

August 6, 2020

VIA ECFS

Ms. Marlene H. Dortch
Secretary Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Conditions Imposed in the Charter Communications - Time Warner Cable - Bright House Networks Order, WC Docket No. 16-197

Dear Ms. Dortch,

On August 4, 2020, Angie Kronenberg, Chief Advocate and General Counsel, and Lindsay Stern, Attorney and Policy Advisor, from INCOMPAS met by phone with Adam Copeland, Pamela Arluk, Edward Krachmer, Zachary Ross, Elizabeth Cuttner, and Connor Ferraro from the Wireline Competition Bureau; Tavi Carare and Eric Ralph from the Office of Economics and Analytics; Jim Bird and Joel Rabinowitz from the Office of General Counsel; and separately with Kate Black, Policy Advisor to Commissioner Rosenworcel (collectively, “staff”) to discuss Charter’s Petition in the above-referenced proceeding.¹ Our presentation during both meetings was consistent with INCOMPAS’ Petition to Deny filed in this proceeding, and we explained why the FCC should deny Charter’s Petition to prematurely sunset the data caps/usage-based pricing and interconnection conditions.²

INCOMPAS and its members have an interest in this proceeding as we participated in the Commission’s underlying merger review. During the merger, the Commission required Charter to demonstrate by a preponderance of the evidence that the merger would serve the public interest.³ INCOMPAS explained to staff that the FCC should use this same legal standard to require Charter to prove that the conditions are no longer necessary. As part of its review, the

¹ Petition of Charter Communications, Inc., *Conditions Imposed in the Charter Communications-Time Warner Cable-Bright House Networks Order*, WC Docket No. 16-197 (filed June 17, 2020).

² INCOMPAS Petition to Deny, *Conditions Imposed in the Charter Communications-Time Warner Cable-Bright House Networks Order*, WC Docket No. 16-197 (filed July 22, 2020).

³ See *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, MB Docket No. 15-149 (rel. May 10, 2016) (“*Merger Order*”), at ¶ 26.

FCC collected the necessary information from the merging parties and third parties and conducted an economic analysis, included in Appendix C of its *Merger Order*, that informed the FCC's *Merger Order* and the conditions applied. Yet Charter's Petition lacks the sufficient evidence for the FCC to be able to do an economic analysis to find that the Commission's concerns are no longer warranted and that the conditions are no longer needed. INCOMPAS urged staff to obtain the information they need and update its economic analysis to fully assess Charter's request to prematurely sunset the conditions. This exercise will be important for the Commission to evaluate Charter's current incentives and the state of the interconnection marketplace, the broadband internet access service ("BIAS") marketplace, and OVD marketplace. INCOMPAS cautioned staff that if Charter's conditions prematurely sunset, there is little doubt that Charter will impose interconnection fees and data caps/usage-based pricing. In fact, Charter's Petition argues that Charter should be given the flexibility to do so. Imposing data caps and interconnection access charges will lead to higher fees for consumers at a time when more people are relying on access to online video and other necessary services like cloud computing during COVID-19.

INCOMPAS expressed its concern that Charter's market power in the interconnection marketplace has only increased since the merger. During the merger, the FCC imposed conditions in part because it was concerned that Charter would have increased bargaining power for interconnection due to its increased number of BIAS subscribers (which was 18.4 million at the time of the merger). INCOMPAS' Petition to Deny explains that Charter has since gained 9 million more subscribers, controlling 27.2 million subscribers, which is 26% of the national interconnection market and a 30% increase since the merger. Yet just last week, it was reported that Charter has added hundreds of thousands of BIAS customers and is the nation's fastest growing Internet service provider, which means it now controls even more of the market.⁴ Therefore, the Commission's finding that Charter would be able to extract excessive interconnection fees against edge providers, CDNs, transit providers, and OVDs still holds true.

Moreover, in its *Merger Order*, the Commission found that Charter faced insufficient competition in the BIAS market and that consumers would not be able to switch providers where Charter uses its market power at interconnection to extract excessive interconnection charges or to avoid data caps and usage-based pricing.⁵ INCOMPAS explained that Charter still faces insufficient competition in the BIAS market, especially for high-speed BIAS, which consumers need at home now more than ever due to COVID-19. Charter is a monopoly in the high-speed BIAS market as it rarely faces a fiber overbuilder. INCOMPAS highlighted that many comments

⁴ Mike Robuck, *Charter Communications tops 30-million customer milestone in first half of 2020*, Fierce Telecom (Aug. 3, 2020), available at: <https://www.fiercetelecom.com/telecom/charter-communications-tops-30-million-customer-milestone-first-half-2020>.

⁵ See *Merger Order*, at ¶ 108 ("because there is limited competition in its BIAS footprint and BIAS subscribers switch providers infrequently, New Charter will be able to pressure edge providers without fear of harming its retail BIAS business.") and ¶ 111 ("The available evidence suggests that consumers . . . do not switch BIAS providers when confronted with poor edge provider performance.").

in the docket echo consumers' frustration that they often have no alternative to Charter. In addition, INCOMPAS noted that, when evaluating the BIAS marketplace, the FCC should continue to find that mobile is not a substitute for fixed BIAS for various reasons, including mobile's higher prices and data caps. INCOMPAS also believes that it is too early to find that 5G is a sufficient substitute. In fact, AT&T CEO's John Stankey recently said: "I personally do not believe that 5G is a replacement in the near term for suburban residential single family living units."⁶

Charter's Petition discusses how the OVD market is flourishing, yet INCOMPAS explained that this makes it even more likely that Charter would extract access fees if the conditions are lifted. To obtain a more accurate assessment of the current interconnection marketplace, the FCC should gather more evidence about how the interconnection market has been impacted by the Charter conditions, AT&T's merger conditions, as well as FCC oversight of interconnection agreements during the net neutrality regime. A highly concentrated BIAS market and an increase in OVD competition shows the increasing importance of interconnection, especially for small OVDs and new entrants. Consumers already pay high fees for their BIAS service given the lack of effective competition in the residential BIAS marketplace, and they ultimately will be the ones to pay higher costs if Charter imposes interconnection fees.

In addition, we discussed how imposing data caps is an inherently unfriendly practice that encourages scarce use of online services. It also gives large BIAS providers an anticompetitive opportunity to hurt their online competitors, especially OVDs. Charter fails to advance any cost-based or efficiency justification for implementing data caps or usage-based pricing, and provides no new economic analysis to show how its incentives have changed since the merger. While we are in the midst of a pandemic requiring high-speed access from home, removing conditions that help consumers obtain the access they need to robust online services at this time to work and educate their children sends the wrong message and is harmful. Certainly, the Commission should reject any attempts that will impose higher costs on customers during a pandemic that already has Americans stretched financially.

Overall, INCOMPAS urged staff to deny Charter's Petition. In addition, because the conditions cannot be lifted until the merger's fifth anniversary on May 18, 2021, we urged staff to take the time needed to update its economic analysis in the *Merger Order* and collect and assess the markets based on current data.

⁶ Mike Robuck, *Tale of the tape: Verizon's 5G Home vs. AT&T's fiber-fed broadband service*, Fierce Telecom (July 24, 2020), available at: <https://www.fiercetelecom.com/telecom/tale-tape-verizon-s-5g-home-vs-at-t-s-fiber-fed-broadband-service>.

If you have any questions about this filing, please feel free to contact me.

Respectfully submitted,

/s/ Angie Kronenberg

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