IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

IN RE COMPETITIVE ENTERPRISE INSTITUTE, *et. al.*,	)	
	)	No. 17-1261
Petitioners	)	

OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION TO PETITION FOR A WRIT OF MANDAMUS

The Federal Communications Commission opposes the petition for a writ of mandamus filed by Competitive Enterprise Institute and others (collectively CEI). Mandamus is a "drastic" remedy that should be invoked "only in extraordinary circumstances." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189 (D.C. Cir. 2016). Petitioners have not come close to showing that such circumstances are present here. The time the Commission has taken to consider CEI's petition for administrative reconsideration is far short of the "egregious" delay required to justify mandamus. *In re Monroe Commc'ns Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988). And although CEI claims that the agency has not met the statutory 90-day period for deciding its request for reconsideration, *see* 47 U.S.C. § 405(a), "[e]quitable relief, particularly mandamus, does not necessarily follow" from the failure to meet a statutory deadline. *In re Barr Labs.*, 930 F.2d 72, 74 (D.C. Cir. 1991). Here, the *TRAC* factors this Court considers in determining mandamus relief weigh heavily against granting the petition; and this is all the more true

because petitioners have not demonstrated standing to challenge an eventual Commission order here. Thus, this Court would lack jurisdiction to consider a subsequent petition for review, and mandamus is therefore not "'necessary or appropriate in aid of'" the Court's eventual jurisdiction over that litigation. *Telecomms. Research & Action Ctr. v. FCC* (*TRAC*), 750 F.2d 70, 76 (D.C. Cir. 1984) (quoting 28 U.S.C. § 1651(a)). The Court should deny the petition.

BACKGROUND

1. The Communications Act of 1934 (Act) requires the Commission to review applications to transfer control of radio licenses, such as those that accompany the mergers of communications companies. 47 U.S.C. § 310. The heart of that mandate, Section 310(d), prohibits a proposed license transfer unless it serves "the public interest, convenience, and necessity." *Id.* § 310(d). In deciding whether a transaction meets these criteria, the Commission first assesses whether "the proposed transaction complies with the specific provisions of the Act, other applicable statutes, and the Commission's rules." *Applications of Charter Communications, Inc., Time Warner Cable Inc. and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, 31 FCC Rcd 6327, 6336 ¶ 26 (2016) ("*Order*"). If the transaction would not violate a statute or rule, the Commission "employ[s] a balancing test

weighing any potential public interest harms of the proposed transaction against any potential public interest benefits." *Id.*

The Commission's public interest authority enables the agency to impose and enforce transaction-specific conditions, where necessary, to ensure that the public interest is served by the transaction. Section 303(r) of the Communications Act empowers the Commission to "prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out the provisions of [the Act.]" 47 U.S.C. § 303(r). Similarly, Section 214(c) of the Act authorizes the Commission to attach "such terms and conditions as in its judgment the public convenience and necessity may require." *Id.* § 214(c).

2. On May 23, 2015, Charter Communications, Inc. (Charter), Time Warner Cable Inc. (Time Warner Cable) and Advance/Newhouse Partnership (Advance/Newhouse or Bright House) agreed to merge into a new entity called New Charter. *Order*, 31 FCC Rcd at 6333 ¶ 18. Following the transaction, New Charter would own or manage systems serving approximately 23.9 million customers across 41 states, including 19.4 million broadband customers. *Id.* at 6334 ¶ 23. To effectuate the merger, on June 25, 2015, Charter, Time Warner Cable, and Bright House filed an application with the Commission for approval to transfer control of certain radio licenses. *Id.* at 6335 ¶ 24. The Commission

subsequently sought public comment on the application, receiving thousands of comments and other filings in the proceeding. *Id*.

On May 10, 2016, the Commission approved the application by a 3-2 vote. Because the Commission determined that the transaction would "materially alter the Applicants' incentives and abilities in ways that are potentially harmful to the public interest," the Commission's approval was contingent on New Charter complying with certain conditions. *Id*. at 6330 ¶ 7. The Commission: (1) prohibited New Charter from "imposing data caps or charging usage-based pricing for its residential broadband service" for seven years after the transaction closes, *Id*. ¶ 9; (2) required New Charter to offer settlement-free interconnection to large IP networks for seven years after the transaction closes, *id*. at 6540; (3) required New Charter to build out its network to 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]" *id*. at 6506 ¶ 388; and 4) required New Charter to operate a "low income broadband program" that offers broadband service at a discounted rate to those who meet specific eligibility requirements. *Id*. at 6529 ¶ 453. Subject to these conditions, the Commission determined that approving the proposed transaction "overall would be in the public interest." *Id*. at 6530 ¶ 455.

Then-Commissioner (now Chairman) Pai dissented in full, and Commissioner O'Rielly dissented in part, from the *Order* approving the transaction. Both objected primarily to the imposition of conditions, with Chairman Pai noting that some of the conditions lacked a "rational connection with the merits of this transaction or public policy." *See id.* at 6668, 6672.

3. On June 9, 2016, CEI and four New Charter broadband customers filed a petition for reconsideration asking the FCC to remove the conditions it imposed on New Charter. Petitioners argued that the conditions were contrary to the public interest, exceeded the agency's statutory authority, and were issued without affording the public adequate notice and a meaningful opportunity to comment. *CEI et al. Petition for Reconsideration* (June 9, 2016), Petitioners' Addendum, A-115. Three other organizations filed separate petitions for reconsideration of the *Order*. After changes to the membership and leadership of the Commission, the FCC granted one petition and granted in part and denied in part another petition, while noting that the remaining two petitions—including CEI's—were "not the subject of [that] Order on Reconsideration." *Applications of Charter Communications, Inc. Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order on Reconsideration, 32 FCC Rcd 3238, 3239 n.11 (2017). Those two petitions for reconsideration, including CEI's, remain pending.

Petitioners subsequently filed their petition for a writ of mandamus on December 12, 2017.

ARGUMENT

PETITIONERS HAVE FAILED TO SATISFY THE STRINGENT STANDARDS FOR MANDAMUS RELIEF

The "drastic" remedy of mandamus "is available only in extraordinary situations" and "is hardly ever granted." *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (internal quotation marks omitted). To obtain that extraordinary remedy, petitioners must show that they have a "clear and indisputable" right to mandamus relief. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). Petitioners fail to make that showing.

A. Mandamus Is Not Warranted Under *TRAC*.

When seeking mandamus on the ground that an agency has unreasonably delayed action, a petitioner must demonstrate that the agency delay is "so egregious as to warrant mandamus." *Am Hosp. Ass'n*, 812 F.3d at 189-90 (internal quotation marks omitted). This Court's decision in *TRAC* identified six principles that help inform when mandamus is an appropriate remedy for agency delay. None of these principles suggests that mandamus is warranted here. But *TRAC* also demonstrates that there is an *initial* hurdle to obtaining mandamus that petitioners fail to clear: The theory of mandamus relief to address agency delay in *TRAC* is that the Court is granting relief in support of its eventual jurisdiction over

a challenge to the agency order. Here, however, petitioners have not shown standing to bring a challenge to that eventual order, and therefore, have not established that this Court would have jurisdiction over a petition for review.

1. Mandamus Is Not Warranted Because Petitioners Have Not Established That This Court Would Have Jurisdiction Over An Eventual Challenge To The Order.

Under *TRAC*, the Court's ability to grant mandamus relief is predicated on preserving its future jurisdiction. *TRAC*, 750 F.2d at 75-77. But petitioners have not shown that they have Article III standing to challenge the *Order* and therefore, they cannot invoke the Court's jurisdiction once the Commission rules on the reconsideration petition.

Petitioners make no effort to show that CEI itself would have standing, noting only that it participated in the underlying agency proceeding. *See* Pet. 8 & n.4. But it is well established that organization participation in rulemaking at the agency level "does not, in and of itself, satisfy *judicial* standing requirements." *Ctr. for Auto Safety v. NHTSA*, 793 F.2d 1322, 1328-29 n.41 (D.C. Cir. 1986) (emphasis in original); *see also CEI v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 122 (D.C. Cir. 1990) (dismissing CEI for lack of standing in agency rulemaking case).

The four individual cable subscriber petitioners attempt to show standing via affidavit, but these also fall well short of the mark. All four state that they

subscribed to broadband service by New Charter's predecessors and continue to subscribe post-merger; and three allege that their monthly broadband bills increased—by $4, $17, and $20, respectively—after the merger. *See* Pet. 9; A-125, 127, 130. But petitioners have not made the critical showing of causation—that their monthly broadband bills increased as a result of the conditions imposed by the Commission or that they would likely decrease if the challenged conditions were lifted. The harms are even more speculative in light of the fact that, as explained further below, Charter was already in the process of implementing versions of the conditions of its own accord. Because it is purely speculative whether the conduct challenged by these petitioners actually harmed them or whether this Court can redress it, they lack standing to challenge the Commission's *Order*. *See, e.g.*, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (dismissing for lack of standing where it was purely speculative whether abolishing a challenged tax credit would benefit taxpayers, because it was unknown whether "legislators will pass along the supposed increased revenue in the form of tax reductions").

Cable companies adjust their rates all the time for a myriad of reasons. Here, petitioners have adduced no facts to demonstrate that the challenged conditions were the cause of the increase in their bills, let alone that New Charter—which is not a party to this litigation—would lower their bills were the

conditions to be lifted. Where a petitioner's injuries result from the independent actions of a third party, "it becomes the burden of the [party asserting standing] to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Spectrum Five v. FCC*, 758 F.3d 254, 260-61 (D.C. Cir. 2014), *see also Klamath Water Users Ass'n v. FERC*, 534 F.3d 735, 739 (D.C. Cir. 2008). Petitioners make no effort to meet that standard here.

In short, petitioners have not established standing to challenge any reviewable Commission order here. And because the Court's authority under *TRAC* to order mandamus for unreasonable delay is to preserve its eventual jurisdiction over a future case, this failure suggests—even were there to be any merit to petitioners' claims—that mandamus would be inappropriate.

2. Mandamus Is Not Warranted Under The Six TRAC Factors.

Setting aside the issue of petitioners' standing, petitioners also fail to demonstrate that mandamus relief is appropriate under the traditional six-factor test set forth in *TRAC* for unreasonable delay.

1. The first *TRAC* factor is that "the time agencies take to make decisions must be governed by a 'rule of reason.'" 750 F.2d at 80. CEI argues that this factor supports the grant of mandamus. Pet. 13-14. It does no such thing.

The rule of reason generally cannot be applied "in the abstract, by reference to some number of months or years beyond which agency inaction is presumed to be unlawful." *Mashpee Wampanoag Tribal Council v. Norton*, 336 F.3d 1094, 1102 (D.C. Cir. 2003). Rather, "[r]esolution of a claim of unreasonable delay is ordinarily a complicated and nuanced task requiring consideration of the particular facts and circumstances before the court." *Id*. at 1100.

Applying those standards, CEI has failed to justify mandamus in these circumstances. Its petition for administrative reconsideration has been pending before the Commission approximately 20 months, a period that does not remotely resemble the sort of "unreasonable delay" that would warrant the extraordinary remedy of mandamus. Indeed, this Court has routinely denied mandamus petitions in cases involving much longer periods of agency inaction. *See, e.g. Her Majesty the Queen In Right of Ontario v. EPA*, 912 F.2d 1525, 1534 (D.C. Cir. 1990) (delay of "more than nine years" was not unreasonable); *In re Monroe Commc'ns Corp*., 840 F.2d at 945-47 (delay of five years fell "so short of egregious" that it did not warrant mandamus); *TRAC*, 750 F.2d at 80-81 (delay of five years did not warrant mandamus).

2. Petitioners next argue that the agency's delay is unreasonable because the Commission has violated a statutory deadline—the second of the *TRAC* factors—by failing to rule on CEI's petition for reconsideration within 90 days of

the filing. *See* 47 U.S.C. § 405(a) (petitions for reconsideration relating "to an instrument of authorization granted without a hearing" must be acted upon within 90 days of filing); Pet. 13-15. But this Court has consistently held that violation of a statutory deadline does not necessarily warrant a grant of mandamus. *See In re Barr Labs.*, 930 F.2d at 74 ("Equitable relief, particularly mandamus, does not necessarily follow the finding of a [statutory] violation"); *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545 (D.C. Cir. 1999) (declining to issue writ of mandamus notwithstanding agency violated 90-day statutory deadline by failing to act for more than 8 years). In the context of merger applications specifically, this Court declined to "dictate" that an agency act after it missed a statutory deadline because the agency is in a "unique" and "authoritative" position to determine how best to allocate its resources toward resolving the various matters pending before it. *W. Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1175 (D.C. Cir. 2000). And even if the statutory timetable might be of particular relevance to a party to a transaction that files a petition for reconsideration—as in *In re People's Mojahedin Org. of Iran*, 680 F.3d 832 (D.C. Cir. 2012) (cited at Pet. 13-14)— CEI has not demonstrated that the statutory timeframe is of any particular significance when, as here, the petition for reconsideration is filed by a stranger to the transaction.

3. The third *TRAC* factor—that delay is "less tolerable when human health and welfare are at stake," *TRAC*, 750 F.2d at 80—suggests that mandamus is not warranted here because petitioners claim no threats to human health or welfare. Petitioners' alleged injuries are solely economic.

4. The fourth *TRAC* factor, too, weighs against a grant of mandamus. As the *TRAC* court recognized, any court action mandating that the agency focus on one issue impedes the agency's ability to conduct "activities of a higher or competing priority." *Id*. Thus, the Court repeatedly has emphasized that "an administrative agency is entitled to considerable deference in establishing a timetable for completing its proceedings." *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987); *see also In re Monroe Commc'ns*, 840 F.2d at 946 ("we must give agencies great latitude in determining their agendas"). And the Communications Act specially provides that the FCC "may conduct its proceedings in such manner as will [be conducive] to the proper dispatch of business and to the ends of justice." 47 U.S.C. §154(j). Thus, the fact that the Commission has "respond[ed] to similar petitions" (Pet. 15) is of little import because the agency "has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing." *Cutler*, 818 F.2d

at 896.[1] In any event, those other petitions presented more targeted requests for agency action than does CEI's petition for reconsideration, which involves a far broader request to remove several of the conditions imposed in the *Order*.

5. Petitioners exaggerate the "nature and extent of the interests prejudiced by delay," *TRAC*, 750 F.2d at 80—the fifth *TRAC* factor—as it pertains to the New Charter transaction. In particular, well before the Commission issued the *Order*, the applicants had already committed to or were in the process of implementing—of their own accord—a version of each of the conditions petitioners challenge.

The first condition prohibits New Charter from "imposing data caps or charging usage-based pricing for its residential broadband service" for seven years. *Order*, 31 FCC Rcd at 6330 ¶ 9. But in seeking FCC approval of the transaction, the applicants informed the Commission that they had already "committed to refrain from implementing data caps or [usage-based pricing] for three years." *Id.* at 6364 ¶ 78. In addition, they "maintain[ed] they ha[d] no current plans to implement data caps" in the future. *Id.* The Commission merely extended the usage-based pricing commitment to seven years and formally imposed the same

[1] And there is no requirement that the FCC address all petitions for reconsideration simultaneously, as "agencies need not address all problems 'in one fell swoop.'" *U.S. Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001) (quoting *Nat'l Ass'n of Broadcasters*, 740 F.2d 1190, 1207 (D.C. Cir. 1984)).

time commitment on data caps, with a right to petition to shorten the timeframe on either commitment to five years.

The second condition CEI challenges requires New Charter to offer settlement-free interconnection to large IP networks for seven years. Here again, Charter had already adopted in July 2015 a "new interconnection policy that enables third parties to connect with it through settlement-free peering" if they meet certain prerequisites, and committed to keep that policy in place until 2018. *Id*. at 6390 ¶ 133. The Commission made modifications to and extended that commitment to 2023, again with the right to petition to shorten it to five years.

The third condition, too, was an extension of the applicants' own plans. As the *Order* explains, "[t]he applicants … committed to building out to one million additional customer locations within four years of closing." *Id*. at 6504 ¶ 382. But as the *Order* notes, the applicants "would likely have completed such a build absent the proposed transaction." *Id.* Taking that into consideration, the Commission extended the required build out to an additional one million customers, *id.*—essentially holding the applicants to their own commitment. *Id*.

The fourth condition, too, was merely a gloss on Charter's own proposal. Charter filed a letter with the Commission in 2015 "describing plans for a low-income broadband program" that would be available "across the entire New Charter footprint." *Id*. at 6528 ¶ 450 . The Commission ultimately adopted a

"modified version of Charter's proposal," which set specific subscriber targets. *Id.* ¶ 453.

Thus, in all instances, the applicants themselves proposed versions of each condition of their own accord. And the applicants had the option to withdraw their transaction if they were unwilling or unable to meet these conditions—which they chose not to do.

6. The final *TRAC* factor is whether there is "impropriety lurking behind agency lassitude," 750 F.2d at 80 (internal quotation marks omitted). Where, as here, there is no evidence or even allegation of impropriety, "the absence of bad faith … is relevant to the appropriateness of mandamus," *In re Barr Labs.*, 930 F.2d at 76, and there is "no reason to think that judicial intervention would advance either fairness or Congress' policy objectives." *W. Coal Traffic League*, 216 F.3d at 1176. In short, on any reasonable application of the *TRAC* factors, the time the agency has taken to consider CEI's application has been reasonable, and mandamus should be denied.

B. Mandamus Is Not Warranted On The Ground That FCC Action Has Been "Unlawfully Withheld."

Unable to show that there has been unreasonable agency delay under the *TRAC* factors, petitioners offer a fallback theory: They claim that the agency has "unlawfully withheld action" by failing to meet "its 90-day statutory deadline to respond to CEI's petition for reconsideration." Pet. 21. Relying on *Forest*

Guardians v. Babbitt, 174 F.3d 1178 (10th Cir. 1999), petitioners contend that the Court must accordingly "compel agency action" under Section 706 of the APA.

This argument is inconsistent with precedent of this Court, which has never adopted the *Forest Guardians* standard. To the contrary, as explained above, this Court has repeatedly held that "[e]quitable relief, particularly mandamus, does not necessarily follow a finding of a [statutory] violation." *In re Barr Labs.*, 930 F.2d at 74.

In *Barr*, for example, the Court denied a petition for mandamus notwithstanding the FDA's failure to meet a 180-day statutory deadline to determine whether to approve generic drug applications. *Id*. at 73. The Court explained that the issue "is not whether the FDA's sluggishness has violated a statutory mandate—it has—but whether we should exercise our equitable powers to enforce the deadline." *Id*. at 74. The Court pointed out that "a finding that delay is unreasonable does not, alone, justify judicial intervention," *id*. at 75, and instead looked at the totality of the *TRAC* factors in denying mandamus relief. *See also United Mine Works of Am. Int'l. Union*, 190 F.3d at 546 (finding that "the agency's failure to conclude its rulemaking violate[d]" a statutory mandate, but declining to issue writ of mandamus); *W. Coal Traffic League*, 216 F.3d at 1174 (declining to compel action where agency failed to meet statutory deadline because

"the specificity of the statutory timetable is merely one of six factors we consider when determining whether a [party] is entitled to relief from the agency's delay.").

Petitioners nevertheless urge the Court to adopt the reasoning in *Forest Guardians*, a case in which the Tenth Circuit granted mandamus relief after determining that the United States Fish and Wildlife Service "unlawfully withheld agency action" within the meaning of the APA when it failed to meet a "statutorily imposed absolute deadline." *Id*. at 1190. But this Court has explained that "[s]ection 706 of the APA 'leaves in the courts the discretion to decide whether agency delay is unreasonable.'" *Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001). And there is no evidence that in enacting Section 706, Congress intended to withdraw the broad discretion agencies have always been afforded in determining how to set its priorities. *See Mashpee*, 336 F.3d at 1101 ("The agency is in a unique … position to view its projects a whole . . . and . . . [s]uch budget flexibility as Congress has allowed the agency is not for us to hijack."). When, as in this case, the petition for reconsideration has been pending for less than two years, mandamus relief is neither warranted nor appropriate because the delay is well "short of egregious," *In re Monroe Commc'ns Corp*., 840 F.2d at 946, even given the statutory time frame. In any event, as petitioners themselves concede (Pet. 25), *Barr* is the law of this circuit and cannot be overruled by a subsequent panel decision.

CONCLUSION

A writ of mandamus is an "extraordinary remedy, to be reserved for extraordinary situations." *In re Brooks*, 383 F.3d 1036, 1041 (D.C. Cir. 2004) (quoting *Cobell v. Norton*, 334 F.3d 1128, 1137 (D.C. Cir. 2003)). Petitioners have failed to demonstrate that such circumstances are present here, or that they have standing to pursue this matter. The Court therefore should deny the petition for a writ of mandamus.

Respectfully submitted,

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March 2, 2018

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I, Thaila Sundaresan, hereby certify that on March 2, 2018, I electronically filed the foregoing Opposition of the Federal Communications Commission To Petition For A Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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