ORAL ARGUMENT NOT YET SCHEDULED
No. 18-1281

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

COMPETITIVE ENTERPRISE INSTITUTE,
JOHN FRANCE, DANIEL FRANK,
JEAN-CLAUDE GRUFFAT, AND CHARLES HAYWOOD,
Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM ORDERS OF THE
FEDERAL COMMUNICATIONS COMMISIONS

INITIAL BRIEF FOR APPELLANTS

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January 14, 2019

Certificate as to Parties, Rulings, and Related Cases

Pursuant to Circuit Rules 12(c) and 28(a)(1), Appellants certify the following:

A. Parties and Amici

Appellants: Four individuals: John France, Daniel Frank, Jean-Claude Gruffat, and Charles Haywood; and the Competitive Enterprise Institute (CEI).

Appellee: Federal Communications Commission ("FCC").

Intervenors: The Court has not granted any motions to intervene at this time, nor have any motions been filed.

Amici: The Court has not granted any motions to participate in this case as *amicus curiae*, nor have any motions been filed.

B. Rulings Under Review

Appellants appeal the Memorandum Opinion & Order ("*Merger Order*") of the FCC in *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 (2016) and the Order on Reconsideration, FCC 18-127 (released Sept. 10, 2018) ("*Reconsideration Order*") in the same case.

C. Related Cases

Case No. 17-1261. Appellants filed a petition for reconsideration of the *Merger Order* with the FCC on June 9, 2016, asking the agency to modify its *Merger Order* by eliminating various unlawful conditions harming consumers that the FCC had placed on the transaction. The FCC failed to meet its ninety-day statutory deadline to respond to the Reconsideration Petition, *see* 47 U.S.C. § 405(a), and Appellants petitioned this Court for a mandamus to order the FCC to issue a decision. *See In re*

Competitive Enterprise Institute, et al., No. 17-1261. Over two years after Appellants sought reconsideration, and one week before oral argument was scheduled on their mandamus petition, the FCC issued an order denying the Reconsideration Petition. On September 13, 2018, Appeal No. 17-1261 was dismissed as moot. Appellants are aware of no other related cases.

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Appellants make the following disclosure: the Competitive Enterprise Institute (CEI) is a non-profit corporation organized under the laws of the District of Columbia. CEI has no parent corporation, and no publicly held company has a 10 percent or greater ownership interest in CEI.

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Statement Regarding Deferred Appendix

The parties have conferred and intend to use a deferred joint appendix.

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Glossary

Merger Order	*Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 31 FCC Rcd 6327 (rel. May 10, 2016)
Reconsideration Order	*Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations*, Order on Reconsideration, 32 FCC Rcd 3238 (rel. Apr. 3, 2017)
2002 Title II Order	*Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, *Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (2002), *aff'd*, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967 (2005)
2015 Title II Order	*Protecting and Promoting the Open Internet, Order on Remand, Order, Declaratory Ruling*, 30 FCC Rcd 5601 (2015)
2017 Charter Order	*Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations*, Order on Reconsideration, 32 FCC Rcd 3238 (rel. Apr. 3, 2017)
2018 Title II Order	*Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 311 (2018)
ACA	American Cable Association
APA	Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*
ASH	Action on Smoking & Health
BHN	Bright House Networks, LLC
CEI	Competitive Enterprise Institute
Communications Act	Communications Act of 1934 as amended, 47 U.S.C. §§ 151–622
FCC	Federal Communications Commission

FCC Public Notice	*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*, DA 15-1010 (Sept. 11, 2015)
ICC	Interstate Commerce Commission
MPAA	Motion Picture Association of America
NHTSA	National Highway Traffic Safety Administration
PEPCO	Potomac Electric Power Company
SEC	Securities and Exchange Commission
TRAC	Telecommunications Research & Action Center
TWC	Time Warner Cable Inc.
UCC	United Church of Christ

Jurisdictional Statement

The Federal Communications Commission ("FCC") is empowered by Congress pursuant to the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.* (the "Communications Act"), to review applications to transfer cable television relay services, private wireless licenses, and satellite communications licenses. *Id.* §§ 214(a), 310(d). At issue is the FCC's action on applications by three major U.S. cable companies, Charter, Time Warner Cable, and Bright House Networks, to transfer such licenses and authorizations in order to consummate a merger of the companies. The FCC issued its Memorandum Opinion & Order, 31 FCC Rcd 6327 (2016) ("*Merger Order*"), approving the applications on May 10, 2016. *Merger Order* ¶ 1 (JA___).

Appellants filed a timely petition for reconsideration with the FCC on June 9, 2016. The FCC's order denying Appellants' petition for reconsideration ("*Reconsideration Order*"), FCC 18-127, was released on September 10, 2018. *Reconsideration Order* (JA___). Appellants filed their notice of appeal in this Court on October 9, 2018. (JA___). This notice is timely under 47 U.S.C. § 402(c) because the petition for reconsideration suspends the thirty-day period to appeal, which "begins to run anew from the date on which final action is taken on the petition" for reconsideration. *Los Angeles SMSA Ltd. Partnership v. FCC*, 70 F.3d 1358, 1359 (D.C. Cir. 1995). (The release date of September 10 is the date of "public notice" under 47 U.S.C. § 402(b). 47 C.F.R. § 1.4.)

The *Reconsideration Order* is treated as final and appealable. 47 U.S.C. § 405(b)(2). 47 U.S.C. § 402(b)(3) provides that the United States Court of Appeals for the District

of Columbia Circuit is the exclusive appellate venue for appeal of the FCC's licensing transfer decisions. Jurisdiction in this Court is proper pursuant to 47 U.S.C. § 402(b)(6) because Appellants are "person[s] who [are] aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described" in 47 U.S.C. § 402(b)(3). Appellants are aggrieved by the FCC's *Merger Order* because it imposed conditions on the merger approval that harm consumers, including Appellants. *See Merger Order* ¶¶ 45, 388, 450, 456 (JA__, JA___, JA___, JA___); Section III, below.

Thus, this Court has jurisdiction over Appellants' challenge of the *Merger Order* and *Reconsideration Order* because the orders are final and the appeal was timely filed.

Standard of Review

"An order from the Commission that exceeds the scope of its statutory authority is, by definition, not in accordance with the law and subject to vacatur." *All Am. Tel. Co., Inc. v. FCC*, 867 F.3d 81, 89 (D.C. Cir. 2017). The question whether the Communications Act delegates authority to the FCC to impose conditions on the merger approval is reviewed *de novo*. *See Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005); *MPAA v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002). Where "an agency's assertion of power into new arenas is under attack, … courts should perform a close and searching analysis of congressional intent." *ACLU v. FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987).

Under the "arbitrary and capricious" standard for review of Administrative Procedure Act ("APA") challenges, the "court must ensure that the agency's action—

and the agency's explanation for that action—falls within a zone of reasonableness." *Multicultural Media, Telecom & Internet Council v. FCC*, 873 F.3d 932, 937 (D.C. Cir. 2017).

Questions of standing are reviewed *de novo*. *Crossroads Grassroots Policy Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 316 (D.C. Cir. 2015).

Statement of the Issues

1. Section 214 of Title II of the Communications Act delegates authority to the FCC to review proposed transfers of certain licenses and authorizations and impose conditions on such transfers. 47 U.S.C. §§ 214(a), 310(d). The FCC forbore applying Section 214 to broadband service. *2015 Title II Order* ¶ 511. Did the *Merger Order* exceed the FCC's statutory authority because it imposed conditions on the transfer approval regarding New Charter's broadband service even though the FCC forbore from applying Section 214 to broadband service?

2. Section 214 of Title II of the Communications Act delegates authority to the FCC to attach "terms and conditions" to the transfer approval that "public convenience and necessity may require." 47 U.S.C. § 214(c). "The FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue." *MPAA v. FCC*, 309 F.3d at 806. The FCC's "public interest authority enables [it], where appropriate, to impose and enforce *transaction-related* conditions." *Merger Order* ¶ 30 (JA___) (emphasis added). An agency acts unlawfully when it "contradict[s] itself" based on reasoning that is "internally inconsistent and

therefore arbitrary." *Business Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011).

a. Did the *Merger Order* exceed the FCC's statutory authority because its condition requiring New Charter to build out its network to an additional two million customers is not transaction-related and because the agency would not otherwise have the authority to issue such a regulation? And was the *Merger Order* arbitrary and capricious because the buildout condition contradicts the agency's own findings expressing concerns regarding the post-merger size of New Charter?

b. Did the *Merger Order* exceed the FCC's statutory authority because its condition requiring New Charter to provide a low-income broadband program is not transaction-related and because the agency would not otherwise have the authority to issue such a regulation?

c. Did the *Merger Order* exceed the FCC's statutory authority because its condition requiring New Charter to refrain from data caps or usage-based pricing for seven years is not transaction-related and because the agency would not otherwise have the authority to issue such a regulation? And was the *Merger Order* arbitrary and capricious because the data caps and usage-based pricing condition contradicts the agency's own findings that New Charter would not likely change its pricing post merger?

2. 47 C.F.R. § 1.106(b)(1) permits a person to seek reconsideration of an order without previously objecting when there is "good reason why it was not possible for him to participate in earlier stages of the proceeding." The FCC gave no public notice that it was considering placing conditions on the merger approval. Did

the FCC err when it found that Appellants' failure to object to an issue that did not yet exist precluded them from moving for reconsideration?

3. Did the FCC err when it found that Appellants lacked standing because they did not show cognizable injury despite record evidence demonstrating injury including Appellants' declarations attesting to injury from the merger conditions, the declaration of telecommunications expert Dr. Robert Crandall declaring that the merger conditions would specifically injure Appellants, and Commissioner O'Rielly's Statement dissenting in part from the *Merger Order* finding that customers of the merging companies would be injured by the *Merger Order's* conditions?

4. An organization can satisfy associational standing to sue on behalf of its members based on "injury to the interests of one of its board members." *Action on Smoking & Health (ASH) v. Dep't of Labor*, 100 F.3d 991, 991-92 (D.C. Cir. 1996). Did the FCC err when it found that Appellant CEI lacked associational standing because Appellant Gruffat serves on CEI's Board but is not a "member[]" of CEI?

Statutes and Regulations

The text of pertinent statutes and regulations are contained in the Addendum attached to this Initial Brief.

Statement of the Case

A. Charter, Time Warner Cable and Bright House Networks agree to merge.

On May 23, 2015, three major U.S. cable companies, Charter, Time Warner Cable, and Bright House Networks, announced they had agreed to merge into a new

entity referred to by the merging parties as the "New Charter." *Merger Order* ¶ 18 (JA___). To consummate this transaction, the companies needed to transfer various FCC licenses and authorizations—including cable television relay services, private wireless licenses, and satellite communications licenses—to New Charter. *Id.* ¶ 26 (JA___). The Communications Act empowers the FCC to review applications to transfer such licenses and authorizations. 47 U.S.C. §§ 214(a), 310(d).

B. FCC requests public comments regarding the New Charter merger.

On September 11, 2015, the FCC issued public notice requesting comments to be filed by October 13, 2015. FCC Public Notice (JA___). The FCC's request for public comments never mentioned that the agency was considering imposing any particular conditions on the license transfers. *See id.* Appellant Competitive Enterprise Institute ("CEI") submitted comments on October 13, 2015. *See* CEI Comments (JA___.) Thousands of comments were received. *See* FCC Certified Index of Items in the Record, No. 18-1281.

C. FCC approves applications but imposes conditions on merger.

On May 10, 2016, the FCC released its Memorandum Opinion & Order ("*Merger Order*") in *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 (2016), approving the cable companies' applications, effectively allowing the companies to finalize their merger. *Merger Order* ¶ 1 (JA___). The *Merger Order* was issued without public hearing. *See id.* ¶ 2 (approving the applications without designating them for a hearing).

The FCC's approval imposed various conditions on New Charter that the agency contended were necessary to "ensure that the transaction will yield net public interest benefits." *Merger Order* ¶ 30 (JA___). The order requires New Charter to comply, among other requirements, with the following:

- 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," *id.* ¶ 388 (JA___);
- 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)," *id.* ¶ 450 (JA___);
- Offer "settlement-free interconnection" to "edge providers" including, in particular, online video distributors such as Netflix or Amazon, for seven years after the transaction closes, *id.* ¶ 456 (JA___); and
- Refrain from imposing "data caps" on, or setting "usage-based prices" for, its residential broadband Internet access services for seven years after the transaction closes, *id.* ¶ 45 (JA___).

D. Commissioners Pai and O'Rielly issue dissents criticizing the merger approval process and the merger conditions.

Commissioners Ajit Pai and Michael P. O'Rielly issued dissenting statements regarding the merger approval. Commissioner Pai, who has since been elevated to FCC Chairman, complained that the approval was not based on any finding of public interest, but was used as a "vehicle for advancing its ambitious agenda to micromanage the Internet economy." *Merger Order*, Dissenting Statement of Commissioner Ajit Pai ("Pai Dissent") at 340 (JA___). He questioned the legality of imposing the merger conditions: the approval was merely "an opportunity for the Commission to check more items off its regulatory wish list." *Id.* at 343.

Questioning the legitimacy of the FCC merger approval process, Commissioner Pai provided a peek behind the curtains of how the conditions are negotiated:

> Unlike at the Department of Justice, the process is politicized from the beginning; the FCC staff report to the Chairman's Office and are often overseen directly by someone loyal to the Chairman's Office. Separately, and more significantly, the parties are required to negotiate behind closed doors with the Chairman's Office or Office of General Counsel (which, again, reports directly to the Chairman's Office) on conditions to be attached to the deal. Months can go by without any transparency, internal or external, regarding the ornaments that the Chairman's Office is seeking to place on the Christmas tree. Even Commissioners have no insight as a matter of right, and parties have told me that they are explicitly warned not to tell anyone else at the Commission about the conditions the Chairman's Office is seeking. And when it comes to those conditions, there is no need for them to be relevant to the merger ("merger-specific," in antitrust parlance).

Id. at 343; *see* Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements,* 53 FED. COMM. L.J. 49, 57 (2000) ("Companies—facing pressure from all quarters to close the transaction—feel they have little choice but to come calling on the Commission, hats in hand, prepared to 'voluntarily' do almost anything to close the deal. In the end, the current Commission often insists on extensive 'voluntary' license-transfer conditions.). Commissioner Pai concluded: "Given how badly broken the current merger review process has become at the FCC—how rife it is with fact-free, dilatory, politically motivated, non-transparent decision-making—I believe Congress should implement major reforms of the procedural and/or substantive rules governing the Commission's assessment of transactions." Pai Dissent at 343 (JA___). Commissioner Pai also questioned the conditions themselves. He criticized the buildout and low-income broadband requirements as not being transaction specific. *Id.* at 341-42 (JA___). He also argued that forbidding usage-based pricing would require consumers "who use less data to subsidize those who use more data." *Id.* at 341 (JA___).

Commissioner Michael P. O'Rielly found it "highly inappropriate for the Commission to include items or conditions that are not part of the transaction itself as a price for approval." *Merger Order*, Statement of Commissioner Michael P. O'Rielly ("O'Rielly Statement") at 347 (JA___). Commissioner O'Rielly found that the non-transaction-specific conditions "actually cause harm to the applicant's existing subscribers" and that the conditions "will result in increases in the cost of cable and broadband service for every current cable subscriber of the three companies." *Id.* at 348. Commissioner O'Rielly describes how the build-out requirement would harm its

customers by diverting capital the company could use to improve services; by artificially introducing competition into "nearby markets of another provider at the expense of the other provider's customers"; and by burdening New Charter with debt that potentially threatens the "viability of the company." *Id.*

E. Appellants file a petition for reconsideration.

On June 9, 2016, thirty days after the FCC released its order approving the companies' applications, the Competitive Enterprise Institute ("CEI") and four individuals—John France, Daniel Frank, Jean-Claude Gruffat, and Charles Haywood—(collectively "Appellants") filed a petition for reconsideration urging the FCC to reconsider its conditions on New Charter on the grounds that they were contrary to the public interest, exceeded the Commission's statutory authority, and were issued by the Commission without affording the public notice and a meaningful opportunity to comment. *See* Petition for Reconsideration (JA___). The petition was timely under 47 U.S.C. § 405(a).

In addition to the petition filed by Appellants, three other organizations—one company and two trade associations—filed timely petitions for reconsideration of the *Merger Order*. On April 3, 2017, the agency issued an order ("*2017 Charter Order*") granting two of these petitions, one of which was filed by the American Cable Association (ACA), and the other by NTCA–The Rural Broadband Association. *2017 Charter Order*, 32 FCC Rcd 3238, ¶ 2 (JA___). The FCC acknowledged in its *2017 Charter Order* that Appellants' petition was "not the subject of this Order on Reconsideration." *Id.* ¶ 6 n.11 (JA___).

The *2017 Charter Order* concluded that the buildout condition did not relate to any transaction-specific harm or benefit, and that it did not further the public interest. *Id.* ¶¶ 9-10 (JA___). The FCC modified the buildout condition to permit New Charter to build out its network to two million customer locations not served by any broadband provider—in contrast to the *Merger Order*, which required that half of New Charter's network expansion cover customer locations already served by at least one broadband provider. *2017 Charter Order* ¶ 2 (JA___). The *2017 Charter Order* did not address any of the other conditions objected to by Appellants. *See id.* (JA___).

F. Appellants file petition for writ of mandamus.

Because the Commission failed to meet its ninety-day statutory deadline to respond to Appellants' Reconsideration Petition, *see* 47 U.S.C. § 405(a), Appellants petitioned this Court for a mandamus to order the Commission to issue a decision. *See In re Competitive Enterprise Institute, et al.*, No. 17-1261. Included with the mandamus petition were declarations of the Appellants attesting to their injuries caused by the challenged merger conditions. *See* Petition for Writ of Mandamus, No. 17-1261.

Dr. John France is an individual who subscribes to New Charter's television and broadband Internet access services of New Charter. *See* Declaration of Dr. John France, A21.[1] Before the merger, he subscribed to BHN. *Id.* Daniel Frank is an individual who subscribes to New Charter's broadband Internet access services. *See* Declaration of Daniel Frank, A22-A23. Before the merger, he subscribed to TWC. *Id.* Charles Haywood is an individual who subscribes to New Charter's television and

[1] "Axyz" refers to page xyz of the Addendum to Appellants' Initial Brief.

broadband Internet access services. *See* Declaration of Charles Haywood, A25-A26. Before the merger, he subscribed to BHN. *Id.* Jean-Claude Gruffat is an individual who subscribes to New Charter's television and broadband Internet access services. *See* Declaration of Jean-Claude Gruffat, A24. Before the merger, he subscribed to TWC. *Id.*

As individual consumers who subscribe to the services of New Charter, France, Frank, Gruffat, and Haywood would prefer not to pay higher prices or receive inferior services. A21-A26. After the merger, however, Appellants France, Frank, and Haywood paid more for the same services. *See* A21 (increase from $84 to $101 per month for same services), A23 (increase from $75.99 to $79.99 per month for same services), A26 (increase from $51 to $71 per month for the same services). Appellant Gruffat declared that "the costs and conditions of the FCC's Order are likely to make my Charter service worse and/or more expensive, because they are likely to result in Charter charging me higher prices—and investing less in improving my service—than it otherwise would." A24.

Appellants' allegations of consumer injury were supported by Dr. Robert W. Crandall, a Ph.D. economist formerly with the Brookings Institute for 37 years, who has published numerous books and journal articles on telecommunications and cable television regulatory policy. *See* Declaration of Robert W. Crandall ¶ 1 ("Crandall Decl."), A27. Dr. Crandall concluded that the FCC's merger conditions harm consumers by either "reducing the quality of their services they receive or raising their cable rates relative to those that would have existed without these conditions." *Id.* ¶ 4, A27-A28.

G. FCC issues its Reconsideration Order.

After failing to act on Appellants' reconsideration petition for over two years, the FCC finally responded, just seven days before argument was scheduled in *In re Competitive Enterprise Institute, et al.*, No. 17-1261. *See Reconsideration Order* (JA___). In its *Reconsideration Order*, the FCC denied Appellants' petition, holding that Appellants were "barred from objecting to the Charter conditions for the first time on reconsideration." *Reconsideration Order* ¶¶ 2-6 (JA___). The FCC also held that Appellants lacked standing because Appellants had "not shown that the four individuals have suffered any cognizable injury stemming from the conditions at issue" and that "CEI did not have associational standing." *Id.* ¶ 6 (JA___).

This timely appeal followed.

Summary of Argument

When three cable companies—Charter, Time Warner Cable, and Bright House—applied to the FCC to combine their FCC licenses to form a new company, known as the "New Charter," the FCC seized the opportunity to regulate via merger review. The FCC imposed conditions on the merger approval that had nothing to do with the merger transaction and that the FCC would otherwise have no authority to regulate. As then-Commissioner—and current FCC Chairman—Ajit Pai described, the FCC "turned the transaction into a vehicle for advancing its ambitious agenda to micromanage the Internet economy." Pai Dissent at 340 (JA___).

The Communications Act, the FCC's enabling statute, tasks the agency with reviewing proposed transfers of telecommunications lines and wireless licenses to ensure that such transfers are consistent with the public interest. 47 U.S.C. § 214(a); *id.*

§ 310(d). In approving such transfers, the agency may attach "terms and conditions" to the transfer approval. 47 U.S.C. § 214(c). The agency has no authority, however, to issue transfer approvals (and accompanying conditions) regarding broadband service. Because the conditions on the New Charter approval deal exclusively with how New Charter operates its cable broadband service, the FCC had no authority to issue such conditions. *See* Section I.A.

Even if the FCC's transfer approval authority extended to broadband service, the agency may only attach conditions to a transfer approval that "public convenience and necessity [] require." 47 U.S.C. § 214(c). The condition must specifically address a public-interest harm caused by the transaction and must be a regulation that the FCC would have the authority to promulgate absent the transaction. *See* Section I.B. Here, the conditions (regarding pricing, practices and footprint of New Charter's broadband services) do not address a transaction-specific harm and the FCC would not otherwise have the authority to issue such regulations regarding broadband service. The FCC exceeded its statutory authority in imposing such conditions and the Court should set them aside as unlawful. *See* Section I.C.

The FCC provided no public notice that it was even considering including these conditions as part of the merger approval, but instead, first announced it was imposing these merger conditions when it issued its order approving the merger. Appellants timely filed a petition for reconsideration, challenging the merger conditions, but the FCC sat on Appellants' petition for reconsideration for two years. When it finally issued its decision, the FCC held that Appellants could not challenge the conditions because Appellants should have objected earlier to the conditions.

According to the FCC's holding, Appellants should have *predicted* that the FCC was considering imposing such conditions and having failed to submit such predictions, Appellants could not petition for reconsideration. The FCC's conclusion is an abuse of discretion, contravenes FCC regulations and operative statutes, and more importantly, does not prevent this Court from now reviewing the unlawful merger conditions. *See Section* II.

In its order denying Appellants' petition for reconsideration, the FCC also found that the individual Appellants lacked standing because they had not suffered any cognizable injury stemming from the conditions at issue and that Appellant Competitive Enterprise Institute (CEI) did not have associational standing. The FCC's order disregards declarations previously submitted by Appellants demonstrating injury, as well as the findings of Commissioner O'Rielly who recognized that consumers of the merging companies would be harmed by the conditions. The individual Appellants more than satisfy the demands of Article III and Appellant CEI also has associational standing because individual Appellant Jean-Claude Gruffat is on CEI's Board of Directors. *See* Section III.

Identity and Standing of Appellants

Appellants include four individuals—John France, Daniel Frank, Jean-Claude Gruffat, and Charles Haywood—and the Competitive Enterprise Institute (CEI). Appellants may demonstrate standing through declarations submitted to the appellate court for purposes of establishing Article III jurisdiction. *See* 28 U.S.C. § 1653; *Cobell v. Salazar*, 679 F.3d 909, 919 (D.C. Cir. 2012); *United States Telecom Ass'n v. FCC*, 295

F.3d 1326, 1330-31 (D.C. Cir. 2002) ("*Telecom I*"). Declarations for each of the Appellants are attached to this Initial Brief, attesting to the injuries caused to Appellants by the merger conditions. *See* A21-A26. These declarations are supported by the Declaration of Robert W. Crandall who concludes that the FCC's merger conditions harm consumers by either "reducing the quality of their services they receive or raising their cable rates relative to those that would have existed without these conditions." Crandall Decl. ¶ 4, A27-A28. *See* Section III.A.

Appellant Gruffat is also a member of the Board of Directors of Appellant CEI. *Id.* CEI is a non-profit public interest organization dedicated to advancing free-market solutions to regulatory issues. CEI regularly participates in FCC rulemaking proceedings by filing comments with the agency, including comments regarding the applications filed with the FCC for the New Charter merger. (JA___). Based on Gruffat's individual standing, CEI has organizational standing. *See* Section III.B.

Argument

I. The FCC exceeded its statutory authority by imposing conditions unrelated to the services provided under the licenses and authorizations at issue and/or unrelated to any transaction-specific harm.

The Communications Act, the FCC's enabling statute, tasks the agency with reviewing proposed transfers of telecommunications lines and wireless licenses to ensure that such transfers are consistent with the public interest. 47 U.S.C. § 214(a) (telecommunications lines); *id.* § 310(d) (wireless licenses). Here, three cable companies—Charter, TWC, and BHN—sought the FCC's permission to transfer various licenses and authorizations necessary to consummate their merger. *Merger*

Order ¶ 1 (JA___). The agency approved these transfers but imposed numerous conditions on the transaction that deal exclusively with how New Charter operates its cable broadband service. *Id.* at ¶¶ 9-12 (JA___). As an initial matter, the conditions are unlawful because the FCC's authority to approve transfers does not extend to broadband service. *See* Section I.A.

Even if the agency's authority for issuing conditions extended to broadband service, the agency may only attach "terms and conditions" to the transfer approval that "public convenience and necessity [] require." 47 U.S.C. § 214(c). The condition must specifically address a public-interest harm caused by the transaction and must be a regulation that the FCC would have the authority to promulgate absent the transaction. *See respectively* Section I.B.2 and Section I.B.1.

The conditions here are unlawful because the FCC would not otherwise have the authority to issue such regulations and/or the conditions bear no relation to any public-interest harm likely to result from the merger. *See* Section I.C.

A. The FCC's authority to impose conditions on transfers of licenses and authorizations does not encompass broadband service.

The FCC's power to impose conditions on proposed transfers of certain licenses and authorizations comes from Sections 214 and 310 of the Communications Act. 47 U.S.C. §§ 214(c), 310(d). The FCC has never applied either of these provisions to cable broadband service. In 2002, the agency determined that cable broadband is not a "telecommunications service" and, as such, is not subject to Title II of the Communications Act (including Section 214). *Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, *Declaratory Ruling and Notice of Proposed Rulemaking*

("*2002 Title II Order*"), 17 FCC Rcd 4798, 4802, ¶ 7 (2002), *aff'd*, *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 1003 (2005).

In 2015, the FCC reversed itself on whether Title II applies to broadband, issuing a rule that reinterpreted Title II to encompass wireline broadband, but the agency nonetheless maintained that it would *not* apply Section 214 to broadband service. *See Protecting and Promoting the Open Internet, Order on Remand, Order, Declaratory Ruling* ("*2015 Title II Order*"), 30 FCC Rcd 5601, 5848–5849, ¶ 511 (2015).[2] In 2018, the FCC decided once again that wireline broadband service—including cable broadband—is not subject to Title II of the Communications Act. *See Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order* ("*2018 Title II Order*"), 33 FCC Rcd 311, 312, ¶ 2 (2018). As the agency explained, it was ending its "utility-style regulation of the Internet in favor of the market-based policies necessary to preserve the future of Internet freedom." *Id.* This light-touch approach to broadband regulation reflects the will of Congress, which in 1996 added to the Communications Act a provision stating that "[i]t is the policy of the United States … to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b).

Section 160 of the Communications Act provides that the FCC "shall forbear" from applying any regulation or provision of the Communications Act if the agency

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[2] The FCC did not forbore from Section 214(e), involving universal service. *2015 Title II Order* ¶ 486.

makes findings that (1) enforcement is not necessary to ensure that the charges and practices are "just and reasonable and are not unjustly or unreasonably discriminatory" (2) enforcement "is not necessary for the protection of consumers," and (3) forbearance is "consistent with the public interest." 47 U.S.C. § 160(a). Mirroring the requirements of Section 160, the FCC made specific findings regarding the application of Section 214 to broadband service, holding that "other protections will be sufficient to ensure just, reasonable, and nondiscriminatory conduct by providers of broadband Internet access service and to protect consumers" and that it was "in the public interest to forbear from applying section 214 with respect to broadband Internet access service insofar as that provision would require Commission approval of transfers of control involving that service." *2015 Title II Order* ¶ 511.

Under the FCC's Title II Orders, Section 214 never applied to broadband access, but based on the specific findings in the *2015 Title II Order*, the FCC was actually *prohibited* under 47 U.S.C. § 160(a) ("Commission shall forbear") from applying Section 214 authorizing approval of transfers (including issuing terms and conditions for transfers) regarding broadband service. *See Murphy v. Smith*, 138 S. Ct. 784, 787 (2018) ("[T]he word 'shall' usually creates a mandate, not a liberty…."); *cf. United States Telecom Ass'n v. FCC*, 825 F.3d 674, 728 (D.C. Cir. 2016) ("*Telecom II*") (affirming FCC's forbearance in *2015 Title II Order* of Sections 251 and 252).

Here, Appellants challenge four conditions placed on the New Charter approval: commitment to build out its broadband Internet access service to two million additional customers, *Merger Order* ¶ 388 (JA___); providing broadband service

to low-income customers at $14.99 per month, *id.* ¶¶ 452–453 (JA___); providing "settlement-free"—i.e., unpaid—interconnection to Internet platforms such as Netflix, *id.* ¶ 132-33 (JA___); and "refrain[ing] from the use of data caps or UBP [usage-based pricing]" for seven years, *id.* ¶ 74 (JA___). These conditions are not related to the company's wireless licenses and telecommunications authorizations for which it sought and obtained the agency's approval to transfer. *See Merger Order*, Appendix A (JA___) ("List of Licenses and Authorizations to be Transferred"). (Nowhere in its *Merger Order* does the FCC even attempt to explain how these four conditions relate to the licenses and authorizations at issue in the New Charter application.) Instead, these conditions deal exclusively with how New Charter operates its cable broadband service. The *Merger Order* could not lawfully "depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." *FCC v. Fox Television Stations, Inc.*, 556 U.S 502, 515 (2009). Accordingly, without authority under Section 214 to approve broadband transfers, the agency also had no authority to issue conditions regarding broadband and the merger conditions were unlawfully imposed.

B. The FCC's transaction review authority does not give the agency carte blanche to dictate merging firms' behavior in exchange for approving the transfer of licenses or authorizations.

Even if the agency's authority for issuing conditions extended to broadband service, the agency may only attach "terms and conditions" to the transfer approval (1) that the FCC would otherwise have the authority to issue, and (2) that address a transaction-specific harm.

1. The agency's authority to advance the public interest must be grounded in the Communications Act when it adjudicates telecommunications transactions.

The FCC may attach "terms and conditions" to the transfer approval that "public convenience and necessity may require." 47 U.S.C. § 214(c). The FCC may not, however, rely on its "public-interest provisions without mooring its action to a distinct grant of authority" in the Communications Act. *Cellco P'ship v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012). For example, in *MPAA v. FCC*, the FCC adopted rules mandating television programming with video descriptions. 309 F.3d 796, 798 (D.C. Cir. 2002). The Communications Act did not provide the FCC the authority to enact video description rules, but the FCC argued that the rules were "obviously a 'valid communications policy goal' and in the public interest," and thus authorized by 47 U.S.C. § 303(r), which permits the FCC to regulate in the public interest "as may be necessary to carry out the provisions of [the] Act." *Id.* at 806. This Court reversed. "The FCC cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue." *Id.* Indeed, "[t]he FCC must act pursuant to *delegated authority* before any 'public interest' inquiry is made…." *Id.*

As Judge Frank Easterbrook has observed, "[o]ften an agency with the power to deny an application … will grant approval only if the regulated firm agrees to conditions. The agency may use this power to obtain adherence to rules that it could not require by invoking statutory authority." Frank Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 Harv. L. Rev. 4, 39 (1984). This practice can "greatly increase the span of the agency's control." *Id.* This Court has warned that for an agency to use procedural gimmicks "to do indirectly what it

cannot do directly" is fundamentally inconsistent with the APA. *Natural Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 763 n.23 (D.C. Cir. 1982) (criticizing EPA for "indefinitely postpon[ing]" a rule, rather than repealing it, to evade judicial review). Indeed, in a directly analogous situation under the Natural Gas Act, this Court has held that an agency "may not, however, when it lacks the power to promote the public interest directly, do so indirectly by attaching a condition to a certificate that is, in unconditional form, already in the public convenience and necessity." *National Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990). "[O]nce want of power to do this directly were established, the existence of power to achieve the same end directly through the conditioning power might well be doubted." *Mid-Continent Oil Co. v. FPC*, 364 U.S. 137, 152 (1960).

The FCC has repeatedly abused its transaction review authority "to attain policy goals outside the strictures of the statute and the courts." Bryan N. Tramont, *Too Much Power, Too Little Restraint: How the FCC Expands Its Reach Through Unenforceable and Unwieldy "Voluntary" Agreements*, 53 FED. COMM. L.J. 49, 54 (2000). If the agency's power to give orders to merging firms is unconstrained, it would render meaningless much of Titles II and III of the Communications Act, which describe in detail the contours of the FCC's authority to regulate telecommunications carriers and wireless licensees. *See* 47 U.S.C. §§ 201–276 (Title II); *id.* §§ 301–399b (Title III). Here, the FCC abused its authority to review New Charter's transfers of licenses and authorizations, usurping powers not delegated to the agency by Congress. Because the FCC's conditions on New Charter run far afield of any regulations the agency could lawfully promulgate under the Communications Act, *see* Section III.C, those

conditions are unlawful and must be vacated. *All Am. Tel. Co., Inc. v. FCC*, 867 F.3d 81, 89 (D.C. Cir. 2017) (FCC order that "exceeds the scope of its statutory authority is, by definition, not in accordance with the law and subject to vacatur").

2. Any conditions imposed must arise as an incident to the transaction itself.

When the FCC determines that a proposed transaction may harm the public interest, it may impose conditions on the transaction to remedy these potential harms. As the FCC observed in issuing the *Merger Order*, "our public interest authority enables us, where appropriate, to impose and enforce *transaction-related conditions* to ensure that the public interest is served by the transaction." *Merger Order* ¶ 30 (JA___) (emphasis added) (citing orders).[3] "With respect to remedying harms, the Commission has held that it will impose conditions only to remedy harms that arise from the transaction (i.e., transaction-specific harms) and that are related to the Commission's responsibilities under the Communications Act and related statutes." *Id.* ¶ 454 n. 1500 (JA___) (citing *AT&T-Verizon Wireless Order*, 25 FCC Rcd at 8747, ¶ 101).

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[3] *See also Merger Order* ¶ 148 n. 461 (JA___) (finding competitive harm as not "transaction-specific"), ¶ 264 (JA___) (finding no "transaction-specific" harm to necessitate program carriage conditions), ¶ 274 (JA___) (refusing to adopt conditions regarding diversity of programming because concerns were not "transaction-specific"), ¶¶ 285-288 (JA___) (refusing to adopt Latino programming conditions because concerns were not "transaction-specific"), ¶ 297 (JA___) (refusing to impose PEG-related conditions because there was no "transaction-specific" harm), ¶ 314 (JA___) (refusing to address harms that pre-date filing because they were "not related to the transaction proposed therein").

The FCC does not have the authority to require merging firms to conduct themselves in whatever manner that the agency believes would benefit the public interest *unrelated to the transaction*. Otherwise, the agency's authority over firms seeking to transfer licenses or authorizations would be effectively boundless, free from any limiting principle—a situation that Congress almost certainly did not intend when it passed the Communications Act. *See Mexichem Fluor Inc. v. EPA*, 866 F.3d 451, 459 (D.C. Cir. 2017) (rejecting "boundless interpretation of EPA's authority" as "border[ing] on the absurd"); *Loan Syndications and Trading Ass'n v. SEC*, 882 F.3d 220, 224-25 (D.C. Cir. 2018) ("That the agencies' interpretation sweeps so far beyond any reasonable estimate of the congressional purpose confirms our view that the interpretation is beyond the statutory language."). If Congress had wished to grant the agency such broad powers over "decisions of vast economic and political significance," it would have done so expressly. *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014). Congress, in delegating authority to agencies, "does not … hide elephants in mouseholes." *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001); *cf. J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (congressional "delegation of legislative power" is "forbidden" if it lacks an "intelligible principle" to which the agency "is directed to conform").

For instance, the agency may impose price-related conditions on a transaction that, if consummated, would give the firm the "ability and incentive to discriminate against compet[itors]." *Atl. Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389 (D.C. Cir. 1995). And the agency may impose conditions on licensees to advance the agency's established policies regarding the provision of such licensed services. *W. Union Tel. Co.*

v. FCC, 541 F.2d 346, 354–55 (3d Cir. 1976). But the FCC cannot, as they did here (Section I.C below), impose conditions unrelated to the transaction.

Such machinations are reminiscent of those that the Supreme Court has repeatedly condemned as unconstitutional regulatory takings. *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). This trilogy of cases prohibits the government from imposing conditions on the use of private property, when those exactions are unrelated or disproportional to the intended use of the property. *Nollan*, 483 U.S. at 831; *Dolan*, 512 U.S. at 384; *Koontz*, 133 S. Ct. at 2591.

The FCC's authority to issue conditions stems directly from its authority to approve the license transfers under Section 214: "The Commission shall have power to issue such certificate as applied for … *and may attach to the issuance of the certificate* such terms and conditions as in its judgment the public convenience and necessity may require." 47 U.S.C. § 214(c) (emphasis added). As this Court has held, "[t]he primary purpose of Section 214(a) is the prevention of unnecessary duplication of facilities, not regulation of services." *MCI Telecoms. Corp. v. FCC*, 561 F.2d 365, 375 (D.C. Cir. 1977). It has only "a limited office with respect to regulation of service offerings on existing lines." *Id.* Therefore, if the FCC issues conditions that do not relate to the transfer approval at issue, the FCC exceeds its statutory authority and the conditions must fail. 5 U.S.C. § 706 ("The reviewing court shall … hold unlawful and set aside agency action … in excess of statutory jurisdiction, authority, or limitations…."); *All Am. Tel. Co., Inc.*, 867 F.3d at 89.

Indeed, permitting conditions that are not transaction-specific contradicts previous FCC rulings, *see Merger Order* ¶ 30 (JA___), and is thus provided no deference, *Norfolk S. Railway Co. v. Shanklin*, 529 U.S. 344, 356 (2000), and is arbitrary and capricious absent a reasoned analysis for the FCC's change of course, *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S 502, 515 (2009). Because the conditions at issue here are not transaction-specific—without any explanation how the FCC would have authority to issue non-transaction-specific conditions—the FCC exceeded its statutory authority and the conditions must be vacated. *See* Section I.C.

C. The FCC lacked authority to issue the conditions on New Charter's broadband service and the conditions are not transaction-specific.

Appellants challenge the conditions imposed by the FCC on New Charter's broadband business.[4] Although the agency claims that these conditions will serve the public interest, the FCC never considered the harm to the merging companies' consumers. Commissioner O'Rielly specifically found that the non-transaction-

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[4] All of the conditions were unlawful because the FCC lacked authority under Section 214 to issue conditions regarding broadband. *See* Section I.A. Appellants do not include the settlement-free interconnection condition (*Merger Order* ¶ 132-33 (JA___)) in Section I.C, however, because the FCC might have had authority to issue such a regulation at the time of the *Merger Order* under its *2015 Title II Order*. The FCC reversed its position in 2018, finding that regulating interconnection arrangements likely harmed consumers and that applying common carrier regulation to "Internet traffic exchange arrangements was unnecessary and is likely to unduly inhibit competition and innovation." *2018 Title II Order* ¶ 167.

specific conditions "actually cause harm to the applicant's existing subscribers" and that the conditions "will result in increases in the cost of cable and broadband service for every current cable subscriber of the three companies." O'Rielly Statement at 348 (JA___). The FCC's failure to consider this harm is "decisional evasion" that deserves no deference. *Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321, 323 (D.C. Cir. 1992) ("*CEI II*") (rejecting "NHTSA's attempt to paper over the need to make a call"); *cf. SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947) ("It will not do for a court to be compelled to guess at the theory underlying the agency's action.").

Further, none of the conditions is plausibly designed to remedy probable harms resulting from the transaction. Instead, the conditions below reflect broad policy goals that the agency has not—and could not—achieve on an industry-wide basis through the rulemaking process. The imposition of any one of these three conditions described below would be an illegal usurpation of authority and they should be vacated as a matter of law.

1. Network Buildout to Residential Customers.

The FCC requires New Charter to build out its network to an additional two million "customer locations within five years of closing" the transaction. *Merger Order* ¶ 388 (JA___).[5] The agency has no authority under the Communications Act to issue

[5] In 2017, the FCC modified this condition to permit New Charter to build out its network to two million customer locations not served by any broadband provider—in contrast to the *Merger Order*, which required that half of New Charter's network expansion cover customer locations already served by at least one broadband provider. *2017 Charter Order* ¶ 2.

such a regulation and thus, the agency exceeded its statutory authority by including such a condition in approving the merger. *See* Section I.B.1.

Further, the agency conceded that New Charter expanding its network to *one* million households was not a "benefit of the transaction." *Id.* ¶ 386 (JA___). Nowhere in the *Merger Order* does the agency explain how the buildout condition is relevant to a transaction-specific harm. *See Merger Order* ¶¶ 382–389 (JA___). Because the condition regarding the buildout was not transaction-specific, the FCC exceeded its authority in issuing such condition and was thus unlawfully issued. *See* Section I.B.2.

Independently, the buildout condition is arbitrary and capricious because it contradicts the agency's own findings. As Commissioner Pai noted in his dissent from the *Merger Order*, the buildout requirement has no "rational connection with the merits of this transaction or public policy." Pai Dissent at 342 (JA___). Instead, the buildout requirement is squarely at odds with the agency's concerns about New Charter's post-merger size. *Id.* For the FCC to cite New Charter's large footprint as a rationale for imposing conditions on the transaction, while simultaneously forcing the firm to grow more rapidly than it would otherwise, is illogical and arbitrary. *See Business Roundtable v. SEC*, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011) (agency acted unlawfully when it "contradicted itself" based on reasoning that was "internally inconsistent and therefore arbitrary"); *ACA Int'l v. FCC*, 885 F.3d 687, 703 (D.C. Cir. 2018) ("the Commission cannot, consistent with reasoned decisionmaking, espouse both competing interpretations in the same order."). The *Merger Order* contradicts itself and is thus arbitrary and the buildout condition must be vacated.

2. Low-Income Broadband Offerings.

The FCC also requires New Charter to provide 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)." *Merger Order* ¶¶ 452–453 (JA___). Again, the agency concedes that this "low-income broadband program is not a transaction-specific benefit" and that the firm could "offer a low-income broadband program absent the transaction." *Id.* Yet the agency nonetheless required New Charter to offer this program, as it would supposedly "ensure that the public benefits of the transaction outweigh the potential harms." *Id.*

By this logic, the agency's discretion to impose conditions on future transactions is unlimited. As Commissioner O'Rielly wondered, "[i]f a company offered to build homeless shelters or donate fire trucks to every local franchise authority, would such offers count as counterweights too?" O'Rielly Statement at 347 (JA___). "Once delinked from the transaction itself," he noted, "such conditions reside somewhere in the space between absurdity and corruption." *Id.* at 348. Because the conditions had nothing to do with the transaction, the FCC exceeded its authority and the conditions must be vacated. *See* Section I.B.2.

The low-income broadband condition is independently unlawful because the FCC would not otherwise have authority to issue such a regulation. In the *2015 Title II Order*, the FCC explicitly held that it would forbear from applying any rate regulation to the Internet. *2015 Title II Order* ¶¶ 5, 452 (forbearing from "pre-existing tariffing

requirements and Commission rules governing rate regulation"). Because the FCC was prohibited from issuing rate regulations for broadband, 47 U.S.C. § 160(a) ("Commission shall forbear"), the FCC exceeded its authority by issuing the low-income broadband condition as part of the transfer approval. *See* Section I.B.1.

3. Data Caps and Usage-Based Pricing.

The FCC requires New Charter to "refrain from the use of data caps or UBP [usage-based pricing] for … seven years." *Merger Order* ¶ 74 (JA___). New Charter is thus barred from charging higher prices to subscribers who transmit unusually large amounts of data—or from offering discounts to subscribers who transmit less data than their neighbors. "When the government forbids usage-based pricing, it is requiring Americans who use less data to subsidize those who use more data." Pai Dissent at 341 (JA___). The agency, however, observes that New Charter—a combination of three cable companies that previously served geographically distinct areas—did not compete against one another for broadband subscribers. *Id.* ¶ 72 & n.216 (JA___). As such, any usage-based pricing is unrelated to the transaction. The *Merger Order* offers no reason why such condition could be transaction-specific. Therefore, the condition is unlawful. *See* Section I.B.2.

The data caps and usage-based pricing condition is also unlawful because again, the FCC would not otherwise have authority to issue such a regulation. The FCC explicitly forbore from applying any rate regulation to the Internet. *2015 Title II Order* ¶¶ 5, 452. Because the FCC was prohibited from issuing such a regulation, 47 U.S.C. § 160(a) ("Commission shall forbear"), the FCC exceeded its authority by issuing the pricing condition as part of the transfer approval. *See* Section I.B.1.

Although the FCC speculates that New Charter might be more likely to implement usage-based pricing after the merger, the agency concedes that it is "unlikely that the transaction will significantly change New Charter's incentives or abilities to price standalone BIAS [broadband Internet access service] in a manner that would harm video competition." *Merger Order* ¶ 73 (JA___). The agency nevertheless imposed this condition based on the theory that New Charter might have a greater incentive to "protect" its "larger profit" after the merger. *Id.* ¶ 83 (JA___). The FCC "rule[d] out all but one business model"—unlimited, all-you-can-eat broadband—based on an economic hypothesis the agency itself recognizes is implausible. Pai Dissent at 341 (JA___). Based on these inconsistent findings, the data cap and usage-based pricing condition should be vacated as arbitrary. *See Business Roundtable v. SEC*, 647 F.3d at 1148–49.

* * *

Because the FCC exceeded its statutory authority in imposing these conditions on the transaction, the Court should set them aside as unlawful. *See* 5 U.S.C. § 706.

II. The FCC wrongly held that Appellants could not seek reconsideration. And in any case, agency reconsideration was not a prerequisite for this Court to now review the merger conditions.

In its *Reconsideration Order*, the FCC did not address the merits of Appellants' challenge to the merger conditions. Instead, the FCC held that Appellants lacked standing (Section III below) and that they were "barred from objecting to the Charter conditions for the first time on reconsideration." *Reconsideration Order* ¶ 2 (JA___).

This conclusion is an abuse of discretion and contravenes FCC regulations and operative statutes because the FCC provided no public notice that it was even considering imposing conditions on the merger approval. *See* Section II.A. More importantly, the FCC's holding regarding reconsideration does not prevent this Court from reviewing those conditions. *See* Section II.B.

A. Appellants properly sought reconsideration of the merger conditions, given that the FCC provided no public notice that the agency was considering them.

In its *Reconsideration Order*, the FCC held that Appellants were barred under FCC Rules from seeking reconsideration of the merger conditions because they did not "specifically object[] to the conditions about which they now complain." *Reconsideration Order* ¶ 2, (JA___). However, the FCC Rules permit a person to seek reconsideration without having previously objected, if he can 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(b)(1).[6] Appellants' petition for reconsideration provided this reason: the FCC had given no notice that it was even *considering* placing conditions on the merger. *See* Petition for Reconsideration at 7-9 (citing FCC Public Notice) (JA___). Appellants thus had no reason to object to an issue that did not yet exist.[7] *Cf. Ass'n of*

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[6] This regulation interposes a requirement to show "good cause" that is notably absent from the relevant statute, 47 U.S.C. § 405(a), which itself specifically contemplates reconsideration motions brought by those who were "not a party to the proceedings resulting in such order…."

[7] Comments filed by Appellant CEI preemptively objected to placing any conditions on the merger approval. *See* CEI Comments (JA___).

Am. R.Rs. v. DoT, 896 F.3d 539, 550 (D.C. Cir. 2018) (no waiver where argument only arose in response to the court's decision).

Despite lack of public notice, the FCC reasoned in its *Reconsideration Order* that Appellants were still expected to object to the merger conditions because "*all* of the conditions were requested by various entities in their opening comments," citing comments filed by other entities. *Reconsideration Order* ¶ 2 & n.3 (JA___). As an initial matter, comments are not public notice. Under "the Administrative Procedure Act, the agency itself must provide fair notice of what it plans to do. Having failed to do this, [the agency] cannot bootstrap notice from a comment." *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 555 (D.C. Cir. 1983); *accord Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991). As a practical matter, the FCC's holding would require Appellants to scour the hundreds of thousands of pages of comments submitted and *predict* which of those proposals the FCC might consider.[8] The law does not require such fortunetelling.

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[8] Indeed, all of the comments cited by the FCC in the *Reconsideration Order* were filed on October 13, 2015, the same day that Appellant CEI filed comments. *See Reconsideration Order*, ¶ 2 & n.3, (JA___) (citing 31 ¶ 79 (Writer's Guild of America West (filed 10/13/2015)); ¶ 134 (COMPTEL (filed 10/13/2015)); ¶ 385 (Stop the Cap (filed 10/13/2015)); ¶¶ 446-48 (Coalition for Broadband Equity (filed 10/13/2015))).

B. Regardless of the FCC's decision regarding reconsideration, Appellants' challenge of the merger conditions is properly before this Court because the FCC effectively ruled on them.

Appellants may still seek judicial review of the unlawful merger conditions—although the FCC dismissed the petition for reconsideration—because the FCC actually considered the legality of the merger conditions at issue. Section 405 of the Communications Act provides:

> The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass.

47 U.S.C. § 405(a). In *Office of Communication of the United Church of Christ v. FCC* ("*UCC*"), this Court explained that Section 405 not only includes the doctrine of exhaustion of administrative remedies, but "traditionally recognized exceptions." 911 F.2d 803, 808 (D.C. Cir. 1990).

In *UCC*, appellant UCC did not oppose one of the transfer applications at issue until it had petitioned the FCC for reconsideration. *Id.* at 809. The FCC dismissed the reconsideration petition for failure to show good reason why it had not previously participated, but nonetheless went on to consider the merits of UCC's challenge. *Id.* This Court held that "[a]s a condition precedent to judicial review, section 405 requires only that the Commission have a 'fair opportunity' to pass on [an] issue." *Id.* (quoting *Meredith Corp. v. FCC*, 809 F.2d 863, 870 (D.C. Cir. 1987)); *see also Washington*

Ass'n for Television & Children v. FCC, 712 F.2d 677, 682 (D.C. Cir. 1983) ("[I]t is not always necessary for a party to raise an issue, so long as the Commission in fact considered the issue."). Because the FCC had "in fact considered the issue," the UCC's challenge fell within the exhaustion exception and the UCC could proceed with its appeal. *UCC*, 911 F.2d at 809.

Further, the issue need not "be raised with absolute precision, and judicial review is permitted so long as the issue is necessarily implicated by the argument made to the Commission." *All Am. Tel. Co., Inc. v. FCC*, 867 F.3d 81, 93–94 (D.C. Cir. 2017) (cleaned up) (quoting *EchoStar Satellite LLC v. FCC,* 704 F.3d 992, 996 (D.C. Cir. 2013)); *see also Sprint Nextel Corp. v. FCC*, 524 F.3d 253, 257 (D.C. Cir. 2008) ("The pith of the test is this: the argument made to the Commission must necessarily implicate the argument made to us.") (cleaned up). In *All American Telephone*, this Court concluded that "[b]ecause the Commission was afforded a full and fair opportunity to consider its treatment of the [] claims and was fully apprised of the Companies' position, Section 405(a) is no bar to reaching the merits." 867 F.3d at 94.

The same is true here. The FCC was fully apprised of Appellants' position, *see* Petition for Reconsideration (JA___), and the FCC did in fact consider the propriety and legality of the merger conditions. In addition to discussion of the conditions in the *Merger Order*, ¶¶ 45, 388, 450, 456 (JA___, JA___, JA___, JA___), two of the agency's five commissioners issued detailed dissents criticizing the legality of the conditions. O'Rielly Statement at 346 (JA___) (criticizing process as means of "accomplish[ing] policy goals that it could not achieve through rulemakings"); Pai Dissent at 343 (JA___) (criticizing conditions as result of "broken" merger review

process). Accordingly, Appellants' challenge of the merger conditions is properly before this Court.

III. The FCC erred in denying reconsideration based on lack of cognizable injury; the individual Appellants more than satisfy injury-in-fact requirements and Appellant CEI has organizational standing.

In its *Reconsideration Order*, the FCC refused to reach the merits of Appellants' challenge, holding that Appellants had "not shown that the four individuals have suffered any cognizable injury stemming from the conditions at issue" and that "CEI did not have associational standing." *Reconsideration Order*, ¶ 6 (JA___). But Appellants had previously submitted declarations demonstrating injury when they filed the petition for mandamus seeking to compel the FCC to issue a reconsideration order. *See* Petition for Mandamus, No. 17-1261. The FCC ignored those declarations when it issued its *Reconsideration Order*. *See* FCC Response, No. 17-1261.

The declarations submitted by the individual Appellants more than satisfy the demands of Article III. Given the standing of the individual Appellants, this Court's standing inquiry can end there: "if one party has standing in an action, a court need not reach the issue of the standing of other parties when it makes no difference to the merits of the case." *Comcast Corp. v. FCC,* 579 F.3d 1, 6 (D.C. Cir. 2009). In any event, Appellant CEI also has standing because individual Appellant Jean-Claude Gruffat is on CEI's Board of Directors.

A. The individual Appellants' declarations are record evidence that Appellants suffered injuries caused by the merger conditions.

Article III requires (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable judicial decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). "[T]he standing determination must not be confused with [the Court's] assessment of whether the party could succeed on the merits." *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990) ("*CEI I*"). Indeed, the Supreme Court instructs that the elements of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. Thus "general factual allegations of injury" will suffice at the pleading stage. *Id.* In challenging the FCC's order approving the transfer of licenses and authorizations, Appellants need only allege an injury sufficient to confer standing. *See, e.g., Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078, 1081-82 (D.C. Cir. 1997) (finding "allegation of injury" sufficient for standing in 47 U.S.C. 402(b)(6) appeal, but still ruling in favor of Commission on the merits). Here, the individual Appellants *exceed* their burden by submitting not just factual allegations, but record evidence, as well as outside factual support for their standing.

First, the individual Appellants have established Article III causation because the record demonstrates a "fairly traceable" connection between their increased monthly bills and the FCC's merger conditions. Consumers have standing to challenge a regulatory scheme if they "have been injured economically" and they

"allege[] a fairly traceable connection" between an agency's action and the alleged injury. *Community Nutrition Inst. v. Block*, 698 F.2d 1239, 1247 (D.C. Cir. 1983) (emphasis in original), *rev'd on other grounds*, 467 U.S. 340 (1984). "For standing purposes, petitioners need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test." *CEI I*, 901 F.2d at 113. And, when injury hinges on the behavior of third parties, this Court has "required only a showing that the agency action is at least a substantial factor motivating the third parties' actions." *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001) (cleaned up). "[M]ere indirectness of causation is no barrier to standing, and thus, an injury worked on one party by another through a third party intermediary may suffice" to establish standing. *Tel. & Data Sys., Inc. v. FCC*, 19 F.3d 42, 47 (D.C. Cir. 1994). In this case, pass-through of higher costs to consumers is well-established economic theory.

In *CEI I*, petitioner Consumer Alert alleged that the stringent fuel economy standards issued by the National Highway Traffic Safety Administration (NHTSA) would prevent its members from purchasing larger vehicles. 901 F.2d at 112. Causation thus hinged on the reaction of the third-party auto manufacturers to the agency's conduct. *Id.* at 113. Several Consumer Alert members submitted affidavits stating that they had been unable to find new large cars. *Id.* at 112. Moreover, the agency itself had evidence that the fuel standards would restrict large-car availability. *Id.* at 114. This Court found a causal link for purposes of Article III standing based on "the agency's own experience and sound market analysis." *Id.* at 114.

This Court contrasted the "abundant evidence" of affidavits and agency findings in *CEI I* with the weak record in *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192 (D.C. Cir. 2011). In the latter case, the Court confirmed that petitioner affidavits and the agency's own record like those produced in *CEI I* could sufficiently support "the burden of adduc[ing] facts showing that those [third-party] choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* at 201 & n.9 (internal quotations omitted) (quoting *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 563 F.3d 466, 477 (D.C. Cir. 2009)).

As in *CEI I*, a similarly strong record of the individual Appellants' declarations and agency findings is present here. Two of the agency's five commissioners observed the link between the conditions imposed on the transaction and increased consumer costs. Commissioner O'Rielly found that "non-transaction-specific conditions such as these actually cause harm to the applicant's existing subscribers. Specifically, this new program will result in increases in the cost of cable and broadband service for every current cable subscriber of the three companies…." O'Rielly Statement at 348 (JA___). Similarly, Commissioner Pai noted that the "natural response" would be "to increase prices on all consumers in order to amortize the cost of serving a bandwidth hungry few." Pai Dissent at 341 (JA___). Furthermore, as the individual Appellants attest, New Charter has increased prices since consummating its merger, to the detriment of the individual Appellants and countless other consumers. *See* Declaration of Dr. John France, A21; Declaration of Daniel Frank, A22-A23; Declaration of Charles Haywood, A25-A26.

The injuries the individual Appellants suffered due to the *Merger Order's* conditions on New Charter are "firmly rooted in the basic laws of economics," which is more than "predictions based only on speculation." *United Transp. Union v. ICC*, 891 F.2d 908, 913 n.7 (D.C. Cir. 1989). The above statements regarding consumer injury are supported by Dr. Robert W. Crandall, a Ph.D. economist formerly with the Brookings Institute for 37 years, who has published numerous books and journal articles on telecommunications and cable television regulatory policy. *See* Declaration of Robert W. Crandall ¶ 1, A27. Dr. Crandall concludes that the FCC's merger conditions harm consumers by either "reducing the quality of their services they receive or raising their cable rates relative to those that would have existed without these conditions." *Id.* ¶ 4, A27-A28.

Consumer Federation of America v. FCC further demonstrates causation here. There, Consumer Federation of America satisfied the injury-in-fact requirement by an affidavit of one of its members alleging that his cable rates had risen before and after the challenged merger. 348 F.3d 1009, 1012 (D.C. Cir. 2003). The Court further held that a person may "satisf[y] the causation aspect of the standing analysis" on account of an "agency order [that] permits a third-party to engage in conduct that allegedly injures a person." *Id.* (emphasis added). If causation is satisfied when the agency merely permits the challenged conduct, then the individual Appellants here more than satisfy causation because the FCC *required* New Charter to engage in conduct that caused injury to Appellants.

Second, Appellants have sufficiently demonstrated that a reversal of the conditions would redress the injury. Where, as here, Appellants seek to stop the

agency's illegal conduct, "the questions whether the injury alleged is 'fairly traceable' to the purportedly illegal conduct and whether the relief requested is 'likely to redress' the injury substantially overlap." *CEI I*, 901 F.2d at 113. In *CEI I*, this Court rejected the government's argument that relaxing the fuel standards would not redress the injury because it would not necessarily increase the production of larger vehicles. *Id.* at 116-17. The Court held that "manufacturers are substantially likely to respond to market forces, and to meet that consumer demand by providing a wider range of large passenger vehicles." *Id.* at 117. "Whatever the difficulties associated with predicting the nature and incidence of the burden that results when a regulation is made more constraining, it is relatively easy to see—at least in a competitive market—how some consumers will benefit if a regulatory constraint is relaxed, and therefore how they continue to be burdened when the regulatory agency denies their request that it be relaxed." *Id.* at 126 (Ginsburg, J., concurring); *see, e.g., Tozzi*, 271 F.3d at 310 (finding redressability because decreased regulation of chemical meant companies would "less likely to stop using PVC plastic" which "would redress at least some of [petitioner's] economic injury").

Similarly, without these merger conditions, the competitive market would restrict the cost increases to consumers that those conditions would otherwise entail. *See, e.g.*, O'Rielly Statement at 348 (JA___) ("Absent this mandated condition, the market conditions would determine whether the merged company entered those markets, meaning that the condition will force the existing provider to divert capital from deployment and other pursuits in order to fight a governmentally-mandated competitor through such things as increased marketing costs."). And "the removal of

some or all of these [merger] conditions would reduce the magnitude of these harms." Crandall Decl. ¶ 12, A29.

B. CEI has associational standing because individual Appellant Gruffat is a member of CEI's board of directors.

CEI also has standing because individual Appellant Jean-Claude Gruffat is on CEI's Board of Directors. As noted in *CEI I*, "[a]n organization has standing to sue on behalf of its members when: (a) its members would have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *CEI I*, 901 F.2d at 111. As a CEI Director, Mr. Gruffat satisfies similar prerequisites.

In its *Reconsideration Order*, the FCC found—citing no legal authority—that CEI does not have associational standing because Mr. Gruffat serves on the Board but is not a "member" of CEI. *Reconsideration Order* ¶ 5, (JA___). The FCC's distinction is without merit. In *Action on Smoking & Health (ASH) v. Dep't of Labor*, a charitable trust (Action on Smoking and Health) challenged the Occupational Safety and Health Administration's failure to issue a final rule regulating secondhand smoke in the workplace. 100 F.3d 991, 991-92 (D.C. Cir. 1996). While the Court noted that ASH was not a traditional membership association, it found that ASH had associational standing on "standard grounds" because it sought to represent the chairman of its board of trustees: "The injury to the interests of one of its board members is therefore enough to allow ASH to proceed with the lawsuit." *ASH*, 100 F.3d at 992. Mr. Gruffat is not simply a concerned bystander. Mr. Gruffat's declaration shows that

he was harmed by the unlawfully-imposed merger conditions, and CEI may act in a representative capacity to redress his injuries.

Relief Sought

For the reasons set forth above, Appellants respectfully urge this Court to vacate the transaction conditions contained in the FCC's *Merger Order*.

January 14, 2019

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the foregoing brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because this brief contains 11,315 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this initial brief has been prepared in a proportionally spaced typeface, 14-point Garamond, using Microsoft Word 2013.

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January 14, 2019

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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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ADDENDUM

Statutes and Regulations

5 U.S.C. § 706 ..... A-1

28 U.S.C. § 1651 ..... A-2

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47 U.S.C. § 160 ..... A-4

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Declaration of Daniel Frank A-22

Declaration of Jean-Claude Gruffat A-24

Declaration of Charles Haywood A-25

Declaration of Dr. Robert W. Crandall A-27

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 U.S.C. § 1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

47 U.S.C. § 160. Competition in provision of telecommunications service

a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the

Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after Commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a).

47 U.S.C. § 214. Extension of lines or discontinuance of service; certificate of public convenience and necessity

(a) Exceptions; temporary or emergency service or discontinuance of service; changes in plant, operation or equipment

No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

47 U.S.C. § 230(b). Protection for private blocking and screening of offensive material

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

47 U.S.C. § 303(r). Powers and duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

[. . .]

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

47 U.S.C. § 310. License ownership restrictions

(d) Assignment and transfer of construction permit or station license

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

47 U.S.C. § 402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 618(a)(3) of this title.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record

upon which the order complained of was entered, as provided in section 2112 of Title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of Title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not

against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

47 U.S.C. § 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided,* That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall

be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b) **(1)** Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 C.F.R. § 1.4. Computation of time

(a) Purpose. The purpose of this rule section is to detail the method for computing the amount of time within which persons or entities must act in response to deadlines established by the Commission. It also applies to computation of time for seeking both reconsideration and judicial review of Commission decisions. In addition, this rule section prescribes the method for computing the amount of time within which the Commission must act in response to deadlines established by statute, a Commission rule, or Commission order.

(b) General Rule—Computation of Beginning Date When Action is Initiated by Commission or Staff. Unless otherwise provided, the first day to be counted when a period of time begins with an action taken by the Commission, an Administrative Law Judge or by members of the Commission or its staff pursuant to delegated authority is the day after the day on which public notice of that action is given. See § 1.4(b)(1)–(5) of this section. Unless otherwise provided, all Rules measuring time from the date of the issuance of a Commission document entitled "Public Notice" shall be calculated in accordance with this section. See § 1.4(b)(4) of this section for a description of the "Public Notice" document. Unless otherwise provided in § 1.4(g) and (h) of this section, it is immaterial whether the first day is a "holiday." For purposes of this section, the term public notice means the date of any of the following events: See § 1.4(e)(1) of this section for definition of "holiday."

(1) For all documents in notice and comment and non-notice and comment rulemaking proceedings required by the Administrative Procedure Act, 5 U.S.C. 552, 553, to be published in the Federal Register, including summaries thereof, the date of publication in the Federal Register.

(2) For non-rulemaking documents released by the Commission or staff, including the Commission's section 271 determinations, 47 U.S.C. 271, the release date.

(3) For rule makings of particular applicability, if the rule making document is to be published in the Federal Register and the Commission so states in its decision, the date of public notice will commence on the

day of the Federal Register publication date. If the decision fails to specify Federal Register publication, the date of public notice will commence on the release date, even if the document is subsequently published in the Federal Register. See Declaratory Ruling, 51 FR 23059 (June 25, 1986).

(4) If the full text of an action document is not to be released by the Commission, but a descriptive document entitled "Public Notice" describing the action is released, the date on which the descriptive "Public Notice" is released.

(5) If a document is neither published in the Federal Register nor released, and if a descriptive document entitled "Public Notice" is not released, the date appearing on the document sent (e.g., mailed, telegraphed, etc.) to persons affected by the action.

(c) General Rule—Computation of Beginning Date When Action is Initiated by Act, Event or Default. Commission procedures frequently require the computation of a period of time where the period begins with the occurrence of an act, event or default and terminates a specific number of days thereafter. Unless otherwise provided, the first day to be counted when a period of time begins with the occurrence of an act, event or default is the day after the day on which the act, event or default occurs.

(d) General Rule—Computation of Terminal Date. Unless otherwise provided, when computing a period of time the last day of such period of time is included in the computation, and any action required must be taken on or before that day.

(e) Definitions for purposes of this section:

(1) The term holiday means Saturday, Sunday, officially recognized Federal legal holidays and any other day on which the Commission's Headquarters are closed and not reopened prior to 5:30 p.m., or on which a Commission office aside from Headquarters is closed (but, in that situation, the holiday will apply only to filings with that particular office). For example, a regularly scheduled Commission business day may become a holiday with respect to the entire Commission if

Headquarters is closed prior to 5:30 p.m. due to adverse weather, emergency or other closing. Additionally, a regularly scheduled Commission business day may become a holiday with respect to a particular Commission office aside from Headquarters if that office is closed prior to 5:30 p.m. due to similar circumstances.

(2) The term business day means all days, including days when the Commission opens later than the time specified in Rule § 0.403, which are not "holidays" as defined above.

(3) The term filing period means the number of days allowed or prescribed by statute, rule, order, notice or other Commission action for filing any document with the Commission. It does not include any additional days allowed for filing any document pursuant to paragraphs (g), (h) and (j) of this section.

(4) The term filing date means the date upon which a document must be filed after all computations of time authorized by this section have been made.

(f) Except as provided in § 0.401(b) of this chapter, all petitions, pleadings, tariffs or other documents not required to be accompanied by a fee and which are hand-delivered must be tendered for filing in complete form, as directed by the Rules, with the Office of the Secretary before 7 p.m., at 445 12th Street, SW., Washington, DC 20554. The Secretary will determine whether a tendered document meets the pre–7:00 p.m. deadline. Documents filed electronically pursuant to § 1.49(f) must be received by the Commission's electronic filing system before midnight. Applications, attachments and pleadings filed electronically in the Universal Licensing System (ULS) pursuant to § 1.939(b) must be received before midnight on the filing date. Media Bureau applications and reports filed electronically pursuant to § 73.3500 of this chapter must be received by the electronic filing system before midnight on the filing date.

(g) Unless otherwise provided (e.g., §§ 1.773 and 76.1502(e)(1) of this chapter), if the filing period is less than 7 days, intermediate holidays shall not be counted in determining the filing date.

(h) If a document is required to be served upon other parties by statute or Commission regulation and the document is in fact served by mail (see § 1.47(f)), and the filing period for a response is 10 days or less, an additional 3 days (excluding holidays) will be allowed to all parties in the proceeding for filing a response. This paragraph (h) shall not apply to documents filed pursuant to § 1.89, § 1.315(b) or § 1.316. For purposes of this paragraph (h) service by facsimile or by electronic means shall be deemed equivalent to hand delivery.

(i) If both paragraphs (g) and (h) of this section are applicable, make the paragraph (g) computation before the paragraph (h) computation.

(j) Unless otherwise provided (e.g. § 76.1502(e) of this chapter) if, after making all the computations provided for in this section, the filing date falls on a holiday, the document shall be filed on the next business day. See paragraph (e)(1) of this section. If a rule or order of the Commission specifies that the Commission must act by a certain date and that date falls on a holiday, the Commission action must be taken by the next business day.

(k) Where specific provisions of part 1 conflict with this section, those specific provisions of part 1 are controlling. See, e.g.,§§ 1.45(d), 1.773(a)(3) and 1.773(b)(2). Additionally, where § 76.1502(e) of this chapter conflicts with this section, those specific provisions of § 76.1502 are controlling. See e.g. 47 CFR 76.1502(e).

(l) When Commission action is required by statute to be taken by a date that falls on a holiday, such action may be taken by the next business day (unless the statute provides otherwise).

47 C.F.R. § 1.106(b). Petitions for reconsideration in non-rulemaking proceedings.

(b)

(1) Subject to the limitations set forth in paragraph (b)(2) of this section, any party to the proceeding, or any other person whose interests are adversely affected by any action taken by the Commission or by the designated authority, may file a petition requesting reconsideration of the action taken. 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.

(2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances are present:

(i) 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; or

(ii) The petition relies on facts or arguments unknown to 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.

(3) A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed circumstances may be dismissed by the staff as repetitious.

No. _____

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
In re COMPETITIVE ENTERPRISE INSTITUTE,
JOHN FRANCE, DANIEL FRANK,
JEAN-CLAUDE GRUFFAT, AND CHARLES HAYWOOD, ***Petitioners.***
declaration of Dr. John France

I. Dr. John France, am one of the petitioners. I reside in Tampa, FL, where I have subscribed to Charter—and, prior to its acquisition, Bright House Networks and its predecessors—since 1981. I have subscribed to broadband service from my cable provider for approximately 15 years. My total monthly cable bill is currently $230.07, including $101.00 for bundled broadband and television service.

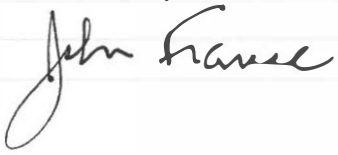
I am not eligible for Charter's Low-Income Broadband Offerings, as I have no children who participate in the National School Lunch Program, nor am I a senior who receives Supplemental Security Income program benefits. Therefore, I do not expect to benefit from the discounted broadband program that the FCC has required Charter to offer certain low-income households.

I am not an unusually heavy broadband user. To the best of my knowledge, my usage of Charter's (or any other company's) broadband service has never exceeded 100 GB per month. I have never received a notification that I exceeded Charter's usage limits. Therefore, I am concerned that the FCC condition forbidding Charter from imposing surcharges on very heavy users means that whenever the company increases prices, I am more likely to be affected.

I do not expect to benefit from the FCC-imposed requirement that Charter expand the number of households it serves, as I do not reside at a location that does not receive broadband service. And I do not expect to benefit from Charter being forced to offer free Internet connections to "edge providers"—that is, to companies that provide content and services over the Internet. But I do think that the costs and conditions of the FCC's Order are likely to make my Charter service worse, because they are likely to result in Charter charging me higher prices—and investing less in improving my service—than it otherwise would.

In January 2016, before the FCC issued its Order regarding the Charter merger, the price of my broadband and television bundle was $84.00 per month. As of June 2017, the price I pay for the same bundle is $101.00 per month. On information and belief, the conditions imposed by the agency on the transaction have probably contributed to this price increase.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on July 19, 2017.

Dr. John France 

No. _____

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re COMPETITIVE ENTERPRISE INSTITUTE,
JOHN FRANCE, DANIEL FRANK,
JEAN-CLAUDE GRUFFAT, AND CHARLES HAYWOOD, *Petitioners.*

DECLARATION OF DANIEL FRANK

I, Daniel Frank, am one of the petitioners. I reside in Los Angeles, CA, where I have subscribed to broadband service from Charter—and, prior to its acquisition, Time Warner Cable—since approximately 2003. My total monthly cable bill is currently $79.99, including $10.00 for my modem rental, excluding taxes and fees.

I am not eligible for Charter's Low-Income Broadband Offerings, as I have no children who participate in the National School Lunch Program, nor am I a senior who receives Supplemental Security Income program benefits. Therefore, I do not expect to benefit from the discounted broadband program that the FCC has required Charter to offer certain low-income households.

I am not an unusually heavy broadband user. As a Time Warner Cable subscriber prior to Charter's acquisition of the company, I was never charged any overage fees, or subjected to throttling, due to excessive broadband usage. Neither Charter nor Time Warner Cable has ever notified me that I have exceeded any applicable usage limits. Therefore, I am concerned that the FCC condition forbidding Charter from

imposing surcharges on very heavy users means that whenever the company increases prices, I am more likely to be affected.

I do not expect to benefit from the FCC-imposed requirement that Charter expand the number of households it serves, as I do not reside at a location that does not receive broadband service. And I do not expect to benefit from Charter being forced to offer free Internet connections to "edge providers"—that is, to companies that provide content and services over the Internet. But I do think that the costs and conditions of the FCC's Order are likely to make my Charter service worse, because they are likely to result in Charter charging me higher prices—and investing less in improving my service—than it otherwise would.

In January 2016, before the FCC issued its Order regarding the Charter merger, the price of my broadband service was $75.99 per month, including modem rental. As of June 2017, the price I pay for the same service is $79.99 per month. On information and belief, the conditions imposed by the agency on the transaction have probably contributed to this price increase.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on August 5, 2017.

Daniel Frank

No. _____

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re COMPETITIVE ENTERPRISE INSTITUTE,
JOHN FRANCE, DANIEL FRANK,
JEAN-CLAUDE GRUFFAT, AND CHARLES HAYWOOD, ***Petitioners.***

declaration of JEAN-CLAUDE GRUFFAT

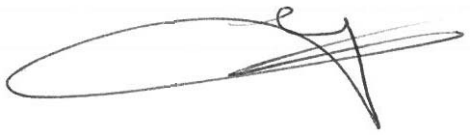
I, Jean-Claude Gruffat, am one of the petitioners. I reside in New York, NY, where I have subscribed to broadband service from Charter—and, prior to its acquisition, Time Warner Cable—since 2011. My total monthly cable bill is currently $273.97, including $109.99 for bundled broadband and television service.

I am not eligible for Charter's Low-Income Broadband Offerings, as I have no children who participate in the National School Lunch Program, nor am I a senior who receives Supplemental Security Income program benefits. Therefore, I do not expect to benefit from the discounted broadband program that the FCC has required Charter to offer certain low-income households.

I am not an unusually heavy broadband user. To the best of my knowledge, my usage of Charter's (or any other company's) broadband service has never exceeded 100 GB per month. I have never received a notification that I exceeded Charter's usage limits. Therefore, I am concerned that the FCC condition forbidding Charter from imposing surcharges on very heavy users means that whenever the company increases prices, I am more likely to be affected.

I do not expect to benefit from the FCC-imposed requirement that Charter expand the number of households it serves, as I do not reside at a location that does not receive broadband service. And I do not expect to benefit from Charter being forced to offer free Internet connections to "edge providers"—that is, to companies that provide content and services over the Internet. But I do think that the costs and conditions of the FCC's Order are likely to make my Charter service worse and/or more expensive, because they are likely to result in Charter charging me higher prices—and investing less in improving my service—than it otherwise would.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on August 24 2017.

Jean-Claude Gruffat 

No. _____

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re COMPETITIVE ENTERPRISE INSTITUTE,
JOHN FRANCE, DANIEL FRANK,
JEAN-CLAUDE GRUFFAT, AND CHARLES HAYWOOD, *Petitioners.*

DECLARATION OF CHARLES HAYWOOD

I, Charles Haywood, am one of the petitioners. I reside in Carmel, Indiana, where I have subscribed to broadband service from Charter—and, prior to its acquisition, Bright House Networks—since approximately April 2016. My total monthly bill is about $71.

I am not eligible for Charter's Low-Income Broadband Offerings, as I have no children who participate in the National School Lunch Program, nor am I a senior who receives Supplemental Security Income program benefits. Therefore, I do not expect to benefit from the discounted broadband program that the FCC has required Charter to offer certain low-income households.

To the best of my knowledge, I am not an unusually heavy broadband user. As a Bright House Networks subscriber prior to Charter's acquisition of the company, I was never charged any overage fees due to excessive broadband usage. To the best of my

recollection, neither Charter nor Bright House Networks has ever notified me that I have exceeded any applicable usage limits.

I do not expect to benefit from the FCC-imposed requirement that Charter expand the number of households it serves, as I do not reside at a location that does not receive broadband service. And I do not expect to benefit from Charter being forced to offer free Internet connections to "edge providers"—that is, to companies that provide content and services over the Internet. But I do think that the costs and conditions of the FCC's Order are likely to make my Charter service worse, because they are likely to result in Charter charging me higher prices—and investing less in improving my service—than it otherwise would.

In April 2016, before the FCC issued its Order regarding the Charter merger, the price of my broadband service was approximately $51.00 per month. As of July 2017, the price I pay for the same service is approximately $71.00 per month. On information and belief, the conditions imposed by the agency on the transaction have probably contributed to this price increase.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on August 8, 2017.

Charles Haywood

Declaration of Robert W. Crandall

Introduction

1. My name is Robert W. Crandall. I am an economist and Nonresident Senior Fellow at the Technology Policy Institute in Washington, DC. For more than 37 years, I was a Senior Fellow at the Brookings Institution in Washington, DC, where I published a number of books and journal articles on telecommunications policy and cable television regulatory policy. A copy of my CV is attached as an Appendix to this declaration. My most recent article, published last year in the *Review of Industrial Organization,* analyzed the effect of the Federal Communications Commission's (FCC's) regulation of network neutrality on equity prices of cable television, telecommunications, and media companies. I have provided expert testimony and advice to a number of major telecommunications companies, antitrust authorities, and the FCC.

2. I have been asked by the Competitive Enterprise Institute to assess the likely effects on consumers, including the individual petitioners in this case, of the conditions imposed by the FCC on Charter Communications to approve its merger with Time Warner Cable.

The Conditions Imposed on the Charter Time Warner Cable Merger

3. The FCC required that Charter agree to these conditions:

- Building out and offering a broadband Internet access service, capable of providing at least a 60 Mbps download speed, to a minimum of two million additional mass market customer premises within five years.
- Offering a "low-income broadband program" with minimum speeds of 30/4 Mbps for $14.99 per month to qualifying households.
- Providing "settlement-free interconnection" to "edge providers" including, in particular, online video distributors, for seven years after the transaction closes.
- Refraining from imposing "data caps" or setting "usage-based prices" for its residential broadband Internet access services for seven years after the transaction closes.

4. I conclude that each of these conditions is likely to harm some or all existing Charter subscribers by either reducing the quality of the services they receive or raising their

cable rates relative to those that would have existed without these conditions. Among the consumers likely to be harmed in this manner are the individual petitioners.

The Build-out Requirement

5. To the extent that the build-out requirement is binding, *i.e.*, requires Charter to build out its network to a greater extent than it would have absent the requirement, it diverts resources from other capital projects that could improve the quality of service for existing customers.

6. Charter has had a very aggressive capital expenditure program in the last two years, spending far more in 2017 than the total Charter and Time Warner spent in 2015 when they were separate companies. [Company Annual Reports (10K) to the Securities and Exchange Commission] Much of this expenditure is directed towards plant upgrades that increase the capacity of its network, a crucial consideration as viewers demand more bandwidth for video streaming.

7. Were any of this capital expenditure diverted to building out its network to areas that it has not considered remunerative, such diversion would reducer Charter's ability to finance network upgrades to its existing plant, thereby reducing the quality of services to existing customers.

The Low-Income Broadband Program

8. It is unlikely that the $14.99 per month low-income broadband offering would cover the full costs of offering the service. Therefore, as with the build-out requirement, the low-income broadband program would reduce Charter's cash flows from its existing and expanded footprints.

9. The reduction in cash flows would reduce Charter's ability to fund improvements in its existing network and would therefore reduce service quality for its existing customers.

Banning Paid Prioritization

10. The requirement that Charter not bill media companies or "edge providers" for interconnection would eliminate one potential future source of revenues for Charter. If Charter were to embrace the opportunity to levy such charges – now that the FCC has vacated its 2015 Net Neutrality rules – the magnitude of these charges would clearly vary with the subscriber base that the edge provider could reach through Charter. As a result, Charter would find it profitable to reduce its subscriber charges somewhat to attract more subscribers and thus greater revenues from interconnection fees.

10. The reduction in subscriber fees would clearly redound to the benefit of existing subscribers. Therefore, any condition that forbids the levying of interconnection charges on edge providers harms existing subscribers.

Forbidding Data Caps

11. The banning of data caps or usage-based charges for seven years deprives Charter of the ability to establish a rate structure that varies with the network costs of customers' data usage. By employing usage-based rates, Charter would have the opportunity to calibrate its charges to reflect the cost of providing increasing amounts of broadband data per month. Without this opportunity, Charter would have to offer a uniform price for each broadband speed regardless of the customer's monthly usage. This uniform rate would be higher than the rate imposed on very low-usage customers under usage-based pricing. Thus, a subset of existing customers would be harmed by the ban on usage-based pricing or data caps.

12. For the foregoing reasons, I believe that there is a significant likelihood that the individual petitioners in this case will be harmed in one or more ways by the conditions imposed by the FCC Order. Furthermore, the removal of some or all of these conditions would reduce the magnitude of these harms.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 15, 2018.

Robert W. Crandall
39 Dinsmore Rd.
Jackson, NH 03846

Curriculum Vitae

Robert W. Crandall

CURRENT POSITION:

Non-Resident Senior Fellow

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Washington, DC

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FIELDS OF SPECIALIZATION:

Industrial Organization, Antitrust Policy, Regulation

PREVIOUS POSITIONS:

Senior Fellow, The Brookings Institution, 1978-2016.

Adjunct Professor, School of Public Affairs, University of Maryland, 1987 - 1993

Deputy Director, Council on Wage and Price Stability, 1977 - 1978

Acting Director, Council on Wage and Price Stability, 1977

Adjunct Associate Professor of Economics, George Washington University, 1975 - 1977

Assistant Director, Council on Wage and Price Stability, 1975 - 1977

Associate Professor of Economics, M.I.T., 1972 - 1974

Assistant Professor of Economics, M.I.T., 1966 - 1972

Johnson Research Fellow, The Brookings Institution, 1965 - 1966

Instructor, Northwestern University, 1964 - 1965

Consultant to Environmental Protection Agency, Antitrust Division Federal Trade Commission, Treasury Department, various years

EDUCATION:

Ph.D., Economics, Northwestern University, 1968

M.A., Economics, Northwestern University, 1965

A.B., Economics, University of Cincinnati, 1962

MEMBERSHIPS:

American Economic Association

PUBLICATIONS:

Books:

First Thing We Do: Let's Deregulate All the Lawyers. (with Clifford Winston and Vikram Maheshri) Washington, DC: The Brookings Institution, 2011.

Competition and Chaos: U.S. Telecommunications since the 1996 Act. Washington, DC: The Brookings Institution, 2005.

Broadband: Should We Regulate High-Speed Internet Access? (edited with James Alleman), AEI Brookings Joint Center for Regulatory Studies, 2002.

Telecommunications Liberalization on Two Sides of the Atlantic. (with Martin Cave) AEI Brookings Joint Center for Regulatory Studies, 2001.

Who Pays for Universal Service? When Telephone Subsidies Become Transparent. (with Leonard Waverman) Washington: The Brookings Institution, 2000.

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