

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Applications of Charter Communications, Inc.,)	
Time Warner Cable Inc. and)	MB Docket No. 15-149
Advance/Newhouse Partnership)	
)	
For Consent to Assign or Transfer)	
Control of Licenses and Authorizations)	

PETITION FOR RECONSIDERATION

Zoom Telephonics, Inc. (“Zoom”) respectfully seeks reconsideration of the Commission’s May 10, 2016 decision granting applications for assignment or transfer of control of authorizations from Time Warner Cable, Inc. (“TWC”) and Advance/Newhouse Partnership (BHN”) to Charter Communications, Inc (“Charter”).¹ Zoom asks that the Commission reconsider its decision to defer consideration of issues pertaining to Charter’s billing practices for cable modems under Section 629 of the Communications Act. Zoom also seeks reconsideration of the unconditional approval of the transaction because it did not undertake an assessment of whether Charter’s billing practices violate Sections 201 and 202 of the Communications Act, Section 706 of the Telecommunications Act of 1996 and, most significantly, the public interest standard of the Communications Act. Without making these determinations, the Commission lacked the information necessary to conduct a proper balancing of the harms and putative benefits of the transaction.

¹*Charter Communications, Inc.*, FCC 16-59 (released May 10, 2016) (“*Decision*”).

I. THE COMMISSION IMPROPERLY APPROVED THE APPLICATIONS WITHOUT CONSIDERING REQUIRING CHANGES IN CHARTER’S BILLING PRACTICES.

Charter customers currently receive bills which bundle the cost of cable modem leases with Internet service offerings and thus do not separately state an unsubsidized price for the lease of cable modems.² Charter has stated that it intends to adopt similar pricing policies for new TWC and BHN customers.

A. The Petition To Deny Raised Issues Under Numerous Statutory Provisions As Well As the Public Interest Standard.

In its *Petition to Deny*, Zoom asked the Commission to find that it could not approve the applications unless it adopted appropriate conditions to insure that Charter separately state an unsubsidized price for cable modems on customers’ bills. (This is referred to herein as “billing transparency.”) Zoom argued that Charter’s billing practices violate Section 76.1206 of the Commission’s rules and Section 629 of the Communications Act.³ In addition, and importantly, Zoom also argued that

Charter’s pricing policies also violate the Sections 201, 202 and 629 of the Communications Act, Section 706 of the Telecommunications Act of 1996, the public interest standard, and FCC Rules promulgated thereunder.⁴

Zoom stressed that

Even if Charter’s attachment and pricing policies did not directly violate the Commission’s rules, as well as Sections 201, 202 and 629 of the Communications Act and Section 706 of the 1996 Telecommunications Act, the Commission must still make a determination as to whether the proposed transaction are in the public interest.⁵

²*Petition to Deny*, pp. 3-4.

³Charter does not dispute that cable modems are covered by Section 629, as affirmed by the consent decree entered into on May 10, 2016. *Charter Communications, Inc., Investigation of Compliance with Rules Relating to Navigation Devices*, DA 16-512 (MB)(released May 10, 2016) at p. 1 (“Navigation devices’ include cable modems, which are used to access ‘other services’ (namely, broadband Internet access) offered over a cable system.”).

⁴*Petition to Deny* at p. 3.

⁵*Petition to Deny* at pp. 23-24.

B. The Commission Failed to Examine Zoom’s Allegations.

In approving the transaction, the Commission failed to follow the standard of review it had itself defined:

Pursuant to Sections 214(a) and 310(d) of the Act, we must determine whether the proposed transfer of certain licenses and authorizations held and controlled by the Applicants will serve the public interest, convenience, and necessity. In making this determination, we first assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission’s rules. If the transaction would not violate a statute or rule, we consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes. We then employ a balancing test weighing any potential public interest harms of the proposed transaction against any potential public interest benefits. The Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest. If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, we must designate the Application for hearing.⁶

Contrary to this standard, the Commission failed to determine whether “proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission’s rules.” Rather, it declined to assess the Applicants’ compliance with Section 629 and the Commission’s rules promulgated thereunder. The *Decision* also fails to assess whether Charter’s billing practices are otherwise contrary to the public interest even if they do not violate specific statutes or rules.

Without making each of these determinations, the Commission’s assessment of the harms from the transaction is incomplete and flawed, and thus fatally undermines its balancing of harms against the putative benefits of the proposed transaction. This is of considerable consequence here, since the Commission’s ultimate public interest determination was a close call, and depended on the imposition of significant conditions to ameliorate the harms that the

⁶*Decision* at pp. 10-11, ¶26.

Commission did identify.⁷ Thus, the failure to consider the issues Zoom has raised is not harmless error, since even a modest finding of harm might be enough to change the ultimate public interest determination.⁸

C. The Commission Improperly Failed to Rule On Issues Concerning Section 629 and Section 1.1206 of the Commission’s Rules.

In its evaluation of Zoom’s *Petition to Deny*, the Commission confined its discussion of Charter’s billing practices to the issues relating to Section 629 and Section 76.1206 promulgated thereunder. The *Decision* declined to address any of Zoom’s arguments. Rather, it determined that

While Zoom has presented the Commission with arguments concerning Charter’s modem billing policies and the impact they may have on the competitive retail market, we need not resolve such contentions here because we find that they are more appropriately addressed in the pending industry-wide rulemaking proceeding on navigation devices. The cable modem pricing policies that Zoom raises in this proceeding are indeed the same types of practices that the rulemaking proceeding seeks to address.⁹

The Commission also

[found] that the ongoing navigation devices rulemaking proceeding is sufficient to protect the public interest with respect to New Charter’s cable modem billing and marketing practices, and accordingly we decline to adopt the conditions that Zoom requests related to modem billing practices.¹⁰

Zoom has raised important issues as to the application of Section 629 and its

⁷*Decision* at p. 205, ¶464 (footnotes omitted).

⁸The *Decision* implies, without specifically holding, that Zoom’s allegations about Charter’s billing practices are not transaction-specific. *Decision* at 120, ¶246. To the contrary, they relate to specific practices that will only affect Charter customers, as no other major cable operator adheres to similar policies. Moreover, there is no basis for suspending statutorily obligated responsibilities because a violation of law or policy is not transaction-specific.

⁹*Decision* at p. 120, ¶246 (footnotes omitted).

¹⁰*Decision* at p. 121, ¶247 (footnotes omitted) (citing *Expanding Consumers’ Video Navigation Choices; Commercial Availability of Navigation Devices*, 31 FCCRcd 1544 (2016)).

implementation in Section 1.1206 of the Commission's rules.² Insofar as many new TWC and BHN customers will be denied the opportunity to benefit from billing transparency for many months at the least, it was an abuse of discretion not to rule immediately upon Zoom's allegations. As explained above, the failure to make the necessary findings is incompatible with the need to make an ultimate benefit/harm assessment on the transaction.

D. Sections 201 and 202 of the Communications Act and Section 706 of the 1996 Telecommunications Act.

Zoom alleged that the Commission has concurrent authority over Charter's billing practices under three additional statutory provisions.¹¹ Because broadband Internet service is subject to regulation under Title II of the Communications Act, Zoom properly invoked the Commission's seminal *Carterfone* decision in arguing that

Unreasonable refusal to allow attachment of non-harmful devices and bundling of cable modem leases with Internet service are "practices, classifications and regulations" which are "unjust and unreasonable," and thus unlawful under Section 201(b)...Charter's unreasonable attachment policies interfere with creation of a competitive market for equipment, and discriminate in favor of Charter's cable modem leasing business and against competitive equipment providers such as Zoom. As such, they violate Section 202(a).¹²

Zoom also argued that the Commission has authority to address Charter's billing practices under Section 706(a) of the Telecommunications Act of 1996 in light of the Commission's finding that "broadband is not being deployed to all Americans in a reasonable and timely manner."¹³ Noting that the Commission's *2005 Internet Policy Report*, issued

¹¹*Petition to Deny* at pp. 21-24.

¹²*Petition to Deny* at p. 23.

¹³*Petition to Deny* at p. 11 (citing *2015 Broadband Progress Report and Notice of Inquiry On Immediate Action to Accelerate Deployment*, 30 FCC Rcd 1375, 1377 (2015)); see also *2016 Broadband Progress Report*, 31 FCC Rcd 699, 700 (2016).

pursuant to Section 706(a), recognized the Commission’s duty “[t]o foster creation, adoption and use of Internet broadband content, applications, services and attachments,” Zoom argued that the Commission can also address Charter’s billing practices under Section 706.¹⁴

Even though the *Decision* briefly acknowledges Zoom’s arguments, the *Decision* does not discuss their merits, much less make the required determinations as to their validity. Without this analysis, the Commission cannot do what it says is necessary, since it did not “assess whether the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission’s rules.”¹⁵ It is a fundamental principle of due process and of administrative law that a decisionmaker must explain its reasoning so that there can be meaningful review of the action.¹⁶

While Zoom believes that longstanding Commission policy dictates that Charter’s billing practices are unjust and unreasonable and that they impede broadband deployment, it is possible that the Commission may consider the questions and determine otherwise. However, that possibility does not relieve the Commission of the obligation to consider the questions, make a determination and state the reasons for such a decision. Its failure to do so requires reconsideration.

E. The Commission Failed to Make A Specific Determination As To Charter’s Billing Practices Under the Public Interest Standard.

The most glaring omission in the *Decision* is its failure to evaluate the facts under the

¹⁴*Petition to Deny* at pp. 21-22 (citing *Internet Policy Statement Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14986 (2005) (citing *Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956) and *Carterfone*, 13 FCC 2d 420 (1968)).

¹⁵Decision at p.10, ¶26; *see supra* at p. 3

¹⁶*See, e.g., Great Lakes Comnet v. FCC*, No. 15-1064 (D.C. Cir. May 24, 2016)(slip opinion at p. 6)(citing *National Cable Television Association v. FCC*, 914 F.2d 284, 289 (D.C. Cir. 1990)(holding that agencies must explain their reasoning).

public interest standard. As the Commission itself said,

If the transaction would not violate a statute or rule, we consider whether it could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Act or related statutes.¹⁷

Even if it could properly defer any decision with respect to Section 629 and other statutes until completion of the Commission's proceeding in Docket 16-42, the Commission committed reversible error by failing to consider whether Charter's billing practices are consonant with the public interest standard and thus should be addressed in the instant proceeding. The requirement to assess whether the issues Zoom has raised could result in public interest harm is different from the ultimate public interest determination. The former is a necessary precursor for the latter. If the Commission has not considered whether particular harms may result, it cannot properly decide if the transaction as a whole is in the public interest.

In its pleadings and *ex parte* presentations, Zoom argued repeatedly that it is contrary to the public interest to approve the applications without mandating billing transparency.¹⁸

Referring to numerous statutory directives and longstanding policy decisions going back to *Carterfone*, Zoom said that

[i]n determining whether it is in the public interest to allow Charter to acquire cable systems whose customers currently have full attachment rights and access to unbundled pricing for cable modems, the Commission must look to fundamental policy favoring competition in the equipment market.¹⁹

It said that

¹⁷*Decision* at p. 10, ¶26 (citations omitted).

¹⁸*See, e.g. Petition to Deny* at p. 23-24 (“Even if Charter’s attachment and pricing policies did not directly violate the Commission’s rules, as well as Sections 201, 202 and 629 of the Communications Act and Section 706 of the 1996 Telecommunications Act, the Commission must still make a determination as to whether the proposed transaction are in the public interest.”); Zoom *Ex Parte* Presentation, March 23, 2016 at p. 2; Zoom *Ex Parte* Presentation, March 4 2016 at p. 2.

¹⁹*Petition to Deny* at p. 25.

These strong expressions of policy demonstrate that there is a strong public interest in insuring that consumers have access to a vibrant, competitive and innovative market for cable modems.²⁰

It was manifest error not even to consider whether approval of the applications without remediating Charter's billing practices is contrary to the public interest. As the Commission acknowledges, its obligation is to consider whether "the transaction could result in public interest harms by substantially frustrating or impairing the objectives of the Act or related statutes."²¹ It must then balance these harms against any potential benefits.²² The Commission

'should not close its eyes to the public interest factors' raised by material in its files....[A]s a general matter, the federal regulatory agencies should construe pleadings filed before them so as to raise rather than avoid important questions. They 'should not adopt procedures that foreclose full inquiry into broad public interest questions, either patent or latent.'²³

By failing to undertake any assessment of the harm that is caused by allowing Charter's billing practices to continue without change, the Commission lacked the information necessary to balance those harms against the claimed benefits of the transaction. This is not something that can be deferred to consideration in a rulemaking which addresses an entirely separate statutory provision.

CONCLUSION

Wherefore, Zoom asks that the Commission

1. Reconsider its decision, and make determinations with respect to Zoom's allegations under Sections 201, 202 and 629 of the Communications Act, Section

²⁰*Petition to Deny*, p. 26.

²¹*Decision* at p.10, ¶26.

²²*Id.*

²³*Retail Store Employees, Local 880 v. FCC*, 436 F.2d 248, 254 (D.C. Cir. 1970)(quoting *Southwestern Publishing Co. v. FCC*, 243 F.2d 829, 832 (D.C. Cir. 1952) and *Midwestern Gas Transmission Co. v. FPC*, 258 F.2d 660, 668 (D.C. Cir. 1958), vacated on other grounds, 358 U.S. 280 (1959).) *See also Clarksburg Publishing Co. v. FCC*, 225 F.2d 511, 515 (D.C. Cir. 1955).

- 76.1206 of the Commission's rules and the public interest standard;
2. Determine that Charter's billing practices violate Sections 201, 202 and 629 of the Communications Act, Section 76.1206 of the Commission's rules and the public interest standard;
 3. Adopt a condition requiring Charter to separately state a non-subsidized price, reasonably commensurate with industry pricing practices, for a Charter-supplied cable modem on the bill of customers using a Charter-supplied cable modem.
 4. Adopt a condition requiring that Charter's customer communications, including its website and Internet-related promotional materials, clearly and prominently inform customers of their right to supply their own cable modem; and
 5. Grant all such other relief as may be just and proper.

Respectfully submitted,



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June 8, 2016

CERTIFICATE OF SERVICE

I certify that on June 8, 2016, copies of the foregoing *Petition for Reconsideration* have been served by email and United States Mail to the following:

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In addition a copy of the foregoing *Petition for Reconsideration* has been delivered by email to the Commission's duplicating contractor:

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