

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)

PETITION BY CHARTER COMMUNICATIONS, INC.)
TO SUNSET MERGER CONDITIONS)
_____)

WC Docket No. 16-197

COMMENTS OF NEWSMAX MEDIA, INC.

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SUMMARY

In 2016, the Commission identified the risk of specific harms arising from the proposed merger of Charter, Time Warner Cable, and Bright House. In particular, it found the merged entity would have the incentive and ability to disadvantage edge providers – and online video distributors (“OVDs”) such as Newmax in particular – in various ways, ultimately limiting services to and/or increasing costs for American consumers. The Commission based those conclusions on rigorous economic analysis, which was confirmed by the contents of confidential internal documents provided by the merging parties. In order to remedy those potential harms, the Commission adopted several conditions, including (1) a prohibition on Charter imposing data caps and usage-based pricing mechanisms; and (2) the requirement for Charter to offer to connect its Internet protocol network to any qualifying entity free of charge and on standardized terms. The Commission imposed both conditions to protect the public interest in competition and fair prices for a term of seven years. However, the order gave Charter the option to petition to shorten the term to five or more years if it could demonstrate that those conditions were no longer in the public interest.

Charter’s Petition requesting that these two conditions be lifted after only five years fails to make that required showing. Charter has provided no new economic analysis to demonstrate that the anticompetitive incentives carefully documented by the Commission as the reason for those conditions have diminished. As importantly, Charter has failed to show that the inability to impose data caps or to extract payment for interconnection to reach its subscribers has had any adverse effect on its ability to compete or to serve its customers. To the contrary, Charter submits several pages of evidence demonstrating how its business is thriving as its network continues to grow and improve. Indeed, Charter’s stock price has increased at a compound annual rate of more

than 22% since the merger was consummated, growing nearly 2.5 times in just over four years. In these circumstances, there is no reason for the Commission to grant early termination of these two conditions.

In fact, with broadband connectivity playing an ever more important role in Americans' lives during the COVID-19 pandemic and beyond, this would be an especially inappropriate time to allow Charter to constrain the ability of edge providers to offer services to Charter subscribers or to increase the cost of doing so. Indeed, Chairman Pai's Keep Americans Connected program encourages broadband providers to waive data caps in recognition of the critical need for high-bandwidth connectivity in a world increasingly dependent upon interaction at a distance. Removing the very merger conditions that prevent Charter from depriving American consumers of the full enjoyment of broadband services they pay for would enable Charter to impose costs on OVDs and other edge providers and thereby raise the price consumers must pay for services. Because Charter has failed to show this would be in the public interest, the Commission should deny the Petition.

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information that helps them make decisions and improve their lives. Newsmax operates a linear programming channel, Newsmax TV, which is available in over 70 million U.S. homes. Newsmax also provides a live, 24-hour over-the-top (“OTT”) streaming video feed of Newsmax TV to reach the approximately 40 million television households that do not receive the linear feed of Newsmax TV from their MVPD. This OTT feed of Newsmax TV is the only option for millions of Charter’s television subscribers who do not receive Newsmax TV in their cable package and the 11 million Charter broadband subscribers that do not subscribe to Charter’s cable television offerings.³ As a result, Newsmax is familiar with the potential obstacles facing an online video distributor (“OVD”) seeking to reach as many viewers as possible.

In May 2016, the Commission approved the merger among Charter, TWC, and BHN. Charter is now the nation’s second largest cable operator, with nearly 25 million residential broadband subscribers in 41 states and annual revenue of more than \$45 billion.⁴ In approving the merger, both the Commission and the U.S. Department of Justice (“USDOJ”) found that the public interest required the imposition of several conditions to ensure that the combined entity would not use its increased scope and scale to hamper or prevent its current and future rivals from expanding, becoming more competitive, or starting up in the first place. Two of these conditions imposed by the Commission are at issue in this proceeding. First, the Commission prohibited Charter from imposing data caps or charging UBP for its residential BIAS service, a condition that “protects subscribers from paying fees designed to make online video consumption more expensive leading

³ See Charter Communications, *About Charter*, Company, <https://corporate.charter.com/about-charter>.

⁴ See Charter Communications, *2019 Annual Report*, 10 (2019), <https://ir.charter.com/static-files/b453964b-6b96-4fb8-aebc-91ccc0fda968>.

subscribers to stick with a traditional pay-TV bundle.”⁵ Second, the Commission required Charter to offer to connect its BIAS network to any qualifying entity free of charge and on standardized terms, in order to “ensure that companies may more easily qualify for free interconnection and that they may increase their traffic and expand their services at a greater rate before needing to pay to deliver content to New Charter’s subscribers.”⁶

Because the Commission recognized that Charter’s new-found market power may diminish over time, it did not impose these conditions permanently but rather for a term of seven years after closing. It found that this period would give the edge provider market time to become more mature and better able to withstand attempts by Charter to impose data caps and UBP at levels that would blunt their competitiveness, and also allow the high-speed broadband market to develop and perhaps introduce competition in markets served by Charter that would constrain its anticompetitive actions.⁷ However, the Commission gave Charter the option to petition to shorten the term of these two conditions to five or more years upon a showing that they are no longer in the public interest.⁸ Charter has now petitioned to have the conditions lifted as of the date that is exactly five years from closing.

The Wireline Competition Bureau (the “Bureau”) ignored the terms of the *Merger Order*, putting the petition out for comment two months before the permissible date of August 18, 2020.⁹ Newsmax and other parties notified the Commission of this unauthorized and unfair step, arguing that such a change reduces the anticipated time for parties to evaluate and comment on the serious

⁵ *Merger Order* ¶ 9.

⁶ *Id.* ¶ 10.

⁷ *Id.* ¶ 86.

⁸ *Id.* Appendix B, Section XII.

⁹ *See id.*

matters involved.¹⁰ The Commission has apparently ignored those complaints and has allowed the comment cycle on the Charter petition to proceed. In its letter, Newsmax noted that the Bureau's rush to put the petition out for comment created the appearance of undue favoritism toward Charter. By refusing to rectify the Bureau's improperly hasty step, the Commission would seem to have tacitly approved that action for the benefit of Charter, pushing through the petition and comment cycle in the middle of the COVID-19 pandemic and depriving interested parties of the anticipated time to develop evidence and present arguments. Despite these disadvantages, Newsmax submits the following comments in opposition to early termination of the two procompetitive conditions at issue.

I. CHARTER HAS FAILED TO DEMONSTRATE THAT ITS INCENTIVES TO USE DATA CAPS AND USAGE BASED PRICING AGAINST OVDs HAVE CHANGED

In the *Merger Order*, the Commission recognized that cable operators have the incentive and ability to disadvantage edge providers that offer rival services. For example, “[t]hrough the practice of metering consumption of rival online video offerings while provisioning MVPD service without such metering, cable companies can discriminate in favor of their own video services and protect them from competition.”¹¹ More importantly, the Commission found that by combining three cable companies, the transaction would give Charter a larger footprint passing more homes so that it would be able to capture more of the gains from any discriminatory actions aimed against edge providers, such as OVDs.¹² USDOJ reached a similar conclusion, finding that increased size would “enabl[e] the merged firm to increase barriers to entry for OVDs or otherwise make OVDs

¹⁰ See Letter from William M. Wiltshire to Marlene H. Dortch, WC Docket No. 16-197 (July 8, 2020); Letter from Mark DeVitre to Marlene H. Dortch, WC Docket No. 16-197 (July 16, 2020).

¹¹ *Merger Order* ¶ 85.

¹² *Id.* ¶ 71.

less competitive” and that the company “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.”¹³ Accordingly, both agencies imposed conditions on the merging parties.

One of the conditions imposed by the Commission was based on its specific finding that “post-transaction, New Charter may be more likely to use data caps or UBP to curb current and future OVD-consumption levels with the purpose of inhibiting or eliminating OVD competition” and would also have “considerable incentives to implement usage-based pricing simply as a method of generating additional revenue.”¹⁴ The Commission discussed at length the increased incentives Charter would have to harm its OVD rivals and the increased ability it would have to do so after the merger. Moreover, the Commission also found confirmation of its conclusions from internal documents provided by the merging parties.¹⁵ By contrast, the merging parties failed to advance any cost-based or efficiency justification for implementing data caps or UBP.¹⁶ To the contrary, Charter claimed an aversion to data caps, asserting that its decision not to limit subscribers in this way would provide a competitive advantage against other BIAS providers, supporting “a strong business case for not implementing caps.”¹⁷ Ironically, while Charter now argues that it faces new competition from OVDs, it advances a nebulous new theory that the company must better allocate bandwidth costs.

¹³ Competitive Impact Statement at 11, *U.S. v. Charter Communications, Inc.*, Civil Action No. 1:16-cv-00759, (D.D.C. 2016), ECF No. 7, <https://www.justice.gov/atr/file/850161/download>.

¹⁴ *Merger Order* ¶¶ 74, 81 n.266.

¹⁵ *See id.* ¶¶ 80-82.

¹⁶ *See id.* ¶ 84.

¹⁷ *Id.* ¶ 78.

The Petition similarly fails to advance any cost-based or efficiency justification for implementing data caps or UBP. Indeed, it provides no new economic analysis to show that the incentives identified by the Commission have changed or abated since adoption of the *Merger Order*. It has not, for example, shown that Charter faces more competition from other broadband providers that could potentially offer an edge provider a viable alternative pathway to reach customers in areas served by Charter.¹⁸ That *other* providers have imposed data caps was known to the Commission at the time of the *Merger Order* and is no basis for prematurely lifting the condition imposed on Charter.¹⁹ To the contrary, other providers' continued use of data caps illustrates the continued lack of broadband competition in certain markets. In this regard, it is worth noting that Comcast has imposed data caps everywhere except where it faces direct competition from Verizon FiOS, which has no data caps – corroborating the Commission's conclusion that direct wireline BIAS competition could ameliorate the concerns that prompted this condition.²⁰ On the other hand, the Petition devotes four pages to touting Charter's investment in its network and improvements in services over the last four years, demonstrating that the conditions did not undermine its ability to implement such upgrades.²¹

The Petition does make much of the fact that the OVD market has developed over the last four years. While this is undeniable, it is not clear that this development materially changes Charter's incentive and ability to disadvantage OVDs. For example, does the fact that more OVDs

¹⁸ *See id.* ¶ 86. *See also id.* Appendix C, ¶ 5 (noting that Charter would be the sole BIAS provider in two-thirds of its footprint). As the Commission recognized, wireless networks do not provide a viable alternative given the costs involved in purchasing sufficient capacity to view OVD programming. *See id.* ¶ 56.

¹⁹ *See* Petition at 22.

²⁰ *See* Xfinity, *1.2 Terabyte Internet Data Usage Plan Availability*, Xfinity Support, <https://www.xfinity.com/support/articles/data-usage-find-area> (listing states where cap applies, which does not include CT, DE, DC, MD, MA, NJ, NY, PA, RI, or VA where Verizon FiOS is available).

²¹ *See* Petition at 4-8.

have emerged to provide a full suite of video programming (which directly competes with Charter) rather than subscription video on demand services (which arguably complement Charter's service) increase the potential threat to Charter's multichannel video service and thus increase its incentives to protect those revenues? Does the "cord cutting" that has seen Charter lose 729,000 video subscribers over the last two years alone²² intensify the urgency of retaining those subscribers who remain? Charter provides no analysis to demonstrate that the changes in the marketplace make the conditions no longer necessary.

Charter argues that the prohibition on data caps and UBP "artificially hamstrings 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."²³ Yet Charter's web page reveals that it has other tools at its disposal to achieve these ends without discriminating against OVDs or other edge providers.

Charter utilizes as necessary a variety of reasonable network management practices consistent with industry standards to ensure that all of its Customers have a high-quality online experience. These practices are undertaken without regard to the source, destination, content, application, or service, and which are designed to protect Customers from activities that can unreasonably burden our network or compromise security.²⁴

Charter does not explain why these network management tools are insufficient to ensure the efficient and fair option of its network.

Moreover, Charter's Petition comes at a particularly inauspicious time for allowing BIAS providers to cut back on the data used by their subscribers. The COVID-19 pandemic has

²² See Charter Communications, Inc., *Customer Metrics* (2020), <https://ir.charter.com/static-files/4e9f3f03-ecae-4574-80a6-b8ecf0e9d015>.

²³ Petition at 23.

²⁴ Spectrum, *Network Management Practices*, Residential Terms of Service/Network Management Practices, <https://www.spectrum.com/policies/network-management-practices.html>.

reinforced the centrality of broadband to American life. Video calls have become a central part of doing business when face-to-face interaction is not an option, while online video and gaming provide much-needed leisure entertainment for those restricted to their homes.²⁵ The broadband connectivity required to support an economy increasingly dependent on remote interactions continues to increase, while alternatives for accessing that connectivity outside the home have become increasingly unavailable.²⁶ Not surprisingly, one element of Chairman Pai’s Keep Americans Connected program encourages BIAS providers to waive data caps in light of subscribers’ needs during the pandemic.²⁷ Broadband providers that have operated without data caps have not had issues with their networks – to the contrary, have done just fine. Charter itself has found that its network “continues to perform well despite higher levels of data traffic.”²⁸ Similarly, Comcast has said that its network “is performing well. . . . While the COVID-19 experience is new and unprecedented, the Internet ecosystem is flexible and performing the way it was designed.”²⁹ This has enabled BIAS providers to extend the waiver on data caps and UBP into the fall.³⁰ Given these facts, Charter’s assertion that it has an imminent need to impose data caps to

²⁵ As the Commission has recognized, these are exactly the kind of edge providers whose services require characteristics currently only available on high-speed fixed networks and thus are susceptible to exercises of market power by large BIAS providers. *See Restoring Internet Freedom*, 33 FCC Rcd. 311, ¶ 133 (2018).

²⁶ *See id.* (noting that ability to reach end users at work and other locations could affect market power).

²⁷ *See* FCC, *Keep Americans Connected*, FCC Initiatives (July 8, 2020), <https://www.fcc.gov/keep-americans-connected>.

²⁸ Charter Communications, *Covid-19 Update: Charter Continues to Keep Customers Connected*, News and Views (June 3, 2020), <https://corporate.charter.com/newsroom/covid-19-update-charter-continues-to-keep-customers-connected>.

²⁹ Comcast, *COVID-19 Network Update*, COVID-19 Response (May 20, 2020), <https://corporate.comcast.com/covid-19/network/may-20-2020>.

³⁰ *See, e.g.*, AT&T, *Consumers*, COVID-19: Our Response (Jul. 15, 2020), <https://about.att.com/pages/COVID-19.html#consumers> (automatically waiving overage fees through September 30); Press Release, “Mediacom Announces Series of Company Initiatives to Help Customers and Communities Recover from COVID-19 Crisis” (June 23, 2020), <https://mediacomcable.com/about/news/mediacom-further-extends-coronavirus-initiatives/> (extending data cap waiver through August billing cycle).

better allocate costs rings hollow. The Commission should not prematurely lift this condition and allow Charter to impose these limitations on subscribers at the time when Americans are most dependent upon broadband connectivity to conduct basic activities of daily life.

II. CHARTER HAS ALSO FAILED TO SHOW THAT ITS INCENTIVES TO IMPOSE PAID INTERCONNECTION HAVE DIMINISHED SUFFICIENTLY TO SUNSET THE CONDITION

In the *Merger Order*, the Commission explained that to demand payment from an edge provider for interconnection, a BIAS provider needs both a large subscriber base and control over interconnection capacity feeding its network.³¹ As the BIAS provider's subscriber base grows, it is able to control an input that is increasingly necessary for the viability of edge providers. The Commission's economic analysis concluded that "the ability of a BIAS provider to charge for access to subscribers increases with the number of subscribers; the greater the number of subscribers, the more the BIAS provider can charge on a per-subscriber basis."³² But this advantage can be lost if there are a variety of ways to get onto a BIAS network. Thus, "[a] BIAS provider's ability to charge for access to its subscribers depends on its ability to control traffic entering and exiting its network" because "[w]ithout such control, edge providers can access the BIAS provider's subscribers via alternative means."³³

The Commission concluded that combining Charter, TWC, and BHN would both substantially increase the number of subscribers controlled by the new entity and allow it to control the means of accessing the network. The Commission found that Charter's lack of interconnection charges prior to the merger was a result of its inability to impose those charges –

³¹ See *Merger Order* ¶ 100.

³² *Id.* ¶ 115.

³³ *Id.* ¶ 116.

but with additional scale and control over the TWC backbone network, Charter would have both ingredients necessary to demand payment for interconnection.³⁴ Because OVDs are bandwidth-intensive, they are particularly vulnerable to interconnection-related harms. The Commission’s economic analysis concluded that Charter would have the specific incentive and ability to discriminate against OVDs through interconnection both to extract higher fees and to defend its own video subscriber base.³⁵ OVDs forced to pay for interconnection will either invest less in developing programming or raise prices to consumers, or both – only the BIAS provider is benefited, and it has no market incentive to share that benefit with subscribers.³⁶

Here again, the Commission bolstered its analysis with corroborating internal documents provided by the merging parties.³⁷ Moreover, the Commission reviewed record evidence suggesting that TWC had allowed its network to congest to pressure Netflix into a paid peering arrangement prior to the merger, demonstrating the ability to use this method to harm OVDs.³⁸ Indeed, the New York Attorney General brought a consumer protection lawsuit based in part on TWC’s actions depriving subscribers of reliable access to online content in general, and Netflix in particular.³⁹ Ultimately, Charter settled the case in 2018 with the largest ever consumer payout by a BIAS provider in U.S. history (\$172.4 million).⁴⁰ Notably, the settlement agreement

³⁴ See *id.* ¶ 119.

³⁵ See *id.* ¶¶ 122, 125-26.

³⁶ See *id.* ¶ 108.

³⁷ See, e.g., *id.* ¶¶ 42, 127.

³⁸ See *id.* ¶ 128.

³⁹ See Complaint at ¶¶ 279-318, *State of New York v. Charter Communications, Inc.*, Index No. 450318/2017, https://ag.ny.gov/sites/default/files/summons_and_complaint.pdf.

⁴⁰ See Press Release, “A.G. Underwood Announces Record 174.2 Million Consumer Fraud Settlement With Charter For Defrauding Internet Subscribers” (Dec. 18, 2018), <https://ag.ny.gov/press-release/2018/ag-underwood-announces-record-1742-million-consumer-fraud-settlement-charter>.

requires that Charter must comply with the settlement-free peering provisions of the *Merger Order*.⁴¹

During the merger proceeding, Charter provided no analysis showing that market forces or other factors would prevent a unilateral price increase for interconnection or the use of interconnection to discriminate against OVDs. Rather, Charter simply asserted that management of the merged entity would not engage in such conduct.⁴² The Commission rejected that argument in light of the economic and other incentives it had documented. The Petition does not contest the Commission's economic analysis, but instead argues that OVDs are flourishing even as some other BIAS providers are able to charge for interconnection.⁴³ Yet as the OVD options proliferate, Charter has even more incentive to staunch the flow of cord cutters given the profitability of video subscribers. Charter also identifies a small handful of large OVDs that may have the heft to counteract Charter's market power, but as Charter notes there are now more than 140 OVDs that cater to the U.S. market⁴⁴ – and the vast majority are small, nascent, or both.

Accordingly, the Petition largely fails to address (much less refute) the reasons that led the Commission to impose the interconnection condition, and therefore it fails to justify an early sunset of that condition.

⁴¹ See Settlement Agreement at ¶ 34, *State of New York v. Charter Communications, Inc.*, 81 N.Y.S. 3d 2 (2018), <https://www.americancable.org/wp-content/uploads/2019/01/190110-Charter-Dec.-17-2018-Executed-Settlement-Agreement.pdf>.

⁴² *Merger Order* ¶ 130.

⁴³ See Petition at 23-25.

⁴⁴ See *id.* at 12.

CONCLUSION

Charter has failed to acknowledge the reasons why the Commission originally imposed the data cap/UBP and interconnection conditions, much less demonstrate that that the underlying economic incentives have changed. Charter still has the incentive and ability to use its market power to disadvantage edge providers – and OVDs in particular – which would either degrade the services available to consumers, raise the prices of those services, or both. Accordingly, the Commission should deny the Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 22nd day of July, 2020, a copy of the foregoing pleading was served by first class U.S. mail upon:

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