brands in the world.”). These OVD services have rapidly acquired subscribers: in just the first

formidable¹⁰⁸ today than they were in 2016. Seemingly insatiable consumer demand for content only bolsters their already strong interconnection negotiating positions. Consequently, just as with the DC/UBP Condition, marketplace changes mean that any reason that may have justified the Interconnection Condition has long since disappeared.

B. Other Broadband Providers Have Entered into Voluntary Interconnection Agreements, and OVDs Have Flourished.

Broadband providers (except Charter) and OVDs have negotiated interconnection agreements that did not include any government-imposed conditions, rules or policies, without any resulting competitive harms. For instance:

- In 2014, Comcast reached an interconnection agreement with Netflix that allowed the streaming company to transmit content directly to Comcast customers instead of using intermediaries.¹⁰⁹
- In 2014, Verizon reached an interconnection agreement with Netflix that allows Netflix to bypass any potential congestion at the interconnection points with ISPs and transit providers.¹¹⁰
- In 2014, AT&T reached an interconnection agreement with Netflix, the streaming service's third agreement of the year.¹¹¹

three months of availability, Disney+ signed up an astonishing 28.6 million users, *see* Brooks Barnes, *Disney Plus Racks Up 28.6 Million Subscribers*, N.Y. Times (Feb. 4, 2020), <https://www.nytimes.com/2020/02/04/business/media/disney-earnings.html>, nearly doubling the total number of Charter's video customers, *see* News Release, Charter Communications, Inc., *Charter Announces Fourth Quarter 2019 Results* (Jan. 31, 2020), <https://ir.charter.com/news-releases/news-release-details/charter-announces-fourth-quarter-2019-results>.

¹⁰⁸ *See supra* Section I.A.

¹⁰⁹ *See* Press Release, Comcast, *Comcast And Netflix Team Up To Provide Customers Excellent User Experience* (Feb. 23, 2014), <https://corporate.comcast.com/news-information/news-feed/comcast-and-netflix>.

¹¹⁰ Jon Brodtkin, *Netflix Pays Verizon For Network Connection To Speed Up Video*, Ars Technica (Apr. 28, 2014), <https://arstechnica.com/tech-policy/2014/04/netflix-and-verizon-reach-interconnection-deal-to-speed-up-video/>.

¹¹¹ *See* Alina Selyukh, *Netflix Agrees To Pay AT&T To Ensure Smooth Video Downloads*, Reuters (July 29, 2014), <https://www.reuters.com/article/us-at-t-netflix/netflix-agrees-to-pay-att-to-ensure-smooth-video-downloads-idUSKBN0FY2FI20140729>.

Yet even with these agreements in place, as demonstrated above, the OVD marketplace has continued to grow and thrive.¹¹² OVDs also enjoy growing access to interconnection alternatives. In the *Restoring Internet Freedom Order*, the Commission identified direct interconnection and content delivery networks (“CDNs”) as innovative new ways for OVDs to deliver their content to consumers.¹¹³ The Commission noted that these innovations would be further spurred by returning to a light-touch regulatory framework in the internet traffic exchange market.¹¹⁴ In the years since, data suggest that there is a healthy and competitive market for such alternatives, with transit prices decreasing and the largest CDNs gaining market share.¹¹⁵ These trends indicate that the Commission’s expectations about the availability of interconnection alternatives have been borne out, with OVDs enjoying additional ways to reach their customers beyond traditional peering arrangements.

Indeed, the entities on the other side of the negotiation include some of the biggest names in technology: Netflix, Google, Akamai, Amazon, Facebook, Apple, Microsoft, Dropbox, and Yahoo. The Commission recently observed that large edge providers such as Amazon and Google, both of which control a significant portion of the OVD market, likely enjoy significant

¹¹² See *supra* pp. 23-24.

¹¹³ See *Restoring Internet Freedom Order*, 33 FCC Rcd at 412-13 ¶ 169.

¹¹⁴ *Id.*

¹¹⁵ See Brianna Boudreau, *Outlook for IP Transit Prices in 2018*, TeleGeography (Sept. 5, 2018), <https://blog.telegeography.com/outlook-for-ip-transit-prices-in-2018> (stating that a weighted median of global transit prices showed an annualized decrease of 27% between 2015 and 2018); Intricately, *2019 CDN Market Report*, 8, <https://cdn2.hubspot.net/hubfs/4238862/2019%20Intricately%20CDN%20Market%20Report.pdf> (“Base CDN pricing is on the decline year over year due to commoditization of core CDN services.”); Internet Society, *2019 Internet Society Global Internet Report: Consolidation in the Internet Economy*, 27 (2019), <https://future.internetsociety.org/2019/wp-content/uploads/sites/2/2019/04/InternetSociety-GlobalInternetReport-ConsolidationintheInternetEconomy.pdf> (“[M]arket trends are reinforced by the continued growth of Content Delivery Networks (CDNs) and large content providers investing in their own infrastructure for international connectivity.”).

market advantages that restrain broadband providers' exercise of power.¹¹⁶ That disparity has only grown since 2018: Only four U.S. companies have achieved market capitalizations exceeding \$1 trillion—Apple, Amazon, and Alphabet, and Microsoft—and all four are parent companies of OVDs and/or OVD platforms.¹¹⁷ Compare this to Charter's market capitalization of roughly \$124 billion, and it is clear that OVDs are formidable economic entities.¹¹⁸

C. The Interconnection Condition Results in the Burdensome and Inefficient Allocation of Resources, and Is Thus Contrary to the Public Interest.

Finally, the Interconnection Condition should sunset because it impedes Charter from operating its network efficiently. The Interconnection Condition imposes requirements untied to engineering or economic realities. For instance, the Condition requires Charter to maintain ten points of presence regardless of changes in traffic patterns or demand.¹¹⁹ But rigid requirements such as these are not necessary as Charter has a natural incentive to maintain optimal network architecture and capacity—including interconnect capacity—in order to deliver competitive quality of service to its customers. Consequently, these network requirements and restrictions interfere with Charter's efficient management of its evolving broadband network without providing any benefit.

¹¹⁶ *Restoring Internet Freedom Order*, 33 FCC Rcd at 390 ¶ 134 & n.483.

¹¹⁷ See Daisuke Wakabayashi, *Google Reaches \$1 Trillion in Value, Even as It Faces New Tests*, N.Y. Times (Jan. 16, 2020), <https://www.nytimes.com/2020/01/16/technology/google-trillion-dollar-market-cap.html>; see also Jennifer Elias, *Alphabet, Google's Parent Company, Hits Trillion-Dollar Market Cap for First Time*, CNBC (updated Jan. 16 2020), <https://www.cnbc.com/2020/01/16/alphabet-stock-hits-1-trillion-market-cap-for-first-time.html>.

¹¹⁸ Charter Communications, Inc. (CHTR), <https://www.zacks.com/stock/chart/CHTR/fundamental/market-cap> (last visited June 10, 2020).

¹¹⁹ *Merger Order*, 31 FCC Rcd at 6559, App'x B, Attach. 1 (“To qualify under this IP Interconnect Offer, the applicant . . . [m]ust interconnect at 8 or more of the New Charter points of presence in the cities listed below.”).

The Interconnection Condition also creates other inefficiencies. For example, it requires Charter to respond to requests of the interconnecting party to augment Charter's capacity if port utilization in either direction exceeds certain specified percentages under conditions set out in the Condition.¹²⁰ Charter is required to accomplish any requested augmentation within 90 days,¹²¹ even though the peering party has no such requirement. These blanket, inflexible requirements do not represent optimal network management principles. While Charter has the incentive and need to continuously update its network, government regulation of Charter's efforts to manage its large, sophisticated, and evolving network creates inefficiencies that, over the long term, result in a more costly and disjointed interconnection network.

In summary, letting the Interconnection Condition expire in 2021 is in the public interest. Competition is flourishing, with OVDs enjoying both market power and the availability of interconnection alternatives. The fact that other broadband providers have entered into interconnection agreements without affecting the robust OVD marketplace proves that the Condition can be safely removed. In fact, the beneficiaries of the Condition are mostly large, highly profitable companies with market power to negotiate a balanced agreement. Since 2018, broadband providers other than Charter have been free to negotiate for interconnection,¹²² and still the OVD marketplace has flourished. Charter's Interconnection Condition, which artificially chooses sides in what would be a negotiation between two strong entities, should

¹²⁰ *Id.* at 6560-61, App'x B, Attach. 1. Specifically, an interconnecting party can require Charter to upgrade the capacity at an interconnection point if port utilization exceeds 70% of the available capacity for a requisite period of time, or to reduce capacity if port utilization falls below 30% of the available capacity for 6 consecutive months. *Id.*

¹²¹ *See id.* ("Neither party shall charge the other for any required augments.")

¹²² *Restoring Internet Freedom Order*, 33 FCC Rcd at 411-12 ¶ 168.

therefore sunset at the end of five years, as allowed for in the FCC’s merger conditions framework.

CONCLUSION

For the foregoing reasons, the Commission should grant Charter’s Petition to end the DC/UBP and Interconnection Conditions on May 18, 2021, as contemplated in the Merger Order. The seven-year term for the Conditions was a ceiling, included to allow the OVD market “room to become more mature and better positioned to withstand attempts by New Charter to impose data caps and UBPs at levels indeed to blunt their competitiveness.”¹²³ The five-year trigger was included in recognition of the fact that the OVD market might mature sooner. And, indeed, the OVD marketplace has flourished in the four years since the merger closed. In fact, far from seeking to harm OVDs, Charter, like many other established broadband providers, is actually actively working to increase its subscribers’ access to online video services. Eliminating these Conditions at the end of five years will therefore advance, rather than thwart the competitive gains that have been made, giving Charter the flexibility it needs to best meet the data usage needs of all of its subscribers and to configure its network to deliver data in the most efficient way possible.

¹²³ *Merger Order*, 31 FCC Rcd at 6370 ¶ 86.

Respectfully submitted,

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