

Andrew Jay Schwartzman
600 New Jersey Avenue, NW
Room 312
Washington, DC 20001
(202) 662-9170
AndySchwartzman@gmail.com

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Via ECFS

Marlene Dortch
Secretary,
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Written *Ex Parte* Presentation

Expanding Consumers' Video Navigation Choices
MB Docket 16-42

Commercial Availability of Navigation Devices
CS Docket 97-80

Proposed Transfer of Control of Time Warner Cable, Inc.
and Charter Communications Inc. and Proposed Transfer of
Control of Bright House Networks from Advance/New-
house Partnership to Charter Communications Inc.
Docket 15-149

Proposed Assignment or Transfer of Control of Licenses
and Authorizations from Cablevision Service Corporation
to Altice N.V.
Docket 15-257

Dear Ms. Dortch:

This presentation is submitted to respond to arguments that counsel for Charter Communications, Inc. ("Charter") presented in an oral *ex parte* communication to General Counsel Howard Symons on September 8, 2016 and a written notice pertaining to that presentation filed on September 12, 2016 ("Charter *Ex Parte*").¹

¹Although this presentation is addressed to Docket 16-42, out of an abundance of caution, this notice is also being filed in Dockets 15-149 and 15-257.

Charter has attempted to argue that

in the wake of the reclassification of broadband Internet access service (“BIAS”) as a common carrier service under Title II of the Communications Act (“the Act”), the Commission lacks the authority to regulate broadband equipment such as cable modems under Section 629 of the Act.²

This assertion is not only wrong, but it is a flat repudiation of what Charter has previously acknowledged in countless pleadings and presentations to the Commission since the Commission reclassified BIAS in March, 2015.³ Indeed, more than a year later, on April 25, 2016, the Media Bureau issued an Order adopting a Consent Decree to resolve an “investigation into whether Charter violated 629 of the Act, as amended, and Sections 76.1201 and 76.1202 of the Commission’s rules...”⁴ The Consent Decree stated that “navigation devices” under the purview of Section 629 “include cable modems which are used to access ‘other services’ (namely, broadband Internet access) offered over a cable system.”⁵ The decree recited that “The Bureau and Charter agree to the following terms and conditions...,” including this term:

8. Jurisdiction. Charter agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and has the authority to enter into and adopt this Consent Decree.⁶

Notwithstanding Charter’s acceptance of the Commission’s authority under Section 629 less than four months ago, including the finding that cable modems are used “to access ‘other services’ (namely, broadband Internet access) offered over cable system...,” Charter has now attempted to argue the opposite position. It claims that

²Charter *Ex Parte* at 1.

³See *Protecting and Promoting the Open Internet*, 30 FCCRcd 5601 (2015), *aff’d. sub nom. U.S. Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). Charter’s last minute reversal raises procedural questions. When parties take one position in comments, reply comments and numerous ex parte presentations and then, after an item has been placed on the Commission’s Open Meeting agenda, reverse course, it deprives others of an the time to conduct legal and factual research and thus impairs their ability to fully address the new arguments. The Commission may conclude that Charter’s new presentation has come too late to be considered in this phase of the proceeding and, if necessary and permissible, should instead be included in a petition for reconsideration subsequent to any Commission action in this docket.

⁴Charter *Communications, Inc.*, 31 FCCRcd 4591, 4593 (2016).

⁵*Id.*, 31 FCCRcd at 4594.

⁶*Id.*, 31 FCCRcd at 4595.

Post-reclassification, a cable modem is not “equipment used by consumers to access...services offered over” a cable television system” or any other “distribution system that makes available for purchase...multiple channels of video programming.”⁷

This argument entirely ignores the clear words of Section 629. The second sentence of Section 629(a) actually states that

Such regulations [with respect to assuring commercial availability of equipment] shall not prohibit any multichannel video programming distributor from also offering converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming ***and other services offered over multichannel video programming systems***, to consumers, if the system operator’s charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service.

(Emphasis added.) Charter dances around the plain meaning of Section 629 by discussing the definitions of “multichannel video programming system” and “cable systems,” but it does not even attempt to explain why BIAS is not a “service[] offered over multichannel video programming systems,” regardless of whether it is a Title II or Title VI service. It does not matter whether BIAS is a Title I, Title II or Title VI service; under any of those titles of the Act, the fact is that it travels through the cables of what is also a “multichannel video service.” Since Internet service is not “multichannel video programming,” cable modem service has always been an “other service[] offered over multichannel video programming systems,...”

Express statutory language aside, there is also a fundamental flaw in Charter’s assertion that the Commission’s reclassification of BIAS under Title II somehow removes the Commission’s Section 629 authority over the equipment used to deliver BIAS. The argument is based on the presumptions that the Title II classification and coverage of Section 629 are mutually exclusive, and that the regulatory status of BIAS had been static at all times from 1996 through 2014. This overlooks the reality that the Commission has always treated cable modems as subject to Section 629 from the adoption of Section 629 in 1996 until the present date. Under Charter’s theory, the Commission had no Section 629 jurisdiction until 2002, when the Commission’s declared that it would regulate BIAS as an information service. However, from 1996 through 2002, the Commission had expressly “declined to determine a regulatory classification” for BIAS delivered over cable modems.”⁸ Notably, during that entire period and

⁷Charter *Ex Parte* at 2.

⁸*Inquiry Concerning High-speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd. 4798, 4801 (2003), *aff’d. sub nom. National Cable Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2007).

for some time thereafter, BIAS provided by telephone companies was a Title II service.⁹ When the Commission ultimately decided to regulate BIAS over cable modems as an “information service,” parties variously argued that BIAS was one of

several different legal classifications for cable modem service, including “cable service,” “information service,” both cable service and information service, a combination of “telecommunications service” and information service, and “advanced telecommunications capability.”¹⁰

It is of particular significance in this regard that, when the Commission adopted its rules implementing Section 629 in 1998, the uncertainty of the regulatory classification, including the possibility that cable modem service was a Title II “telecommunications service,” was not raised by any party as an obstacle to covering cable modems under the new rules and did not affect the Commission’s determination to do so.

Charter argues that since a “cable system” within the meaning of Title VI cannot be regulated as a common carrier, the Commission cannot use Title VI to regulate equipment offered by a cable system which is used to deliver a common carrier service. This not only ignores the “other services” language in Section 629 discussed above, but also conflicts with case law making it clear that the Commission can regulate services and activities which may involve multiple provisions of the Communications Act. Although much more can be said about this, Zoom will limit this discussion to just a few of the many applicable precedents.

In *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 376 n.4 (1986), the Supreme Court authorized FCC jurisdiction over intrastate communications when the communications also have interstate components and where it is “not possible to separate the interstate and the intrastate components of the asserted FCC regulation.”¹¹

In a highly relevant case, this principle was applied to pole attachments as well. In *National Cable Television Association v. Gulf Power Co.*, 534 U.S. 327 (2002), the Supreme Court sided with the cable industry in rejecting utility company arguments that pole attachments used for carrying commingled BIAS and cable television services were outside the scope of the Pole Attachment Act because “an attachment is only an attachment by a cable television system

⁹See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCCRcd 14853 (2005), *aff’d. sub nom. Time Warner Telecom v. FCC*, 507 F.3d 205 (3d Cir. 2007).

¹⁰*Id.*, 17 FCCRcd at 4819 (footnotes omitted).

¹¹See *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (affirming FCC regulation of jurisdictionally mixed communications when unbundling it is not feasible). See also *Policies and Rules Concerning Interstate 900 Telecommunications Services*, 6 FCCRcd 6166, 6180 (1991) (“neither the local exchange carriers, interexchange carriers, nor information providers will know whether the call is intrastate and thus within the state’s jurisdiction”), *aff’d. on reconsideration*, 8 FCCRcd 2343 (1993).

to the extent it is used to provide cable television.”¹² In response to the utilities’ assertion, similar to the one made by Charter, that common carrier status removed the Commission’s authority over pole attachments, the Court held that “[c]able television systems that also provide Internet services are still covered...”¹³ As noted above, the Commission had not determined how it would classify BIAS delivered over cable as of that time (2002). The Court acknowledged that the utilities were “frustrated by the FCC’s refusal to categorize Internet services,” but said that this did not matter, because “even if commingled services are not ‘cable service,’” they “still warrant” coverage by the Pole Attachment Act.¹⁴

Yet a third example of addressing the FCC’s powers where more than one element of the Act is implicated arose when the Commission’s asserted authority over wireless operators’ data roaming. In *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012), the D.C. Circuit explained that the Communications Act imposes a “bifurcated regulatory scheme.”¹⁵ It held that, although wireless voice service is a common carrier service, the exclusion of mobile data services from Title II does not preclude regulating them under Title III and that the Commission “has significant latitude to determine the bounds of common carriage in particular cases.”¹⁶

Evidently aware of the limitations of its jurisdictional argument, Charter also advances a fallback position that, even if Section 629 does confer authority to regulate cable modem billing, the Commission’s effort to do so violates the APA. It says that the Commission lacks “substantial evidence on the record on which to base the proposed rule.”¹⁷ It says that modems are readily available in the retail market and there is no evidence of anticompetitive pricing and no indication of actual consumer harm.

These arguments are multiply flawed. Most importantly, when the Commission is implementing a Congressional directive - in this case, to insure that “the system operator’s charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service” - it does not need to make evidentiary findings to justify regulation. Second, even if that were not so, there is no basis for Charter’s assertion that the Commission can regulate only after “identifying market failure or consumer harm...” To the contrary, there are scores of cases confirming that the Commission has broad latitude to use its expertise to make predictive judgments to adopt rules to designed preclude the development of anticompetitive conditions. For example, in *Rural Cellular Association v FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009), the Court explained that

In circumstances involving agency predictions of uncertain future events,
“complete factual support in the record for the Commission’s judgment or

¹²*Id.*, 534 U.S. at 333.

¹³*Id.*, 534 U.S. at 336.

¹⁴*Id.*, 534 U.S. at 338.

¹⁵*Id.*, 700 F.3d at 538.

¹⁶*Id.*, 700 F.3d at 547.

¹⁷Charter *Ex Parte* at 3.

prediction is not possible or required” since “‘a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency.’” *Melcher v. FCC*, 134 F.3d 1143, 1151 (D.C.Cir.1998) (quoting *FPC v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 29, (1961)).

Similarly, in response to an argument that the Commission was trying to “solve a problem that does not exist,” the D.C. Circuit said that

While it is true that the FCC must “do more than ‘simply posit the existence of the disease sought to be cured,’ ” the Commission is entitled to “appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency.” *Time Warner Entm't Co.*, 240 F.3d at 1133 (quoting *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 664 (1994)).

Consumer Electronics Association v. FCC, 347 F.3d 291 (D.C. Cir. 2003). So, too, in *Earthlink v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006), the Court declined

to second-guess the FCC's predictions. “[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to particularly deferential review, as long as they are reasonable,” [In re Core Commc'ns, Inc., 455 F.3d 267,] 282 [(D.C.Cir.2006).] (emphasis added) (internal quotation marks and citation omitted), and need not rest on “pure factual determinations,” *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 594 (1981). See *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (“Substantial evidence does not require a complete factual record—we must give appropriate deference to predictive judgments that necessarily involve the expertise and experience of the agency.”).

Most recently, in affirming the FCC’s Open Internet Order, Judge Tatel quoted the preceding passage in stressing that courts review agency predictions under a “highly deferential standard.”¹⁸ Judge Tatel also rejected the notion that the agency must find market failure or consumer harm to justify imposition of regulation. He said, with respect to reclassifying BIAS under Title II,

[N]othing in the statute requires the Commission to make such a finding. Under the Act, a service qualifies as a “telecommunications service” as long as it constitutes an “offering of telecommunications for a fee directly to the public.” 47 U.S.C. § 153(53). ***** Nothing in *Brand X* suggests that an examination of market power or competition in the market is a prerequisite to classifying broadband.¹⁹

Even if it were necessary to demonstrate harm, and leaving aside the fact that the Media

¹⁸*U.S. Telecom Association v. FCC*, 825 F.3d 674, 707 (D.C. Cir. 2016).

¹⁹*Id.*, 825 U.S. at 708.

Bureau had found that actual harm from Charter's non-compliance with Section 629 to be sufficient to justify entry of a Consent Decree, Zoom's experience unequivocally demonstrates that bundled pricing of cable modems and Internet service is anticompetitive. While there is, indeed, a robust retail market for cable modems outside of Charter territory, Zoom's experience confirms Charter customers buy far fewer cable modems at retail than non-Charter customers. For example, Zoom recently analyzed sales of a major national storefront retailer and a major online retailer. For the major national storefront retailer, Zoom compared sales in stores in Comcast territories to sales in stores in Charter territories from May 28, 2016 through June 25, 2016, for a Zoom model that was Comcast and Charter certified. Sales per store were over 4 times higher for Comcast areas than for Charter areas. For the major online retailer, Zoom looked at sales of a Motorola branded Zoom cable modem that was Comcast and Charter certified, comparing sales in Charter zip codes to sales in all zip codes. Sales in the Charter zip codes were only 12% of what would be expected based on the national figures. Thus in both instances, Charter customers were far less likely to buy a cable modem than customers of other cable service providers.

Finally, Zoom must briefly address Charter's suggestion that the Commission violated the APA by failing to provide adequate notice of its intention to apply Section 629 to cable modem billing. Actually, it is Charter that is engaged in a surprise attack by adopting a new position which is the exact opposite of what it previously had taken.²⁰ In the NPRM in this docket, the Commission asked for comment on its "tentative[] conclu[sion] that" it should require all MVPDs to state separately a charge for leased navigation devices and to reduce their charges by that amount to customers who provide their own devices,..."²¹ It specifically asked if it "should adopt such a requirement with respect to all navigation devices, including modems, routers, and set top boxes,..."²² Since the NPRM was adopted almost a year after the Commission reclassified BIAS under Title II, this surely constituted notice that the Commission intended to rely upon Section 629 to regulate billing for cable modems notwithstanding the earlier reclassification of BIAS. At the least, such a finding would be a "logical outgrowth" of the questions the Commission asked,²³ especially since the comments filed on this issue, including Charter's, discussed Section 629 in the context of cable modems.²⁴ Nor could Charter claim that this was unexpected, since in granting consent for the Charter to acquire Time Warner Cable and Bright House Networks, the Commission discussed Zoom's assertions that Section 629 applied to cable modems,²⁵ and expressly stated that the issues Zoom had raised would be

²⁰The same can be said for Charter's unfounded assertion that the Commission has somehow changed course without explanation. Charter *Ex Parte* at 3-4.

²¹*Expanding Consumers' Video Navigation Choices*, 31 FCCRcd 1544, 1585 (2016)

²²*Id.*

²³*See South Terminal Corp. v. EPA*, 504 F.2d 646 (1st Cir. 1974).

²⁴*National Mining Association v. Mine Safety and Health Administration*, 512 F.3d 696, 699 (D.C. Cir. 2008) (citing cases).

²⁵*Charter Communications, Inc.*, 31 FCCRcd 6327, 6443 (2016) (footnote omitted) ("Zoom argues that Section 629 of the Communications Act requires a cable operator to separately itemize and not subsidize the charges for cable modems provided by the cable

addressed in this docket.²⁶

Respectfully submitted,



Andrew Jay Schwartzman
Counsel for Zoom Telephonics, Inc.

cc. Howard Symons
Gigi Sohn
Jessica Almond
John Williams

David Grossman
Marc Paul
Robin Colwell
Nicholas Degani

operator to customers.”)

²⁶*Id.*, 31 FCCRcd at 6447.