

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

**PETITION FOR RECONSIDERATION OF A MERGER CONDITION
OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

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EXECUTIVE SUMMARY

In this petition, NTCA requests the Commission reconsider the build out requirement that the Commission imposed upon the New Charter merger proposal. As NTCA member companies have a vested interest in the outcome of this proceeding, NTCA feels it is vitally important to file this petition for reconsideration.

Good cause exists for reconsidering the build-out requirement and granting this Petition for Reconsideration. In approving the New Charter merger, NTCA asserts that the Commission failed to provide sufficient notice of the residential build-out requirement. The Commission's build-out requirement is dramatically different from that originally proposed by the companies. The only "notice" of the Commission's change in plans was statement issued by Chairman Wheeler on April 26, 2016—only nine business days before the merger was approved. Consequently, NTCA and other stakeholders had no realistic opportunity to comment or propose modifications.

Additionally, public interest requires reconsideration of the residential build-out condition. NTCA member companies are quite small, and do an extremely commendable job of providing broadband services to areas that are extremely difficult and expensive to serve. Many member companies do not currently face competition in their service areas due to these very challenges. The Commission's build out requirement would compel New Charter to provide service to at least two million new residential customers—one million of which area already receiving broadband service of at least 25 Mbps. Mandating competition where none would otherwise exist imposes the risk of undermining, rather than furthering, broadband availability and affordability. The lack of consideration and coordination with other efforts will lead to duplicative and wasteful efforts to reach certain locations, even as other unserved locations

remain ignored altogether in frustration of the Commission's stated objectives. The public interest demands reconsideration and further review.

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Pursuant to Section 1.429 of the Commission’s rules, NTCA-The Rural Broadband Association (“NTCA”),¹ respectfully submits this Petition for Reconsideration of the Residential Build-Out condition adopted as part of the *Memorandum Report and Order* (“*Order*”) in the captioned proceeding.²

I. INTRODUCTION

NTCA’s members are committed to providing high quality broadband service to anchor institutions and consumers in the rural communities they serve. Several NTCA members currently compete directly for broadband and/or video subscribers with one of the parties to

¹ NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA’s members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities.

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*, MB Docket No 15-149 (released May 10, 2016) (“*Merger Order*”).

the merger and others are potential competitors solely due to the build-out requirements imposed as a condition to the merger approval.³

In the *Merger Order*, the Commission granted the application for the merger of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership (“the Merger Application”),⁴ subject to specific conditions which included, *inter alia*, a commitment to invest in residential broadband facilities. The Commissioner reasoned that the condition would ensure the promised public benefits as a result of such investment will inure to consumers and that it would provide an opportunity for increased competition from services that rely on wired broadband internet access service (“BIAS”) to deliver video by creating more customer locations or more service options that can receive higher speed broadband service.

The Build-Out Condition adopted in the *Merger Order* is far removed from the build-out condition proposed in the Merger Application and NTCA respectfully requests that it be reconsidered as matter of procedure and public policy.⁵

II. NTCA HAS STANDING TO FILE THIS PETITION

NTCA’s members have a vested interest in the outcome of this proceeding and NTCA, on their behalf, filed comments and actively participated in numerous *ex parte* meetings with Commission staff.⁶ A party who did not petition the Commission to deny a merger generally

³ Residential Build-Out Condition, *Merger Order*, Appendix B, IV, pp. 218 – 221 (“Build-Out Condition”).

⁴ Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to the Transfer of Control of Licenses and Authorizations, MB Docket No. 15-149, (filed June 25, 2015) (“the Application.”)

⁵ 47 C.F.R. § 1.106

⁶ See, for example, NTCA, *Ex Parte* Notice, In the Matter of Charter Communications, Inc., Time Warner Cable, Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of

may not seek reconsideration of the Commission’s decision regarding the transfer of control of the licenses or authorizations at issue or appeal a final decision to the courts.⁷ However, while NTCA did not petition the Commission to deny the merger, it is not now seeking reconsideration of the decision regarding the transfer of control of the licenses. NTCA is seeking reconsideration of a single condition, which as discussed more fully *infra*, was not fully vetted, will adversely affect NTCA members’ interests and is contrary to Commission’s policy goals.

III. GOOD CAUSE EXISTS FOR RECONSIDERING THE BUILD OUT CONDITION

Petitions for Reconsideration may be granted where: (1) the petition relies on facts or arguments which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission; (2) the petition relies on facts or arguments unknown to the petitioner until after his last opportunity to present them to the Commission, and he could not through the exercise of ordinary diligence have learned of the facts or arguments in question prior to such opportunity; or (3) the Commission or the designated authority determines that the public interest requires consideration of the new arguments.⁸

Licenses and Authorizations, MB Docket No. 15-149, filed May 4, 2016, <http://apps.fcc.gov/ecfs/document/view?id=60001836175>.

⁷ 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(b)(1) (“If the petition is filed by a person who is not a party to the proceeding, it shall state with particularity the manner in which the person’s interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding.”); 47 C.F.R. § 1.106(m); Shareholders of Tribune Co., Transferors & Sam Zell, et al. Transferees, 29 FCC Rcd 844, 847-48 ¶¶ 10-15 (2014) (discussing prerequisites for petitions to deny).

⁸ 47 C.F.R. § 1.106(p)(2).

Good cause exists for reconsideration of the build-out requirement under each of the prongs. While the Merger Application proposed a modest, voluntary build-out condition on which parties had the opportunity to comment, the “modified version” mandated by the Commission veers so drastically from what was contemplated that it bears little resemblance to what was originally proposed and could not have been anticipated. The public had no adequate notice or time to consider the condition or provide the Commission with analysis or thoughtful commentary. The lack of adequate public input likely led the Commission to adopt a build out condition that, rather than providing a public benefit, substantially increases the competitive harm of the merger, risks undermining other important public policy objectives of the Commission, and is antithetical to the Commission’s overarching policy goals. The public interest demands that the Commission reconsider or modify the build-out mandate in response to the information presented herein.

A. The Commission Failed to Provide Sufficient Notice of the Residential Build-Out Condition

The Applicants on June 25, 2015 submitted to the Commission their Public Interest Statement.⁹ If the license transfer were to be granted, the Applicants therein committed to “within 4 years of close, New Charter will invest at least \$2.5 billion in the build-out of networks into commercial areas within our footprint beyond where we currently operate” and “within 4 years of close, we will build out one million line extensions of our networks to homes in our franchise area.”¹⁰ As late as March 9, 2016, the build out promise was characterized by the

⁹ *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*, MB Docket No. 15-149, Applicants’ Public Interest Statement (filed June 25, 2016).

¹⁰ *Id.*, p. 20.

Applicants as a commitment “to build out a million line extensions [and] invest over \$2.5 billion in commercial buildout . . . within 4 years of close.”¹¹ NTCA is aware of no public notice or publicly available document in which notice could be gleaned that the Commission was considering a build-out condition that varied significantly from what was initially contemplated.

However, on April 25, 2016, FCC Chairman Wheeler issued a statement that an order approving the merger was already circulating among the other FCC Commissioners for a vote. In this statement, the Chairman announced, “[i]f the conditions are approved by my colleagues, an additional two million customer locations will have access to a high-speed connection. At least one million of those connections will be in competition with another high-speed broadband provider in the market served. . . .”¹² This was the only “notice” that the Commission would mandate a condition that veered so drastically from what was offered as a voluntary, relatively modest build-out commitment within the Applicants’ footprint and franchise area.¹³ Nine business days later, the last of the Commissioners voted and the merger was approved.

¹¹ See, *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*, MB Docket No. 15-149, *ex parte* letter of John L. Flynn, Counsel for Charter Communications, Inc., memorializing a meeting with Matthew Berry, Chief of Staff to FCC Commissioner Ajit Pai (March 9, 2016).

¹² Statement of FCC Chairman Tom Wheeler on Recommendation Concerning Charter/Time Warner Cable/Bright House Network (April 25, 2016) available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-339028A1.pdf

¹³ Upon learning of the Chairman’s statement, NTCA scrambled to meet with three of the Commissioners to try and learn more about the build-out mandate, but the *Merger Order* was already drafted and circulating. Some Commissioners may have already voted the item. By the time NTCA or others could schedule any meetings, the Condition was a *fait accompli*. Clearly, the Commission was not seeking public input.

The Commission fully recognized that the proffered build-out commitment was not a transaction-specific benefit,¹⁴ yet adopted a “modified version” that implicates a whole host of additional offensive competitive concerns and bears little resemblance to what was originally contemplated. Rather than investing \$2.5 million for *commercial* build-out *within its footprint* and build-out line extensions to one million customers *within its franchise area*, New Charter must comply with a Residential Build-Out Condition to deploy to customers in areas where it does not have existing facilities, broadband internet access service (“BIAS”) to at least 2 million mass market customer locations, such as those occupied by residences, home offices and very small businesses. And at least one million of these customer locations must be “*out-of-footprint locations*” that are *already served* by at least one other BIAS provider.¹⁵

The Residential Built-Out Condition is not merely a “modification” to what was voluntary offered by the Applicants. Instead of commercial build-out, it is residential. Instead of a commitment to build one million extension lines, it is a commitment to build to two million customer locations. Instead of building within the current footprint and franchise area, New Charter must deploy to completely new service areas and it must provide service to one million new customers who already receive BIAS service from another provider. No version of anything that was adopted appears in the Public Record. NTCA and other stakeholders could not through the exercise of ordinary diligence have learned of the Residential Build-Out condition and had no realistic opportunity to comment or propose modifications.

¹⁴ *Merger Order*, ¶ 387.

¹⁵ *Merger Order*, Appendix B, § V, p. 218.

B. The Public Interest Requires Reconsideration of the Residential Build-Out Condition

While the Commission's intentions in proposing the Residential Build-Out requirement are undoubtedly good, the reality is imposing such a condition could undermine, rather than further, broadband availability and affordability – particularly in higher-cost areas.

Competition is a powerful force that can lower prices, improve service and product quality and provide consumers with more choices than they would otherwise have had. However, artificial attempts to impose competition in areas where none had previously existed will not provide the same benefits as realized where competition arose on its own, the end result likely being wasted resources and little or no appreciable benefit to the customer.

NTCA member companies are quite small and have limited resources at their disposal with which to serve their customers. They face numerous significant challenges in providing BIAS to their communities. Respondents to NTCA's 2014 Internet/Broadband Availability Survey identified their biggest challenges in providing broadband service. Ninety-two percent of survey respondents cited cost, 74% regulatory uncertainty, 54% long loops, 46% current regulatory rules, 22% obtaining financing, 18% low customer demand, and 18% fiber order fulfillment delays.¹⁶ Yet despite these myriad challenges, NTCA member companies continue to provide their customers with state-of-the-art services.

¹⁶ *NTCA 2014 Internet/Broadband Availability Survey*, rel. June 2015, p. 10. Available online at: <http://www.ntca.org/images/stories/Documents/Advocacy/SurveyReports/2014ntcabroadbandsurveyreport.pdf>.

It is reasonable to assume that these challenges – and cost in particular – are a major reason why those service areas with only a single provider have not seen any competition. Larger providers recognize the challenges inherent to serving high-cost, low-density rural areas. Without a compelling business case to enter these areas and lacking the community ties that the locally-owned, smaller telcos possess, they have exhibited little interest in providing service there. These barriers, as identified by the companies that must address them on a daily basis, will likely not appreciably diminish in the foreseeable future. As Commissioner O’Rielly pointed out, “[a]bsent this mandated condition, the market conditions would determine whether the merged company entered those markets. . . .”¹⁷ Absent the Commission requiring New Charter to provide service into these new areas, it seems improbable they would do so of their own accord, as none of New Charter’s component companies has done so as of yet.

Perhaps of greatest concern, the Commission’s action in mandating the build out threatens to undermine other important public policy initiatives intended to extend broadband. The lack of consideration and coordination with other efforts will lead to duplicative and wasteful efforts to reach certain unserved locations, even as other unserved locations remain ignored altogether in frustration of the Commission’s stated objectives. For example, the Connect America Fund (“CAF”) Phase II unserved area build outs by price cap carriers are just commencing, the Commission is still in the process of developing the CAF II competitive bidding process for areas the price cap carriers choose to leave unserved, and a recent order creates new CAF mechanisms for

¹⁷ Statement of Commissioner Michael P. O’Rielly, Approving in Part, Concurring in Part, and Dissenting in Part, *Merger Order*, p. 348.

rate-of-return-regulated carriers that include buildout requirements.¹⁸ Moreover, universal service funds are also used – and essential – for ongoing support of networks and affordability of voice and broadband services in rural areas where buildout has already taken place. To the extent that New Charter builds in areas where universal service programs are directing resources toward buildout and ongoing affordability of service, it will undermine or inefficiently duplicate the use of several billion dollars per year of universal service fund resources via these initiatives to reach unserved consumers.

The buildout provisions therefore have the potential to harm the existing subscribers of both New Charter and the provider to be overbuilt. It would force New Charter to use resources that might better be used to improve service to existing customers or expand service to households without advanced services. Commission induced competition in difficult-to-serve areas, where margins are already razor thin, could result in companies cutting back services or going out of business altogether – or consumers paying unaffordable prices for services in markets that can barely (or not at all) justify a single provider, never mind two network operators.¹⁹ In the extreme, the more difficult-to-serve areas could find themselves back in their original situation: having only a single service provider. Yet they would ultimately be worse off in the long run. If the emergent single provider is New Charter, it would only be serving them because it is compelled to, and there is no guarantee that those services would be “reasonably comparable” in price and quality to what is

¹⁸ See, *In the Matter of Connect America Fund, et.al.*, WC Docket No. 10-90, *et. al.*, Report and Order and Further Notice of Proposed Rulemaking (rel. March 30, 2016).

¹⁹ Commissioner Pai recognized that New Charter’s increased broadband market share as a result of the condition will come at the expense of smaller competitors. See, Dissenting Statement of Commissioner Ajit Pai, *Merger Order*, p. 342.

made available in urban areas. It seems improbable that consumers would receive the same level of customer care as they did when served by their small, community-based service provider.

The U.S. Department of Justice has previously recognized that imposing uneconomical build-out requirements results in less efficient competition and the potential for higher prices. It stated, “consumers generally are best served if market forces determine when and where competitors enter. . . [Regulatory restrictions and conditions on entry] should be avoided except where necessary to protect other important statutory goals and even then be tailored as narrowly as possible.”²⁰ While the Commission claims that compelling New Charter to enter areas where only one provider offers high speed BIAS “would introduce new competition to the local BIAS market, leading to lower prices and greater choice for consumers,”²¹ it is highly likely that artificially introducing competition into areas where the existing provider is providing quality service—and that do not support competition on their own, in the absence of intervention—could ultimately have a far different outcome from that hoped.

The Commission’s non-transaction specific Residential Build-Out Condition makes the merger more harmful to competition, competitors and consumers than it otherwise would be. The failure to seek public and industry input led the Commission to attempt to advance one policy goal in a vacuum without recognizing or considering the full ramifications of the action. The public interest demands reconsideration and further review.

²⁰ *Ex parte* submission of the Department of Justice, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No 05-311 (May 10, 2006).

²¹ *Memorandum Opinion and Order*, p. 180.

IV. CONCLUSION

For the above-stated reasons, good cause exists for the Commission to reconsider the build-out requirement imposed as part of the Commission's approval of the New Charter merger. NTCA and other stakeholders were not given sufficient time to respond to the Commission's build-out requirements. Additionally, the conditions as proposed could undermine, rather than further, broadband availability and affordability—particularly in higher-cost areas. NTCA respectfully urges the Commission to grant this Petition for Reconsideration and rescind or modify the Residential Build-out Condition.

Respectfully Submitted,



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