Before the
Federal Communications Commission
Washington, D.C. 20054

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 Assign or Transfer Control of	)	
Licenses and Authorizations	)	

PETITION FOR RECONSIDERATION OF THE COMPETITIVE ENTERPRISE INSTITUTE, JOHN FRANCE, DANIEL FRANK, JEAN-CLAUDE GRUFFAT, AND CHARLES HAYWOOD

The Competitive Enterprise Institute,[1] John France,[2] Daniel Frank,[3] Jean-Claude Gruffat,[4] and Charles Haywood[5] hereby seek reconsideration of the Commission's Memorandum Opinion and Order[6] in the above-captioned proceeding, in which the Commission approved, subject to conditions, the applications of Charter Communications, Inc. (Charter), Time Warner Cable Inc. (Time Warner Cable), and Advance/Newhouse Partnership (Advance/Newhouse or Bright House) to transfer various Commission licenses and other authorizations from Charter, Time Warner Cable, and Bright House to a new company, known as "New Charter."[7]

We do not object to Commission's decision to approve these applications. However, we urge the Commission to reconsider its decision to impose various conditions on New Charter, because the conditions (1) are contrary to the public interest, as they "will result in increases in the cost of cable and broadband service for every current cable subscriber,"[8] in the words of Commissioner

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1. The Competitive Enterprise Institute (CEI) is a nonprofit, nonpartisan public interest organization dedicated to the principles of limited constitutional government and free enterprise. CEI filed comments in this proceeding. *See* Comments of the Competitive Enterprise Institute, the International Center for Law & Economics, and TechFreedom, *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149 (2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001329147.
2. John France is an individual who subscribes to the television and broadband Internet access services of Bright House Networks, LLC.
3. Daniel Frank is an individual who subscribes to the television and broadband Internet access services of Time Warner Cable Inc.
4. Jean-Claude Gruffat is an individual who subscribes to the television and broadband Internet access services of Time Warner Cable Inc. He is also a member of the Board of Directors of the Competitive Enterprise Institute.
5. Charles Haywood is an individual who subscribes to the television and broadband Internet access services of Bright House Networks, LLC.
6. *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149, Memorandum Opinion and Order, 31 FCC Rcd __ (rel. May 10, 2016) (the "Order").
7. *Id.* ¶ 1.
8. Order at 348 (O'Rielly, Comm'r, concurring in part, dissenting in part).

O'Rielly; (2) exceed the Commission's statutory authority under the Communications Act of 1934, as amended; and (3) were issued by the Commission without affording the public notice and a meaningful opportunity to comment. Therefore, the Commission should amend the Order so that it grants the applications of the three merging companies free from any FCC-imposed conditions.

I. THE CONDITIONS WILL HURT SUBSCRIBERS OF NEW CHARTER AND ARE CONTRARY TO THE PUBLIC INTEREST

The Commission is authorized to review the "proposed transfer of certain licenses and authorizations held and controlled by the Applicants" to determine whether they "will serve the public interest, convenience, and necessity."[9] The Commission asserts that this "public interest authority" includes the authority, "where appropriate, to impose and enforce transaction-related conditions to ensure that the public interest is served by the transaction."[10] The Order imposes numerous conditions on New Charter and claims they are necessary to "ensure that the transaction will yield net public interest benefits."[11] But these conditions will not benefit the public interest. Instead, they will actually hurt subscribers of New Charter—including the four individuals who join CEI in bringing this petition and currently subscribe to New Charter.

First, the Order requires New Charter to build out its network to "pass, deploy, and offer [broadband Internet access service] capable of providing at least a 60 Mbps download speed to at least two million additional mass market customer locations within five years of [the transaction] closing."[12] Yet, as the Order notes, "under normal operating procedures," the applicants "do not plan residential build several years in advance but expand their networks organically in response to market demand."[13] The Order would thus require New Charter to deviate from this commonsense business practice, and instead undertake a high-risk, long-term experiment by spending a

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9. Order ¶ 26 (citing 47 U.S.C. §§ 214(a), 310(d)).
10. Order ¶ 30.
11. *Id.*
12. *Id.* ¶ 388; *see also id.* at 218–21 (Appendix B, Part V).
13. *Id.* ¶ 383 (citing Charter Response to Information Request at 13).

considerable sum to expand its network to cover two million additional U.S. households. As the Commission noted recently in its Sixteenth Video Competition Report, however, of the "133.8 million homes in the United States" as of 2013, approximately 133.4 million had access to cable.[14] For New Charter to expand its network footprint to pass two million additional U.S. households, therefore, it would necessarily have to invest in covering households that are *already* served by one or more cable providers. As Commissioner O'Rielly noted, this condition "diverts capital that the merged company could use to improve service to their existing customers or expand service to households without advanced services, *harming these consumers*."[15]

Second, the Order requires New Charter to operate a "low-income broadband program" that offers "standalone broadband service 30/4 Mbps for $14.99 per month … to households with a child enrolled in the National School Lunch Program (NSLP) receiving either free or reduced lunch, or at least one senior citizen (65 or older) receiving Supplemental Security Income (SSI)."[16] This condition, which Commissioner Pai described as "rate regulation,"[17] will undermine New Charter's ability to price its services in an economically rational manner, resulting in some combination of higher prices and lower service quality for consumers who are not eligible for the low-income broadband program. It is no coincidence that the Department of Justice, which reviewed this transaction under the antitrust laws, declined to include any conditions related to broadband pricing in its consent decree with the merging firms.[18] As the Department of Justice Antitrust Division explained in its 2004 *Policy Guide to Merger Remedies*, price conditions are discouraged as merger

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14. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, Sixteenth Report, 30 FCC Rcd 3253, 3267, ¶ 31 (2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-41A1_Rcd.pdf.

15. Order at 348 (O'Rielly, Comm'r, concurring in part, dissenting in part) (emphasis added).

16. Order ¶ 450; *see also id.* at 221–23 (Appendix B, Part VI).

17. Order at 340 (Pai, Comm'r, dissenting).

18. *See* Proposed Final Judgment, United States v. Charter Commc'ns, Inc., No. 16-cv-00759 (D.D.C. Apr. 25, 2016), *available at* https://www.justice.gov/atr/file/844851/download.

remedies for numerous reasons, as they may "prevent [the merged firm] from responding efficiently to changing market conditions."[19]

Third, the Order requires New Charter to offer "settlement-free interconnection"[20] to "edge providers" including, in particular, online video distributors, for seven years after the transaction closes.[21] In other words, the firm will be required to allow edge providers to transmit traffic over its network at a price of zero, even though "[p]aid interconnection arrangements have long been commonplace in the Internet economy."[22] This condition means that New Charter's broadband subscribers will bear the full burden of funding the firm's infrastructure expenses, while the firm will be barred from recovering a penny from edge providers such as Netflix. By lowering the price New Charter can charge on one side of the market—the side facing edge providers—the firm will likely charge higher prices on the other side: its broadband subscribers.[23]

Fourth, the Order requires New Charter to refrain from imposing "data caps" or setting "usage-based prices" for its residential broadband Internet access services for seven years after the transaction closes.[24] Given that "the record makes clear that online video places enormous demands upon the networks of Charter and Time Warner Cable and increases their capital costs,"

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19. U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, POLICY GUIDE TO MERGER REMEDIES 8–9 (2004), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf. The Department of Justice has since revised this Guide. *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, POLICY GUIDE TO MERGER REMEDIES (2011), *available at* https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

20. Order ¶ 456.

21. *Id.* ¶ 129–134; *see also id.* at 214–16 (Appendix B, Part III).

22. Order at 341 (Pai, Comm'r, dissenting).

23. *See* Robert Robson, *Two-Sided Markets: A Tentative Survey*, 4 REV. NETWORK ECON. 142 (2005) (discussing the "topsy-turvy principle" in two-sided markets); *cf.* FTC v. H.J. Heinz Co., 246 F.3d 708, 719 (D.C. Cir. 2001) ("[T]he antitrust laws assume that a retailer faced with an increase in the cost of one of its inventory items 'will try so far as competition allows to pass that cost on to its customers in the form of a higher price for its product.'" (quoting In re Brand Name Prescription Drugs Antitrust Litigation, 123 F.3d 599, 605 (7th Cir. 1997))).

24. Order ¶ 457; *see also* Order at 217–18 (Appendix B, Part IV).

Commissioner Pai asked a simple question in his dissent: "Who should bear those costs?"[25] Because the Order concludes that "all customers must do so equally," New Charter's natural response to this condition "will be to increase prices on all consumers in order to amortize the cost of serving a bandwidth-hungry few."[26] The four individuals on this petition, like most of New Charter's subscribers, are not among the top broadband subscribers in terms of data usage, and they should not be forced to subsidize the top 1% of users.[27]

These four conditions, among several others imposed by the Commission in its Order, will hurt consumers and are contrary to the "public interest, convenience, and necessity." The Commission should therefore reconsider these conditions and remove them from the Order.

II. THE COMMISSION HAS NO AUTHORITY TO IMPOSE THE CONDITIONS CONTAINED IN THE ORDER, ESPECIALLY WHEN THE COMMISSION HAS CONCEDED THAT SEVERAL CONDITIONS DO NOT RELATE TO TRANSACTION-SPECIFIC HARMS

Congress never authorized the Commission to review telecommunications mergers in their entirety. Instead, the Commission has *specific* authority to review applications to transfer licenses and authorizations under Sections 214(a) and 310(d) of the Communications Act of 1934, as amended.[28] In this proceeding, Charter, Time Warner Cable, and Bright House sought consent to transfer various licenses and authorizations involving (1) cable television relay service,[29] (2) private wireless licenses,[30] (3) domestic and international Section 214 authorizations,[31] and (4) satellite communications licenses.[32] These licenses and authorizations include the applicants' station licenses

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25. Order at 341 (Pai, Comm'r, dissenting).
26. *Id.*
27. *See id.* (referring to this condition as "the paradigmatic case of the 99% subsidizing the 1%").
28. *See* 47 U.S.C. §§ 214(a), 310(d).
29. *See* Order at 207, 209, 212 (Appendix A).
30. *See id.* at 207, 210, 212.
31. *See id.* at 208, 211–12.
32. *See id.* at 210, 212.

used for the transmission of television signals, which are subject to Section 310(d) of the Communications Act, and the applicants' authorizations to provide voice services, which are subject to Section 214(a) of the Act. The applicants did not, however, seek to transfer licenses or authorizations regarding their provision of broadband Internet access services, as Section 214(a) does not apply to broadband service providers.[33]

Yet nearly all of the conditions imposed by the Order on New Charter relate not to the firm's cable television or voice services, but to its broadband Internet access services. The Commission justifies these conditions by pointing to provisions such as Section 303(r) of the Act, which relates to the agency's authority regarding radio station licenses, and Section 214(c), which authorizes the Commission to "attach to the issuance of [a Section 214] certificate such terms and conditions as in its judgment the public convenience and necessity may require."[34] However, the Commission provides no legal basis for asserting *carte blanche* authority to review this $55 billion merger in its entirety, and attach whichever conditions the Commission deems appropriate, simply because the merging companies happen to hold certain FCC licenses and authorizations that they wish to transfer—even though these licenses and authorizations have nothing to do with New Charter's broadband Internet access services. Instead, according to Commissioner Pai, the Commission "has turned the transaction into a vehicle for advancing its ambitious agenda to micromanage the Internet economy" through transaction conditions.[35]

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33. In its 2015 Open Internet Order, the Commission exercised its forbearance authority under Section 10 of the Communications Act to forebear from applying Section 214 to BIAS providers, excepting the provisions of Section 214(e) interrelated with Section 254 of the Act. *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601, 5817–18, ¶ 456(e) (2015); *see also id.* at 5848–49, ¶ 511 (rejecting "arguments against forbearance from applying section 214 to enable the Commission to engage in merger review").

34. Order ¶ 30 (citing 47 U.S.C. §§ 214(c), 303(r)).

35. Order at 340 (Pai' Comm'r, dissenting); *see also* CEI et al. comments, *supra* note 1, at 6–9 (arguing that the "Communications Act … contemplates clear limitations on the Commission's scope of transaction review" and that any conditions imposed on the merger must be "relevant to the particular transfers at issue—not the merger as a whole").

Moreover, even if the Commission's authority to impose conditions on the transfer of licenses and authorizations is unbounded by the subject matter of the licenses and authorizations themselves, surely the Commission is limited to imposing conditions that are related to the transaction itself. But although the Commission admits in the Order that it "find that[s] Charter's proposed low-income broadband program is not a transaction-specific benefit,"[36] it nevertheless requires New Charter to offer this program "to ensure that the public benefits of the transaction outweigh the potential harms."[37] Similarly, although the Order concedes that the Commission "find[s] no reason to credit the commitment" by the applicants to build out their network to new households "as a transaction-specific, public interest benefit,"[38] the Order nevertheless imposes "a modified version of the Applicants' residential buildout commitment as a condition to the transaction"[39] because it would "confer a substantial public interest benefit by providing high-speed [broadband Internet access service] to otherwise unserved populations."[40] "Once delinked from the transaction itself, such conditions reside somewhere in the space between absurdity and corruption," as Commissioner O'Rielly aptly noted.[41]

III. THE COMMISSION FAILED TO GIVE THE PUBLIC NOTICE AND AN OPPORTUNITY TO COMMENT ON THE CONDITIONS IT WAS CONSIDERING INCLUDING IN THE ORDER, IN VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT

Under the Administrative Procedure Act (APA), an agency must notify the public when it intends to issue a rule, and "give interested persons an opportunity to participate in the rule making."[42] Although this notice-and-comment requirement may not apply to informal adjudication,

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36. Order ¶ 452.
37. *Id.* ¶ 453.
38. *Id.* ¶ 386.
39. *Id.* ¶ 388.
40. *Id.* ¶ 387.
41. Order at 348 (O'Rielly, Comm'r, concurring in part, dissenting in part).
42. 5 U.S.C. § 553(b)–(c).

an agency may not circumvent the APA's rulemaking provisions through "the process of making rules in the course of adjudicatory proceedings."[43] Yet the conditions imposed by this Order, along with similar conditions imposed by the Commission in other recent proceedings involving large telecom mergers,[44] amount to a concerted attempt by the agency to "use transactions as vehicles to accomplish policy goals that it could not achieve through rulemakings alone."[45] Indeed, the Commission has "turned the transaction into a vehicle for advancing its ambitious agenda to micromanage the Internet economy."[46] Meanwhile, the public has been repeatedly denied a meaningful opportunity to comment on this regulatory voyage.

In September 2015, when the Commission informed the public that it was seeking comment on the Charter transaction, it wrote that "[w]e seek comment from interested persons to assist the Commission in its independent review of all proposed transfers of licenses and authorizations referred to in this public notice."[47] Of the myriad issues a person might conceivably raise regarding this transaction, the Commission gave no indication as to which issues it was most interested in commenters addressing, or its tentative views on the extensive body of information provided by the merging companies regarding their joint application[48]—even though the Commission had received

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43. *See* NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969) (plurality opinion); *see also* NLRB v. Bell Aerospace Co. Div. of Textron, 416 U.S. 267, 294 (1974) ("[T]here may be situations where the [NLRB's] reliance on adjudication would amount to an abuse of discretion or a violation of the Act … .").

44. For instance, the Commission imposed thirty pages of conditions on the Comcast-NBCU merger, such as requiring the firm to abide by FCC "open Internet" rules even if a court vacated them. *See* CEI et al. comments, *supra* note 1, at 7; *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, 26 FCC Rcd 4238, 4430–4509 (2011).

45. *See* Order at 346 (O'Rielly, Comm'r, concurring in part, dissenting in part).

46. Order at 340 (Pai, Comm'r, dissenting).

47. *See Commission Seeks Comment on Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149, Public Notice, 30 FCC Rcd 9916, 9917 (rel. Sept. 11, 2015), *available at* https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1010A1_Rcd.pdf.

48. *See generally id.*

the application materials three months earlier.[49] The Commission also referred to an earlier notice, released in late July, in which it announced its acceptance of the joint application.[50] Yet the July 2015 notice merely recited the materials submitted by the companies, including a brief summary of several "commitments" to which New Charter would be bound if the Commission approved the application.[51]

Nowhere in either notice did the Commission discuss its position on any of these commitments—yet in the Order, the Commission transformed several of the commitments into binding conditions with terms materially distinct from those contained in the application. For instance, the Commission decided that "Charter's original [interconnection] commitment was lacking,"[52] so it replaced it with a very different set of interconnection conditions.[53] The Commission also increased the buildout requirement by one million locations[54]—a doubling of the "original commitment"—and more than doubled the duration for which New Charter will be required to forego data caps and usage-based pricing.[55] On the other hand, the Commission declined to impose conditions based on commitments regarding job creation[56] and transitioning to an all-digital network.[57] Until it released the Order, however, the Commission gave the public no opportunity to participate in the proceeding with informed comments based on the tentative views of the agency.

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49. *Id.* at 9916.

50. *Commission Accepts for Filing Applications of Charter Communications, Inc., Time Warner Cable, Inc., And Advance/Newhouse Partnership for Consent To Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149, Public Notice, 30 FCC Rcd 8107 (rel. July 27, 2015).

51. *Id.* at 8111–13.

52. Order ¶ 134.

53. *Id.*

54. *Id.* ¶ 382.

55. *Id.* ¶ 74.

56. *See id.* ¶ 444.

57. *Id.* ¶ 347.

As discussed above, CEI participated in this proceeding. The four individual petitioners, who are simply cable subscribers, did not individually participate. However, the question raised in this petition are all based on points made in CEI's earlier comments and/or raised for the first time by the Commission in the Order itself.

For the foregoing reasons, the Commission should grant this petition, reconsider the transaction, and amend the Order so that it grants the applications without imposing conditions on New Charter.

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Respectfully submitted,

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