

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554**

In the Matter of)	
)	
Conditions Imposed in the Charter)	WC Docket No. 16-197
Communications-Time Warner Cable-)	
Bright House Networks Order)	

REPLY COMMENTS OF ROKU, INC.

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TABLE OF CONTENTS

I.	Introduction and Summary	1
II.	Charter Misconstrues the Rationale for the Merger Conditions.....	3
III.	The Rationale for the Merger Conditions Is Just as Valid Today as When the Commission Imposed Them.	8
	A. More Americans Depend on Streaming, Which in Turn Remains Critically Dependent on Broadband.	9
	B. The Incentives for Charter to Act Anti-Competitively and the Lack of Broadband Competition Are Just as Prominent Today as When the Commission Imposed the Merger Conditions.	14
	C. Data Caps Are One of Myriad Tactics Available to ISPs in the Absence of Broadband Competition.....	17
IV.	Conclusion.....	21

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I. INTRODUCTION AND SUMMARY

Charter contends the conditions the Commission imposed on the company following its 2016 merger with Time Warner Cable and Bright House are no longer necessary. That claim is false, and the Commission should deny Charter’s petition to sunset those conditions two years early.¹ The bases for the safeguards the Commission adopted to protect consumers following Charter’s merger were Charter’s incentives to act anti-competitively post-merger and the absence of viable competition to Charter in the broadband internet access services market to prevent Charter from acting on those incentives.² Charter’s petition for relief mentions neither, and that omission alone is sufficient for the Commission to dismiss Charter’s request.

As one of the nation’s leading video streaming platforms, Roku welcomes public policy initiatives seeking to drive greater in-home broadband deployment and adoption. In particular, we appreciate Commission “efforts to close the digital divide and extend the reach of broadband

¹ Petition by Charter Communications, Inc. to Sunset Merger Conditions, WC Docket No. 16-197 (filed June 22, 2020) (“Charter Petition”).

² *In the Matter of 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”).

deployment to all Americans.”³ In-home broadband internet access service is fundamental to full participation in all spheres of our digital world, and until there is effective competition throughout the country for terrestrial broadband internet access services, the Commission should remain vigilant against any efforts by internet service providers (“ISPs”) to weaken constraints on their power to implement anti-competitive measures.

Some commenters claim Charter’s charitable donations and community involvement might temper Charter’s incentive and ability to act in its own economic self-interest by discriminating against Online Video Distributors (“OVDs”).⁴ These arguments ignore Charter’s role as a gatekeeper for OVDs and as a monopoly in many broadband access markets.⁵ Indeed, several commenters state that they support Charter’s petition because Charter has given them money or other assistance, and they hope the company will continue to do so, without ever discussing the merits of Charter’s petition.⁶ But co-opting politicians and nonprofits to create the appearance of grassroots support is neither useful, nor informative in administrative proceedings.⁷ The Commission should afford these Charter-sponsored comments no weight.

Other commenters claim that there should be a “level playing field,” but ignore how Charter—and not other cable operators—approached the FCC to approve “a merger the FCC

³ *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2020 Broadband Deployment Report, GN Docket No. 19-285, ¶ 9 (2020) (“Broadband Deployment Report”).

⁴ *See, e.g.*, Letter from Gaby Ortigoni, President and CEO, Hispanic Chamber of Commerce of Metro Orlando, to Ajit Pai, Chairman, FCC, WC Docket No. 16-197 (July 22, 2020).

⁵ *See* Comments of Writers Guild of America, West, Inc., WC Docket No. 16-197, 3 (July 22, 2020) (“Writers Guild Comments”).

⁶ *See, e.g.*, Letter from Fanny Villareal, CEO, YWCA of Syracuse and Onondaga County, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-197 (July 20, 2020).

⁷ *See, e.g.*, Victoria Peng, *Astroturf Campaigns: Transparency in Telecom Merger Review*, 49 U. MICH. J.L. REFORM 521, 536 (2016).

declared was not in the public interest without conditions”⁸ The Commission, in other words, knew the regulatory distinctions the 2016 *Merger Order* might create, and the persistence of differences between Charter as the subject of the *Merger Order* and other broadband internet access providers is not the least bit surprising.⁹ Indeed, in seeking approval of its merger, Charter itself claimed to be different,¹⁰ and as Newsmax Media explained, other providers’ continued use of data caps simply “illustrates the continued lack of broadband competition in certain markets” that prompted the FCC to impose conditions on Charter in the first instance.¹¹

Charter’s petition does nothing to advance the Commission’s broadband goals. Granting it would eliminate measures that remain relevant, targeted, and necessary to preserve streaming video competition.¹² For these reasons, the Commission should deny Charter’s petition.

II. CHARTER MISCONSTRUES THE RATIONALE FOR THE MERGER CONDITIONS.

The petition reads as if the only reason for the merger conditions prohibiting data caps and usage-based pricing (“UBP”) and requiring settlement-free interconnection (collectively, the

⁸ Letter from Phillip M. Dampier, President, Stop the Cap!, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-197, 4 (July 22, 2020) (“Comments of Stop the Cap!”).

⁹ Comments of Newsmax Media, Inc., WC Docket No. 16-197, 6 (July 22, 2020) (“Newsmax Comments”).

¹⁰ See *Merger Order* at ¶ 78 (“Charter in particular emphasizes its aversion to data caps, stating that instead of enforcing usage limits it chooses to market the absence of data caps as a competitive advantage.”).

¹¹ Newsmax Comments at 6 (specifically noting that Comcast has imposed data caps everywhere except where it faces direct competition from Verizon FIOS).

¹² As multiple commenters have also noted, this Public Notice is also premature because it has been published nearly two months earlier than permitted under the *Merger Order*. See, e.g., Letter from William M. Wiltshire, Counsel to Newsmax Media, Inc., to Marlene H. Dortch, Secretary, FCC WC Docket No. 16-197 (July 8, 2020) (suggesting that the Commission hold this proceeding in abeyance until August 18, the date specified in the *Merger Order*); Entertainment Studios Networks Petition to Deny, WC Docket No. 16-197 (July 22, 2020).

“Merger Conditions”) was to allow sufficient time for OVDs to “flourish.”¹³ That claim is simply not correct. The underlying rationale for the conditions was not the state of the OVD marketplace. Rather, the rationale the Commission cited in adopting the conditions was two-fold: 1) the incentives of Charter post-merger to act anti-competitively toward OVDs, and 2) the lack of competition in the provision of terrestrial broadband that otherwise would constrain Charter from acting anti-competitively.¹⁴ The Charter petition addresses neither of those concerns.

The focal point of the Commission’s public interest review of the proposed merger was the heightened incentives that Charter would face post-merger, and the merger conditions were designed accordingly to address those incentives.¹⁵ Based on the record, the Commission found that the merger would, in fact, increase such incentives:

We conclude that the transaction will materially alter the Applicants’ incentives and abilities in ways that are potentially harmful to the public interest. First, New Charter’s increased broadband footprint and desire to protect its video profits will increase incentives to impose data caps and usage-based prices in order to make watching online video more expensive, and in particular more expensive than

¹³ Charter uses the words “flourishing” and “flourished” to describe the OVD marketplace twelve times in its petition. Ironically, the words “flourish,” “flourishing,” and “flourished” do not appear anywhere in the *Merger Order*, let alone in any Commission projection of the impact of the Merger Conditions on the OVD marketplace.

¹⁴ See *Merger Order* at ¶¶ 8-12.

¹⁵ *Id.* at ¶¶ 6, 34-47. One of the reasons the Commission focused on Charter’s post-merger incentives was Charter’s claim to have a “best-in-class” business model that “focuses on offering services with higher broadband speeds and simplified, uniform pricing that is often faster and cheaper than its cable peers,” *Merger Order* at ¶ 3, and in particular Charter’s claim that it did not impose data caps or usage-based pricing for broadband. *Id.* Indeed, Charter feigned to have an “aversion” to data caps, with “no current plans” to implement them, and even claiming a competitive advantage in its ability to market its lack of data caps. *Id.* at ¶ 78. In its marketing, Charter continues to boast that it has “NO data caps.” See Attachment A. It is thus particularly appalling that Charter would now seek permission to impose data caps, in part because everyone else is doing it. See Charter Petition at 21. Apparently, the Commission was correct all along that, notwithstanding its claim to be different, Charter was simply “keeping its options open” to impose data caps. *Merger Order* at ¶ 81.

subscribing to a traditional pay-TV bundle. Second, New Charter's larger number of broadband subscribers will increase its incentive and ability to raise prices on companies—including online video distributors—that interconnect with New Charter's network to deliver Internet traffic that consumers want.¹⁶

In rejecting Charter's protestations to the contrary, the Commission concluded that Charter's post-merger incentives to act anti-competitively would be "quite strong."¹⁷ Moreover, the Commission made clear that it imposed the conditions specifically to address those incentives: "In order to address New Charter's increased incentive to discriminate against OVDs in the future, targeted conditions are necessary to ameliorate anticompetitive harms with respect to data caps and UBP."¹⁸ While it may not be surprising that Charter fails to say one word about these incentives in its petition, the plain fact is that the incentives of a post-merger Charter to use its facilities to the detriment of its over-the-top rivals were the lynchpin of the Commission's public interest analysis in reviewing the proposed merger.

The second pillar underlying the *Merger Conditions* was the Commission's finding that there is insufficient broadband competition to constrain Charter from acting on its incentives.

The Commission concluded:

We further find that in any given location, customers have few BIAS choices and that high entry barriers make it unlikely that new substitutes will emerge in the near future. We therefore conclude that New Charter will have the ability to act on its incentives to use anticompetitive terms in connection with the company's residential retail BIAS products.¹⁹

Integral to the Commission's conclusion that Charter had the incentive and ability to discriminate against its over-the-top rivals was the Commission's consistent finding of a "lack of

¹⁶ *Merger Order* at ¶¶ 7, 47, 50, 72, 83.

¹⁷ *Id.* at ¶ 80.

¹⁸ *Id.* at ¶ 71.

¹⁹ *Id.* at ¶ 50.

alternatives”²⁰ to Charter and the “limited choice”²¹ for high-speed broadband throughout its footprint. The Commission held that Charter could leverage this lack of competitive constraint to prevent customers from switching from its MVPD services to OVDs.²² The Commission added that additional broadband entry or expansion was unlikely to occur and would thus not diminish Charter’s market share, leaving consumers with “no (or limited) alternative cable or fiber BIAS options”²³ that could act as a constraint on potential Charter anti-competitive conduct. The lack of competition that could prevent Charter from acting on its increased incentives to engage in anti-competitive behavior was thus part and parcel of the Commission’s justification for adopting the *Merger Conditions*.

Yet, as other commenters have noticed, Charter’s petition attempts to shift the Commission’s attention away from the BIAS market by touting successes in the OVD marketplace.²⁴ The state of the OVD marketplace had nothing at all to do with the basis for the *Merger Conditions*. At no point in the *Merger Order* did the Commission justify the imposition of the *Merger Conditions* using any sort of assessment that OVD competition was not yet “flourishing.” Charter’s claim that the *Merger Conditions* were imposed because the Commission “believed that OVDs were still finding their place in the market”²⁵ is simply not true; the Commission said no such thing. To the contrary, the Commission specifically remarked

²⁰ *Id.* at ¶ 67.

²¹ *Id.* at ¶ 38.

²² *Id.*

²³ *Id.* at ¶ 86.

²⁴ *See, e.g.*, INCOMPAS Petition to Deny, WC Docket No. 16-197, 15-16 (July 22, 2020) (“INCOMPAS Comments”); Letter from Joshua Stager and Amir Nasr, New America’s Open Technology Institute, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-197, 4 (July 22, 2020) (“OTI Comments”).

²⁵ Charter Petition at 12.

in the *Merger Order* that “OVD competition has been persistent for several years.”²⁶ The *Merger Conditions* were not the result of the state of the OVD marketplace. They were based entirely on Charter’s incentives and the lack of competition constraining Charter’s ability to act on those incentives.

Nor was the seven-year term of the *Merger Conditions* predicated on the state of the OVD marketplace. As an initial matter, it is apparent that the seven-year term for the *Merger Conditions* was a concession by the Commission to limit the length of the term of the conditions, not an upper bound of the Commission’s authority or intent to constrain Charter from engaging in anti-competitive behavior for a longer period of time. The primary consideration in limiting the condition to only seven years was the Commission’s inability to predict Charter’s “future market power” after the merger (not the state of the OVD marketplace), and thus the continuing viability of the incentives for Charter to engage in anti-competitive behavior.²⁷

In its petition, Charter never addresses the remaining viability of those incentives, or the lack of competitive forces that would otherwise constrain Charter from acting on those incentives. Rather, Charter’s entire petition effectively rests on a single sentence in the paragraph in which the Commission said that seven years “will allow the edge provider market

²⁶ *Merger Order* at ¶ 81. This stands in stark contrast to the Commission’s imposition of conditions in the Comcast-NBC Merger (“Comcast-NBC Merger Order”), in which the Commission found that, “[b]y all accounts, OVD services have just begun,” *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, Memorandum Opinion and Order, MB Docket No. 10-56, ¶ 80 (2011), and in part imposed conditions on Comcast in order to protect the “nascent” OVD market. *See id.* at pp. 276-79 (joint statement of Commissioners McDowell and Baker and Statement of Commissioner Clyburn). Nevertheless, the Commission also made clear that the precise state or level of competition in the OVD market was not the salient point. *Id.* at ¶ 76 n.167. Rather, citing the *Horizontal Merger Guidelines*, the Commission noted that the relevant inquiry was simply the potential to “harm online video.” *Id.*

²⁷ *Merger Order* at ¶ 86.

room to become more mature and better positioned to withstand” potential anti-competitive conduct by Charter.²⁸ That sentence does not in any way suggest that the Commission would have accepted a shorter term if only the OVD marketplace had been “flourishing” in 2016, or that there is some specific level of OVD competition that would justify the removal of the *Merger Conditions*. Indeed, that logical leap is belied entirely by the Commission’s finding just five paragraphs earlier that OVD competition had been persistent for several years.²⁹

That the *Merger Conditions* themselves, as well as their term, are premised on *Charter’s* incentives and lack of competitive constraints in the marketplace is reinforced by the Commission’s hope that seven years would be sufficient time for the broadband market to develop further, to the point that it might “foster competition in the market to make the anticompetitive use of data caps less tenable.”³⁰ The inescapable conclusion is that the Commission envisioned a need for the *Merger Conditions* as long as there remain incentives for Charter to engage in anti-competitive behavior and an insufficiently competitive marketplace to constrain Charter’s ability to act on those incentives.

III. THE RATIONALE FOR THE MERGER CONDITIONS IS JUST AS VALID TODAY AS WHEN THE COMMISSION IMPOSED THEM.

The success of streaming services depends on broadband. That success is even more critical today than it was when the Commission adopted the *Merger Conditions*, because more Americans rely on streaming now than did in 2016.³¹ And the ongoing Covid-19 pandemic has

²⁸ *Id.*

²⁹ *Id.* at ¶ 81.

³⁰ *Id.* at ¶ 86.

³¹ A 2019 report by Hub Entertainment Research found that cable TV/pay-TV subscriptions dropped from 84% of Americans to 75%, while American subscribers of Netflix, Amazon, and Hulu jumped 1%, 5%, and 8%, respectively, between 2018 and 2019. *See* Luke Bouma, *Fewer*

only heightened this reliance and served to underscore the importance of preserving consumer choice beyond May 2021, when Charter seeks to end the Commission-imposed limits on data caps, usage-based pricing and costly interconnection.³² Increased consumer dependence on broadband has, if anything, heightened the incentive and ability for Charter to act anti-competitively, and those incentives are just as powerful, and the marketplace is just as ineffective at constraining Charter’s ability to act, today as they were when the Commission adopted the *Merger Conditions*.³³ As Newsmax Media explained, “Charter provides no new economic analysis to show that the incentives identified by the Commission have changed or abated” since the *Merger Conditions* were instituted.³⁴ For these reasons, Charter’s petition must be denied.

A. More Americans Depend on Streaming, Which in Turn Remains Critically Dependent on Broadband.

Over the course of the last decade, there has been a radical transformation in the way Americans use broadband internet access service and consume video.³⁵ One of the primary applications of broadband internet access services in the U.S. is now video streaming, especially streaming of high-definition video. Headlines no longer predict the imminent or future arrival of

Americans Are Watching Cable TV But More Americans Are Streaming Netflix, Amazon, & Hulu, CORD CUTTER NEWS (May 23, 2019), <https://bit.ly/3ewVGTj>.

³² See Letter from Maura Healy, Attorney General, Commonwealth of Massachusetts, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-197, 2 (July 22, 2020).

³³ See Becky Chao and Claire Park, THE COST OF CONNECTIVITY 2020, at 67-68 (July 2020) (“Cost of Connectivity”) (only four companies, including Charter, dominate the U.S. internet service market, causing a lack of choice that directly affects the cost and quality of internet service).

³⁴ Newsmax Comments at 6.

³⁵ See, e.g., *In the Matter of Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663, ¶ 3 (2011) (“CAF R&O”).

streaming; indeed, streaming video is not only mainstream now, but well on its way to becoming the predominant way that Americans consume video content.

Recent studies and data bear out this conclusion. Nielsen recently reported that streaming now accounts for nearly 20% of “television time” viewing in OTT-capable homes.³⁶ Another recent study indicates that “[s]treaming will account for 60% of all video viewing in 2020, compared with 56% in 2018”³⁷ That study predicts that 2020 will be the year when “streaming fully takes over linear TV as the dominant mode of video consumption for some audiences” and estimates streaming will account for fully 70% of all video consumption in 2024.³⁸ Another recent study by The Trade Desk found that a whopping 64% of U.S. households with at least one screen have cut the cord with cable TV, are planning to cut the cord, or never subscribed.³⁹ Brian Stempeck, Chief Strategy Officer of Trade Desk predicted, “With only a quarter of young adults having any long-term interest in traditional cable TV, in a few years we won’t be talking about linear or cable TV at all. It will all be online and streaming.”⁴⁰ Perhaps somewhat surprisingly, families are one of the largest groups opting to cut the cord in favor of streaming.⁴¹ As we said in our most recent Roku shareholder letter, “We have now entered the

³⁶ See Ben Munson, *Netflix, YouTube Combine for Over Half of Streaming Time on TVs*, FIERCEVIDEO (Feb. 11, 2020), <https://bit.ly/37AxwUn>.

³⁷ See Brian Steinberg, *Madison Avenue Tries to Pick a Winner in TV’s Streaming Wars*, VARIETY (Dec. 17, 2109), <https://bit.ly/2wkuh6p>.

³⁸ *Id.*

³⁹ *Survey: US Losing Interest in Cable TV*, ADVANCED TELEVISION (Apr. 23, 2020), <https://bit.ly/2OxHY85>.

⁴⁰ *Id.*

⁴¹ See *Portrait of a Cord-Cutter*, FUBO TV (2019), <https://bit.ly/2OyVfwU>.

streaming decade when we believe consumers around the world will choose streaming as their primary way of viewing TV.”⁴²

The success of streaming means that a growing number of Americans count on it for access to entertainment, as well as news, weather and other critical information. Roku’s success bears this out. All the major broadcast news outlets have applications on Roku, as do specialty news channels, such as NewsON, newsy, Haystack News, and newsmaxtv, and more than one hundred local broadcast stations.⁴³ There also is a variety of specialty weather applications, such as WeatherNation and Weather4us.⁴⁴ Moreover, there are several “virtual” MVPD apps on Roku, such as Hulu, YouTubeTV, fubo and philo.⁴⁵ Overall, we estimate that millions of Americans get their television news from various applications on Roku’s platform.⁴⁶ And beyond news, there are more than 1,000 faith-based channels on Roku, as well as channels dedicated to health and wellness, sports, lifestyle, education and, of course, entertainment. In short, streaming is not merely a marketplace success; it is fast becoming the predominant way Americans get their news, entertainment, and critical information.

But streaming, as well as the broader array of all the services provided over the internet, is not possible without robust and open broadband internet access. It should thus come as no surprise that the surging demand for streaming video corresponds with increasing demand for bandwidth on broadband networks. As the Commission has recognized, increasing broadband

⁴² Roku Q4 and Full Year 2019 Shareholder Letter at 3 (Feb. 13, 2020), *available at* <https://bit.ly/2ZwFIUW>.

⁴³ *Browse New & Notable*, ROKU (last visited July 15, 2020), <https://bit.ly/2CI2J4a>.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ More recently, streaming has become a source for information specifically on the coronavirus. The White House launched its official coronavirus.gov channel on Roku, and there are other channels, such as Haystack TV’s “Coronavirus News and Tracker,” dedicated to the pandemic.

connectivity must reflect and account for the bandwidth and performance necessary to support the content, applications, and services Americans increasingly want, need, and use in today's digital economy, including the ability to stream high-quality video.⁴⁷

Media (including video, audio, and gaming) is expected to account for nearly 70% of all internet traffic in the near future.⁴⁸ Moreover, as 4K and ultra-high-definition video becomes more ubiquitous, “data requirements will grow a staggering 700 per cent, calling into question the existing network capacity to handle video.”⁴⁹ These eye-popping figures reflect the simple technical reality that video content demands higher bit rates than other types of mobile content. The math is straightforward: ultra-high-definition video consumes up to 7 GB of data per hour,⁵⁰ and the average consumer watches 5 or more hours of television a day.⁵¹ And that amount of digital information does not account for multiple televisions, or any other high bandwidth traffic, such as online gaming, video conferencing, telemedicine, or cloud storage and backup. Bandwidth availability is a critical necessity to meet consumer demand for streaming.

The math is validated by usage studies. The fourth quarter OpenVault Broadband Industry Report shows that the *median* 2020 monthly broadband usage by broadband customers

⁴⁷ See, e.g., *In the Matter of Establishing the Digital Opportunity Data Collection*, Report and Order and Second Further Notice of Proposed Rulemaking, 34 FCC Rcd 7505 (2019). See also FCC, Broadband Performance: OBI Technical Paper No. 4 (2010), available at <https://bit.ly/3h9c7GR>.

⁴⁸ See *Report: Video Over 70% of Internet Traffic in Near Future*, ADVANCED TELEVISION (Dec. 19, 2019), <https://bit.ly/3bNUeeO>.

⁴⁹ *Id.*

⁵⁰ See, e.g., *How Can I Control How Much Data Netflix Uses?*, NETFLIX (last visited July 16, 2020), <https://bit.ly/30kzdDB>.

⁵¹ See Sarah Perez, *U.S. Adults Now Spend Nearly 6 Hours Per Day Watching Video*, TECH CRUNCH (July 31, 2018), <https://tcrn.ch/3eCXkTj>.

is on pace to surpass 250 GB, year over year growth of 25% from 2019 to 2020.⁵² The average bandwidth usage consumption statistic is even higher; in 2019 it was 344 GB.⁵³ And the increases are projected to continue: Open Vault projects that in 2020, 12% of all broadband subscriptions will consume 1 TB or more of data per month.⁵⁴ This level of consumption is consistent with statistics focused on streaming video. According to a recent study, cord cutters use an average of 520.8 GB per month, and 12% of cord cutters use at least 1 TB of data per month.⁵⁵ The numbers demonstrate that we are rapidly approaching a world where monthly data consumption on terrestrial broadband networks will no longer be measured in gigabytes of data, but in terabytes.

It also remains apparent that terrestrial broadband remains critical to fulfilling the consumer demand for streaming. Current mobile and satellite internet services are not yet adequate for a variety of online applications and services, including video streaming. The Commission found in its most recent *Broadband Deployment Report* “that fixed and mobile services often continue to be used in distinct ways, and that users tend to subscribe to both services concurrently and treat them as complements,”⁵⁶ and accordingly found that “fixed broadband and mobile wireless broadband services are not functional substitutes in all cases.”⁵⁷ This is fully consistent with the Commission’s finding in the *Charter Merger Order* that

⁵² See Mike Robuck, *Report: Median Broadband Usage to Top 250 GB per Month for First Time in 2020*, FIERCETELECOM (Feb. 11, 2020), <https://bit.ly/37xPMxt>; see also 4Q 2019 Broadband Industry Report (OVBI) at 8, available at <https://bit.ly/2C7JXNT>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Michael Balderston, *Cord Cutters’ Broadband Usage Surpasses 500 GB per Month*, TVTECHNOLOGY (Nov. 13, 2019), <https://bit.ly/2P1uaDq>.

⁵⁶ *Broadband Deployment Report* at ¶ 12.

⁵⁷ *Id.*

“consumers do not view wireless, satellite, or legacy DSL BIAS as close substitutes for cable or fiber BIAS offerings.”⁵⁸ Put simply, consumers need robust terrestrial broadband in order to meet the demand for streaming.

Streaming is indeed “flourishing,” as more Americans rely on streaming for access to news, weather, and entertainment, and terrestrial broadband remains essential to meeting that reliance. Nonetheless, broadband providers such as Charter continue to control a critical input necessary to fulfill consumer demand for streaming. As more Americans stream more content, and especially more high definition content, broadband providers have the power to interfere with consumer demand by artificially capping the amount of bandwidth available. Data caps, along with a variety of other tools, remain an avenue for anti-competitive conduct by broadband providers while there is insufficient competition to constrain anti-competitive behavior.

B. The Incentives for Charter to Act Anti-Competitively and the Lack of Broadband Competition Are Just as Prominent Today as When the Commission Imposed the Merger Conditions.

Nowhere in its petition does Charter make any effort to address the Commission’s underlying justifications for the *Merger Conditions*: the incentives for Charter to act anti-competitively, and the lack of broadband competition that would act as a natural constraint on Charter’s ability to act on those incentives. Charter’s omissions are not surprising. Neither condition has been eliminated or ameliorated, and thus the bases for the *Merger Conditions* are just as strong today as when the Commission adopted them four years ago.⁵⁹

⁵⁸ *Merger Order* at ¶ 50.

⁵⁹ As an initial matter, there are fundamental economic incentives for all ISPs to engage in anti-competitive behavior and frustrate consumer demand for edge services. *See Verizon Communications Inc. v. FCC*, 740 F.3d 623, 645-46 (D.C. Cir. 2014) (“Broadband providers also have powerful incentives to accept fees from edge providers, either in return for excluding their competitors or for granting them prioritized access to end users.”). Overall, the Court found such concerns “based firmly in common sense and *economic reality*,” *id.* at 646 (emphasis added),

The Commission found that Charter’s incentives to act anti-competitively derive from its increased “broadband footprint” post-merger.⁶⁰ That footprint only continued to increase since the time the merger was approved. When the Commission approved the merger in 2016, Charter had 18.4 million broadband subscribers. That number has increased to 27 million broadband subscribers, a nearly 50% increase in only four years since the merger was approved.⁶¹ Thus, the Commission’s prior finding that Charter will be able to act anti-competitively by imposing data caps and usage-based pricing and charging higher interconnection fees not only still holds true, but also has even greater force now.

Just as the economic incentives for Charter to act anti-competitively remain, there also remains little or no broadband competition that would act as a natural economic constraint on Charter’s ability to act on those incentives.⁶² In many parts of the country, including throughout

and found no “reason to doubt the Commission’s determination that broadband providers may be motivated to discriminate against and among edge providers.” *Id.* at 645. Moreover, with respect to OVDs in particular, the Commission pointed out in the *Merger Order* that it “has recognized the incentive of Internet access providers such as Charter to discriminate against unaffiliated OVDs.” *Merger Order* at ¶ 38 n.103.

⁶⁰ *Merger Order* at ¶¶ 7, 71.

⁶¹ See *Press Release: About 1,165,000 Added Broadband in 1Q 2020*, LEICHTMAN RESEARCH (May 13, 2020), <https://bit.ly/2OBjivr>. Charter increased its internet subscribers again in Q2 2020 by 800,000 subscribers. See Jill Goldsmith, *Charter Q2 Earnings Show Surprise Bump in Video Subs; CEO Tom Rutledge to Extend Contract*, DEADLINE (July 31, 2020), <https://bit.ly/2C0cdBO>. Charter reports on its website that it has 27 million BIAS subscribers. See *Charter by the Numbers*, CHARTER (last visited Aug. 3, 2020), <https://bit.ly/3ha619n>.

⁶² As an initial matter, an unfortunate number of Americans still lack access to broadband, particularly in rural areas. The Commission’s most recent *Broadband Deployment Report* indicates that while 94.4% of the overall U.S. population has access to internet access at the 25/3 bandwidth tier, 22.3 % of rural Americans and 27.7% of Americans on tribal lands lack such access. *Broadband Deployment Report* at ¶ 36. And for the 50/5 bandwidth tier, which is becoming increasingly necessary for applications such as streaming video, the *Broadband Deployment Report* indicates that nearly 30% of rural Americans and 35% of Americans living on tribal lands lack access. *Id.* at ¶ 41, Fig. 4. Moreover, there is “strong evidence [] that the percentage of Americans without broadband access is much higher than the figures reported by the FCC.” John Kahan, *It’s Time for a New Approach for Mapping Broadband Data to Better*

Charter’s footprint, Americans have access to only a single broadband provider.⁶³ This was borne out by a Commission study in 2017 finding that 46.1 million households with access to the 25/3 bandwidth tier of terrestrial broadband had access to *only one terrestrial broadband provider*.⁶⁴ In other words, tens of millions of Americans with access to terrestrial broadband literally have *no choice* of terrestrial broadband providers. At best, only 54.5 million American households have access to two providers, hardly the picture of a competitive marketplace.⁶⁵ This is consistent with the Commission’s finding in the 2015 *Open Internet Order* that “meaningful alternative broadband options may be largely unavailable to many Americans, further limiting the ability to switch providers [I]t appears that between 65% and 70% of households have at most two options for high speed Internet access.”⁶⁶ It also is consistent with the Commission’s determination in the *Merger Order* that a whopping 66% of post-merger Charter customers would have no alternative for broadband service.⁶⁷ There is no evidence that this statistic has appreciably improved in the four years since the *Merger Order*. In short, just as when the Commission adopted the *Merger Conditions*, there remains a staggering lack of competition in

Serve Americans, MICROSOFT (Apr. 8, 2019), <https://bit.ly/2Ws9fNt>. Similarly, a study by BroadbandNow found that the broadband gap was double what the Commission’s 2019 *Broadband Deployment Report* had found. See John Busby et al., *FCC Reports Broadband Unavailable to 21.3 Million Americans, BroadbandNow Study Indicates 42 Million Do Not Have Access*, BROADBANDNOW (Feb. 3, 2020), <https://bit.ly/2Wq4W5v>. For that very reason Congress enacted, and the President signed into law, the Broadband DATA Act. See Pub. L. No 116–130 (2020).

⁶³ See Jon Brodtkin, *50 Million US Homes Have Only One 25 Mbps Internet Provider or None at All*, ARS TECHNICA (June 30, 2017), <https://bit.ly/3eGtc9O>.

⁶⁴ *Id.*

⁶⁵ *Id.* (The same study found that only 6.9 million American households had access to three such providers).

⁶⁶ *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, ¶ 81 n.134 (2015).

⁶⁷ *Merger Order* at ¶ 67.

the market for terrestrial broadband.⁶⁸ And just as the incentives remain for Charter to act anti-competitively, the lack of competition for broadband means there are no competitive constraints on Charter's ability to act on those incentives.

C. Data Caps Are One of Myriad Tactics Available to ISPs in the Absence of Broadband Competition.

Wherever there remains little or no competition for broadband internet access service, there is a corresponding lack of constraint on the power of ISPs to interfere with consumer demand and discriminate against independent or third-party streaming services and other edge providers. Many of the largest broadband providers, including Charter, are vertically integrated and are not only ISPs, but also MVPDs, content producers, and even OVDs.⁶⁹ As the Commission found in the *Merger Order*, this vertical integration, combined with the sheer size of the biggest ISPs, creates enormous incentives to impede consumers from switching or unbundling their video services, and cutting the cord entirely.⁷⁰

Unconstrained by effective competition, ISPs have myriad tools to effectuate those incentives. A lack of pricing transparency makes it hard for consumers to make price comparisons and informed decisions in their purchase of broadband, video and other communications services, especially for different bandwidth tiers and service bundles.⁷¹ This lack of transparency also makes it difficult for consumers to decide to switch broadband providers or to switch providers of other services offered by horizontally integrated ISPs,

⁶⁸ See also INCOMPAS Comments at 6-7; Writers Guild Comments at 3-6; Comments of Stop the Cap! at 4-6.

⁶⁹ *Merger Order* at ¶ 161.

⁷⁰ *Id.* at ¶ 165.

⁷¹ See *Cost of Connectivity* at 59-61.

including video services.⁷² Without being able to easily calculate the costs of various alternatives, inertia is a powerful force in preventing consumers from moving away from incumbent broadband, MVPD and OVD services.⁷³

Beyond making it confusing for consumers to decide whether to switch, ISPs can simply structure their pricing and bandwidth tiers to make it uneconomical for consumers to do so. This is particularly the case for bundled offerings of broadband, MVPD, and OVD services. For example, “data caps can amount to price increases if they are manipulated to preference certain services [over others],” such as Charter’s own services and content offerings.⁷⁴ In addition, ISPs use early termination fees, onerous device usage and return policies, bundling of broadband service and streaming devices, exclusive deals with third party video providers, and other switching deterrents to lock consumers into their current bundles of service and service providers.⁷⁵

Additionally, both paid prioritization and zero-rating could allow broadband internet access services providers to charge a toll to independent or third-party streaming and cloud services providers, even though consumers already pay subscriptions for broadband internet access services. And broadband providers can pressure online content, applications, and services providers into entering such arrangements and to demand increasingly higher tolls and greater concessions over time.⁷⁶ Paid prioritization and zero-rating distort consumer demand, harm

⁷² *Id.* at 49-51.

⁷³ *See, e.g., Comcast-NBC Merger Order* at Appendix B, ¶ 4 (explaining that greater consumer inertia makes certain anti-competitive strategies more profitable and appealing).

⁷⁴ OTI Comments at 5 (AT&T, for example, gave preference to its own HBO Max service by exempting it from data caps but left data caps in place for Netflix and Hulu).

⁷⁵ *Cost of Connectivity* at 59-61; *see also Merger Order* at Appendix C, ¶ 42.

⁷⁶ *Merger Order* at ¶ 213.

streaming and cloud service provider investment and innovation, and reduce incentives for broadband internet access services providers to invest in more and better network capacity to meet consumer demand.

The Commission found in the *Merger Order* that data caps and UBP can harm online video consumption because vertically integrated ISPs can use them to interfere with consumer demand in general and to cut the cord and switch from traditional MVPD services to streaming services in particular.⁷⁷ The Commission explained that, “by their very nature, the data caps and UBP in use by wired BIAS providers currently significantly and chiefly affect online video traffic.”⁷⁸

Cord cutting is simply not possible when an ISP, unconstrained by head to head competition in the BIAS market, artificially caps the monthly bandwidth it will provide to consumers.⁷⁹ Commenters have noted—and Covid-19 has starkly illustrated—just how contrary to the public interest data caps can be.⁸⁰ Data caps prevent consumers from working remotely, learning at a distance, and engaging with friends, family, and online media—all of which are critical now more than ever.⁸¹ Consumers should not be forced to choose between their children’s online homework, a video exam with their doctor, a video conference call with their

⁷⁷ *Id.* at ¶ 84.

⁷⁸ *Id.* at ¶ 85.

⁷⁹ See *Cost of Connectivity* at 48-49 (“The fact that the caps were lifted almost immediately [during the Covid-19 pandemic] suggests that ISPs had significant excess capacity on their networks all along and were using data caps to create artificial scarcity.”).

⁸⁰ See, e.g., Opposition to Petition by Charter Communications of Public Knowledge and Sports Fans Coalition, WC Docket No. 16-197, 4 (July 22, 2020).

⁸¹ See *Cost of Connectivity* at 48-49 (data caps can discourage the use of even moderately bandwidth-intensive services, such as streaming videos, using telehealth services, and attending online classes).

work colleagues, or catching up with current events from the news they get from streaming television. By injecting uncertainty about vaguely defined financial penalties from consuming “too much” bandwidth, data caps contribute to the financial stress that American consumers, already beset by unemployment, underemployment, job insecurity, and other financial hardships, must face.⁸²

It is no wonder that data caps, particularly in combination with a “waiver” of those caps for consumption of services offered by the ISP or a demand for payment by third party service providers to waive caps, are a powerful deterrent to doing anything other than staying on an ISP’s network and consuming services offered by the ISP. That combination is a particularly malign symptom of the underlying condition of a lack of effective competition for broadband internet access service.⁸³

⁸² *Id.* (data caps significantly increase the risk of overages, which fall hardest on low-income households that are unable to pay for unexpected fees).

⁸³ Moreover, there is no justification for imposing data caps as a network management tool. See INCOMPAS Comments at 24. The temporally and geographically limited nature of most network congestion makes across-the-board caps an ill-suited remedy for addressing congestion. Caps are merely a punitive tool designed to frustrate consumer demand for content, applications and services. The robust network connectivity witnessed during the Keep Americans Connected Pledge highlights just how little use data caps serve in achieving any purported network management objectives. In conjunction with his Keep Americans Connected Pledge, FCC Chairman Ajit Pai called on broadband providers to “relax their data cap policies in appropriate circumstances,” and to their credit more than 500 broadband providers have agreed to eliminate data caps to ensure connectivity during the COVID-19 pandemic. Keep Americans Connected Pledge, Federal Communications Commission (last visited Mar. 25, 2020), <https://bit.ly/39NIt66>. That broadband networks continued to perform well despite the elimination of data caps reveals their irrelevance to network management. Press Release, *Chairman Pai Hears From Broadband and Telephone Service Providers That Traffic Is up but Networks Are Performing Well*, FCC (rel. Apr. 2, 2020), available at <https://bit.ly/3dTLpBv> (“The Chairman heard from providers across the country who reported network usage had risen about 20-35% for fixed networks [C]ompany representatives reported that their networks were holding up quite well, and they expected that resilience to continue.”). AT&T, for example, suspended its home broadband data caps in early March, but recently explained that performance has not suffered even with a 27% month-over-month increase in core network traffic: “AT&T’s network continues to perform well during the coronavirus pandemic.” *COVID-19: Our Response*, AT&T (last visited Mar. 25,

IV. CONCLUSION

The Commission's broadband deployment initiatives should be aspirational and forward-looking. Instead of endorsing barriers to fulfilling consumer demand for content, applications, and services accessible through broadband, the Commission should concentrate its resources on promoting broadband competition. If it were to sanction data caps in the absence of competitive broadband internet access services, the Commission would not only allow Charter to act on its incentives to act anti-competitively, but also signal to other broadband providers who are unconstrained by competition that they too are free to adopt anti-competitive measures. Data caps should become a relic of the past.

2020), <https://about.att.com/pages/COVID-19/updates.html> (explaining that, as of March 23, “[AT&T’s] core network traffic -- which includes our business, home broadband and wireless usage -- was up 27% yesterday compared to the same day last month.”). Sanctioning or allowing data caps is especially unnecessary because, as one industry executive observed, “the cost of increasing [broadband] capacity has declined much faster than the increase in data traffic.” Karl Bode, *Broadband CEOs Admit Usage Caps Are Nothing More than A Toll on Uncompetitive Markets*, TECHDIRT (June 7, 2016), <https://bit.ly/3bHyXDI>. Beyond serving no legitimate network management purpose, data caps thus divert ISPs from investing in their networks to improve bandwidth.

The Commission should deny Charter's petition and continue its critical work of promoting broadband competition and closing the digital divide.

Respectfully submitted,

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August 6, 2020

Attachment A

From: Spectrum <Spectrum@email.spectrum.com>
Sent: Tuesday, July 14, 2020 2:01 PM
To: [REDACTED]
Subject: A little something extra just for you

Spectrum

Deal expires 08/14/20!

Get faster speeds for the best price.

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GET 400 Mbps FOR JUST
(wireless speeds may vary)

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