No. 17-1261

IN THE 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.

PETITION FOR A WRIT OF MANDAMUS

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December 12, 2017

Certificate as to Parties, Rulings, and Related Cases

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

A. Parties and Amici

Petitioners: The Competitive Enterprise Institute (CEI) and four individuals—John France, Daniel Frank, Jean-Claude Gruffat, and Charles Haywood—are the Petitioners.

Respondents: The Federal Communications Commission is the Respondent.

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

Petitioners seek a writ of mandamus to compel the Federal Communications Commission (FCC) to meet its statutory obligation under 47 U.S.C. § 405(a) by "enter[ing] an order, with a concise statement of the reasons therefor, denying … or granting" the petition for reconsideration filed with the FCC by the Petitioners regarding the agency's order to approve various transfers of licenses and authorizations sought by three merging cable companies. 2016 Charter Order, A-14.

C. Related Cases

Petitioners are aware of no related cases, and this case has not previously come before this Court or any district court.

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioners 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.

/s/ Theodore H. Frank
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2017 Charter Order on Reconsideration	*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), *available at* https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-34A1_Rcd.pdf.
ACA	American Cable Association
APA	Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*
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
FDA	Food and Drug Administration
ICC	Interstate Commerce Commission
NHTSA	National Highway Traffic Safety Administration
PEPCO	Potomac Electric Power Company
TRAC	Telecommunications Research & Action Center
TWC	Time Warner Cable Inc.

Jurisdictional Statement

This Court is empowered to issue writs of mandamus under 28 U.S.C. § 1651. The Administrative Procedure Act authorizes this Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). And this Court has the authority to review "decisions and orders of the [Federal Communications] Commission" related to "an application for authority to transfer, assign, or dispose of any … instrument of authorization" involving a "construction permit or station license." 47 U.S.C. § 402(b). This Court has held that its jurisdiction encompasses the authority to issue writs of mandamus to compel the FCC to act when it has unlawfully failed to do so. *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984) ("*TRAC*"). This jurisdiction includes cases that are within this Court's "appellate jurisdiction" even when "no appeal has been perfected." *Id.* (quoting *FTC v. Dean Foods Co.*, 384 U.S. 597, 603–04 (1966)).

Statement of the Issues

Petitioners filed a petition for reconsideration with the Federal Communications Commission (FCC) on June 9, 2016, asking the agency to modify its order approving the applications of three cable companies seeking to merge by eliminating various unlawful conditions harming consumers that the FCC had placed on the transaction. The FCC had a statutory deadline of ninety days to respond to this petition, 47 U.S.C. § 405(a), and has not yet ruled. A "reviewing court shall compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

1. Has the FCC "unreasonably delayed" a response to this petition for reconsideration, when it has failed to respond for 18 months—over ***six times*** the

length of its 90-day statutory deadline—when the delay has deprived petitioners of the opportunity for judicial review of the FCC's decision?

2. In the alternative, does 5 U.S.C. § 706(1) require this Court to compel agency action that was "unlawfully withheld" in violation of a statutory deadline?

Statement of the Case

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." A16.[1] 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. *See id.* The Communications Act empowers the FCC to review applications to transfer such licenses and authorizations. 47 U.S.C. §§ 214(a), 310(d).

On May 10, 2016, the FCC released an order ("2016 Charter Order") approving the cable companies' applications, effectively allowing the companies to finalize their merger. A15. The FCC's approval, however, imposed various conditions on New Charter that the agency contended were necessary to "ensure that the transaction will yield net public interest benefits." A24-A25. The order requires New Charter to fulfill, among other requirements, the following:

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[1] "Axyz" refers to page xyz of Petitioners' Addendum.

- 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." A53 at para. 388.
- 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)." A75, para. 450.
- Offer "settlement-free interconnection" to "edge providers" including, in particular, online video distributors, for seven years after the transaction closes. A77, para. 456.
- 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. A77, para. 457.

These conditions materially curtail New Charter's ability to price its services and negotiate with other Internet companies over interconnection. In the Dissenting Statement of the 2016 Charter Order, Commissioner Ajit Pai criticized the agency's "radical" approach as eliminating "all but one business model," barring New Charter from "ask[ing] high-bandwidth users to shoulder more of the burden than low-bandwidth users." A101. To comply with the Order's conditions, New Charter must undertake a costly, long-term expansion of its coverage footprint; Commissioner Michael P. O'Rielly criticized the build-out condition as burdening New Charter "with

greater leverage and debt costs … to pay for building out facilities to these areas." A108. New Charter would normally "not plan residential build several years in advance," but instead build out its "networks organically in response to market demand." A51-52. The 2016 Charter Order conditions, however, require the firm to commit to a substantial expansion of its footprint in excess of its ordinary growth rate, without regard to economic realities. *Id.* at A52-A53. This process necessitates spending hundreds of millions of dollars each year to lay cable underground, attach new wires to utility poles, and modify the company's existing infrastructure to accommodate new users. *Id.*, para. 386, n.1302 (describing Charter's residential buildout analysis). Commissioner Ajit Pai, who has since been elevated to FCC Chairman, warned that the Order moves the FCC "one more step down the path of micromanaging where, when, and how ISPs deploy infrastructure." A102. Commissioner Pai's dissent further noted that the Order "doesn't bother to make any effort to explain how its regulatory grab-bag has anything to do with addressing any transaction-specific harms." A101. Commissioner Pai suggested that the methodology involved was one of politically-motivated "extortion" rather than the public interest. A104.

The FCC's order was issued without public hearing. *See* 2016 Charter Order, A15 (approving the applications without designating them for a hearing). 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 CEI) filed a petition for reconsideration urging the FCC to reconsider its decision to impose various conditions on New Charter on the grounds that the conditions 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* CEI Petition for Reconsideration, A114-A115. The petition was timely under 47 U.S.C. § 405(a).

In addition to the petition filed by CEI, three other organizations—one company and two trade associations—filed timely petitions for reconsideration of the 2016 Charter Order.[2] 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. A110, para. 2. Both of these petitions urged the agency to strike the order's "overbuild condition," which required New Charter to construct new facilities to offer service to at least one million locations *already served* by one or more high-speed broadband providers. A110, para. 5. The agency concluded that this condition did not relate to any transaction-specific harm or benefit, and that it did not further the public interest. A112, paras. 9-10.

However, the agency has yet to act on CEI's petition for reconsideration (or on the petition filed by Zoom Telephonics, which contends that Charter's cable modem

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[3] *See* Zoom Telephonics, Inc. Petition for Reconsideration (June 8, 2016), *available at* https://ecfsapi.fcc.gov/file/60002098813.pdf, NTCA–The Rural Broadband Association Petition for Reconsideration (June 9, 2016), *available at* https://ecfsapi.fcc.gov/file/60002112473.pdf, American Cable Association Petition for Reconsideration (June 9, 2016), *available at* https://ecfsapi.fcc.gov/file/60002112529.pdf.

billing practices violate FCC regulations). The FCC acknowledged in its 2017 Charter Order that the CEI and Zoom Telephonics petitions were "not the subject of this Order on Reconsideration." A110, para. 6 n.11. Although the FCC's 2017 Charter Order ended the overbuild condition—which is one of the conditions CEI urged the agency to eliminate—the FCC instead effectively expanded the build-out condition by requiring network build-out to 2 million unserved locations, instead of the 1 million unserved locations *and* 1 million locations already served by a broadband provider. *Id.* at A113, para. 12. The 2017 Charter Order did not eliminate this condition, as CEI urged, nor did it address any of the other conditions to which CEI objected. *See* A115-A116.

Summary of Argument

Acting with no statutory authority, the FCC unlawfully placed various conditions on its approval of the applications of three cable companies—Charter, Time Warner Cable, and Bright House—to combine their licenses to form a new company, known as the "New Charter." CEI Petition for Reconsideration, A118-A120. To challenge the FCC's attempt to regulate via merger "extortion," CEI filed a petition for reconsideration with the FCC on June 9, 2016, urging the agency to revise its approval order.

Federal law requires the FCC to act on any petition for reconsideration that "relates to an instrument of authorization granted without a hearing … within *ninety days* of the filing of such petition." 47 U.S.C. § 405(a) (emphasis added). Thus, the FCC had until September 7, 2016, to act on this petition. That day has long since passed. In

the 18 months since CEI filed its petition for reconsideration, the agency has taken no action on it, even though the FCC has granted two other petitions regarding its 2016 Charter Order. In informal communications, the FCC's Office of General Counsel and its Wireline Competition Bureau have declined to comment on when the agency plans to act on the petition.

Mandamus is warranted in this case because the FCC has withheld action on this petition for reconsideration for an unreasonable amount of time. By enacting 47 U.S.C. § 405, Congress provided a 90-day timetable for FCC action on petitions for reconsideration, which may provide the duration of the "reasonable time" within which the FFC is required to carry out its duties under the Administrative Procedure Act (APA). *See TRAC,* 750 F.2d at 80. The FCC's extreme delay prejudices CEI's ability to seek judicial review of the 2016 Charter Order, as the agency's inaction on the petition for reconsideration renders its 2016 order nonfinal and hence unreviewable by this Court. *See TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 133 (D.C. Cir. 1989). And because New Charter is already in the process of making long-term capital commitments to comply with the conditions of the 2016 Charter Order, the FCC delay also prejudices New Charter and its consumers.

In the alternative, the FCC has unlawfully withheld agency action by failing to comply with the Congressionally mandated deadline in § 405. 5 U.S.C. § 706(1) requires this Court to order action.

Petitioners thus respectfully request that this Court issue a writ compelling the FCC to meet its statutory duty by expeditiously entering an order to grant or deny CEI's petition for reconsideration.

Identity and Standing of Petitioners

The Competitive Enterprise Institute (CEI) is a non-profit public interest organization dedicated to advancing free-market solutions to regulatory issues. CEI was founded in 1984 and is headquartered in Washington, D.C. CEI regularly participates in FCC rulemaking proceedings by filing comments with the agency, including comments regarding the applications filed with the FCC by Charter Communications, Inc. (Charter), Time Warner Cable Inc. (TWC), and Bright House Networks, LLC (BHN).[3]

Dr. John France is an individual who subscribes to New Charter's television and broadband Internet access services of New Charter. Before the merger, he subscribed to BHN. *See* Declaration of Dr. John France, A125.[4]

Daniel Frank is an individual who subscribes to New Charter's television and broadband Internet access services. Before the merger, he subscribed to TWC. *See* Declaration of Daniel Frank, A126-A127.

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[3] *See, e.g.*, Comments of CEI, the International Center for Law & Economics, and TechFreedom, Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations, MB Docket No. 15-149 (2015), available at http://apps.fcc.gov/ecfs/document/view?id=60001329147.

[4] A petitioner may demonstrate standing through a declaration submitted to the appellate court for purposes of establishing Article III jurisdiction. 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).

Jean-Claude Gruffat is an individual who subscribes to New Charter's television and broadband Internet access services. Before the merger, he subscribed to TWC. Gruffat is also a member of the Board of Directors of the Competitive Enterprise Institute. *See* Declaration of Jean-Claude Gruffat, A128.

Charles Haywood is an individual who subscribes to New Charter's television and broadband Internet access services. Before the merger, he subscribed to BHN. *See* Declaration of Charles Haywood, A129-A130.

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, or both. They will thus be injured by the FCC's 2016 Charter Order, as they impose conditions on New Charter that "will result in increases in the cost of cable and broadband service for every current cable subscriber of the three companies," as recognized by FCC Commissioner Michael O'Rielly (who dissented in part from the order). A108.

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). This is so "even if they could ameliorate this injury by purchasing some alternative product," such as another broadband provider's services. *Id.* Consumers may establish such injury by showing that manufacturers reacted to regulations by offering less desirable products. *Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 112-13 (D.C. Cir. 1990) (consumer group had standing to challenge federal fuel-economy regulations that

allegedly caused car makers to build smaller cars). And consumers can challenge regulations that impose higher costs on producers, under the reasonable assumption that higher prices will result, even if such price increases are not a certainty, or if they depend on the reactions of intervening suppliers or sellers. *Id.* at 113 ("[P]etitioners need not prove a cause-and-effect relationship with absolute certainty … . This is true even in cases where the injury hinges on the reactions of third parties … to the agency's conduct").

Argument

Mandamus is an extraordinary remedy, but it is appropriately imposed where an agency has refused to perform a statutory duty or has unreasonably delayed in doing so. *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004) ("*American Rivers*"). The Administrative Procedure Act (APA) requires this Court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). And this Court is empowered to issue writs of mandamus to ensure agencies comply with the APA by the All Writs Act. 28 U.S.C. § 1651(a) (empowering "[t]he Supreme Court and all courts established by Act of Congress" to "issue all writs necessary or appropriate in aid of their respective jurisdictions").

In assessing whether to issue a writ based on unreasonable delay, the Court must determine whether the agency has a duty to act and, if so, whether it has unreasonably delayed in complying with that duty. *American Rivers*, 372 F.3d at 418 (D.C. Cir. 2004). Here, the FCC had a statutory duty to respond to CEI's petition for reconsideration within 90 days. The FCC's failure to satisfy this duty is unreasonable because the

agency's 18-month delay is over ***six times*** the 90-day timetable required by statute. In the alternative, this Court should compel the agency to respond to CEI's petition because the agency's failure to respond is unlawfully withheld under the APA, and the plain language of the statute requires this Court to compel the agency to act.

I. The FCC has a statutory duty to rule on CEI's petition for reconsideration within 90 days of the petition.

On May 10, 2016, the FCC released an order ("2016 Charter Order") approving the cable companies' applications regarding the merger. A15. In approving the New Charter applications, the FCC concluded that certain issues did not "warrant designation for hearing." A25. As such, the agency exercised its discretion to adjudicate the applications without conducting a public hearing pursuant to 5 U.S.C. § 554. Thus, the agency's order approving the applications was "an instrument of authorization granted without a hearing." 47 U.S.C. § 405(a).

On June 9, 2016, thirty days after the FCC released its order approving the companies' applications, CEI filed a petition for reconsideration urging the FCC to reconsider its decision to impose various conditions. A114-A115. Section 405 requires that the FCC "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." *Id.* The statute further provides that if any "petition [for reconsideration] 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." *Id.* (emphasis added). The FCC's ninety-day window for taking action on

CEI's petition for reconsideration ended on September 7, 2016, without a response from the agency. Over 550 days have elapsed since CEI's petition was filed on June 9, 2016.

II. The FCC should be compelled to act because its 18-month delay is "unreasonable delay" given the 90-day statutory timetable and the prejudice to CEI and consumers.

While mandamus is "reserved for extraordinary circumstances," an "agency's unreasonable delay presents such a circumstance because it signals the breakdown of regulatory processes." *American Rivers*, 372 F.3d at 418 (internal quotations omitted) (quoting *Cutler v. Hayes*, 818 F.2d 879, 897 n. 156 (D.C. Cir. 1987)). Courts "will interfere with the normal progression of agency proceedings to correct transparent violations of a clear duty to act." *Id.* (internal quotations omitted) (quoting *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000)). Although "there is 'no per se rule on how long is too long' to wait for agency action, ... a reasonable time for agency action is typically counted in weeks or months, not years." *Id.* at 419 (quoting *In re Int'l Chem. Workers Union*, 958 F.2d 1144, 1149 (D.C. Cir. 1992)).

In assessing whether an agency's unreasonable delay in a particular case warrants mandamus, this Court has articulated several principles that may serve as "useful guidance":

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the

> sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

TRAC, 750 F.2d at 79-80 (internal citations and quotations omitted). This Court describes these *TRAC* principles as "the hexagonal contours of a standard," but has been careful to emphasize that they are "hardly ironclad," *id.*, and that "[e]ach case must be analyzed according to its own unique circumstances," *Air Line Pilots Ass'n v. Civil Aeronautics Board*, 750 F.2d 81, 86 (D.C. Cir. 1984). Among other considerations, "[s]ome agency action will have a timetable mandated by statute." *Id.*

A. The FCC's 18-month delay is egregious because it is over ***six times*** the 90-day limit promulgated by Congress.

In assessing undue delay, the time agencies take to make decisions must be governed by a "rule of reason." *PEPCO v. ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983). "[W]here Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason." *TRAC*, 750 F.2d at 80. "Congress's timetable may supply content for th[e] rule of reason—***the first and most important*** of the TRAC factors." *In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 837 (D.C. Cir. 2012) ("*PMOI*") (emphasis added) (internal citations and quotations omitted).

In *PMOI*, this Court granted a petition for writ of mandamus requiring the Secretary of State to act on an organization's petition for revocation of its Foreign

Terrorist Organization (FTO) listing. 680 F.3d at 833. The Secretary had a 180-day statutory deadline that she had failed to meet. *Id.* at 837. This Court explained that "[t]he specificity and relative brevity of the 180-day deadline manifests the Congress's intent that the Secretary act promptly on a revocation petition and delist the organization if the criteria for the listing no longer exist. The Secretary's twenty-month failure to act plainly frustrates the congressional intent and cuts strongly in favor of granting PMOI's mandamus petition." *Id.*

The delay here is even worse. The FCC's inaction is over six times the 90-day statutory deadline. 47 U.S.C. § 405(a). This specific, short period of time demonstrates Congress's intent that the FCC is expected to promptly respond to petitions such as CEI's. Indeed, this 90-day timetable does *not* apply to all petitions for reconsideration of FCC actions, such as petitions that relate to FCC rulemaking proceedings, or to matters decided by formal adjudication. *See generally id.* The Communications Act is silent as to how long the FCC may take to respond to such petitions. *Id.* Yet Congress chose to impose a statutory timeframe on the agency with respect to a certain type of petitions—those relating to an instrument of authorization granted without a hearing—evincing Congress's intent to limit the FCC's discretion over the "speed with which the Commission perform[s] its regulatory duties" regarding certain petitions for reconsideration. *See PEPCO*, 702 F.2d at 1034. Here, after the FCC approved several applications by Charter, TWC, and BHN involving various instruments of authorization that it granted without a hearing, the agency failed to respond to CEI's petition for reconsideration within 90 days.

Even if Congress had not supplied a statutory timetable governing how long the FCC had to act on this petition, the agency's delay would still be unreasonable. Unlike many other cases involving claims of unreasonable agency delay, in which courts have been asked to compel agencies to finalize complex rulemaking proceedings, *e.g.*, *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d 21 (D.C. Cir. 1984), or re-evaluate ratemaking decisions based on contested economic evidence, *e.g.*, *PEPCO*, 702 F.2d at 1026, CEI's petition for reconsideration merely asks the FCC to eliminate the conditions it imposed on a single cable transaction. *See* A114.

Given the agency's apparent ability to respond to similar petitions, the FCC's failure to act on CEI's petition to date is an exemplar of unreasonable delay. *See PMOI*, 680 F.3d at 837 ("But the Congress undoubtedly knew the enormous demands placed upon the Secretary and nonetheless limited her time to act on a petition for revocation to 180 days…."). As described below, the FCC's inaction results in significant prejudice, but independent of that prejudice, the undue delay—that is over ***six times*** what Congress promulgated—requires mandamus.

B. The FCC's extreme delay prejudices the interests of CEI and consumers.

When this Court decides "whether the pace of decision" by an agency "is unreasonably delayed," it "consider[s] the nature and extent of the interests prejudiced by delay." *Pub. Citizen Health Research Grp. v. FDA*, 740 F.2d at 35. The FCC's egregious delay prejudices the interests of CEI, consumers and New Charter.

First, the FCC's failure to take timely action on this petition is not only unlawful, but it also precludes CEI from obtaining judicial review of the underlying order

approving the New Charter applications. As "person[s] who [are] aggrieved or whose interests are adversely affected by an[] order of the Commission granting or denying any application," 47 U.S.C. § 402(b)(6), CEI and the four individuals are entitled by statute to appeal the FCC's order—but their petition remains pending at the agency. This Court has previously "denied jurisdiction of an appeal" of an FCC order "where appellant's prior-filed petition for rehearing is *still pending* before the Commission." *Wrather-Alvarez Broadcasting, Inc. v. FCC*, 248 F.2d 646, 648 (D.C. Cir. 1957) (emphasis added) (citing *Southland Industries v. FCC*, 99 F.2d 117 (D.C. Cir. 1938)). "[A] pending petition for administrative reconsideration renders the underlying agency action nonfinal, and hence unreviewable, with respect to the petitioning party." *United Transportation Union v. ICC*, 871 F.2d 1114, 1114 (D.C. Cir. 1989).

In *PMOI,* this Court found that mandamus was appropriate because the Secretary's inaction "insulates her decision from [appellate] review" and placed petitioner in "administrative limbo; it enjoys neither a favorable ruling on its petition nor the opportunity to challenge an unfavorable one." 680 F.3d at 837. "[T]he primary purpose of the writ in circumstances like these is to ensure that an agency does not thwart our jurisdiction by withholding a reviewable decision." *American Rivers,* 372 F.3d at 419 (citing *TRAC*, 750 F.2d at 76). The FCC has similarly insulated its 2016 Charter Order from review by preventing CEI from challenging it on appeal.

Indeed, the longer the FCC takes to address CEI's petition, the more likely it becomes that the prejudice and harms stemming from the agency's conditions can no longer be reversed. The agency should not be able to evade judicial review by delaying a mandatory procedural move until a potential appeal of its decision is rendered moot.

If the FCC is allowed to continue stalling indefinitely on this petition, it would effectively nullify the ninety-day statutory deadline imposed by Congress. As this Court explained in an order compelling NHTSA to immediately promulgate fuel economy standards, an agency's failure to observe a statutory deadline "evis[c]erates the very purpose of the regulation." *In re Ctr. for Auto Safety*, 793 F.2d 1346, 1353 (D.C. Cir. 1986). Such an outcome would be at odds with the fundamental interpretive canon that "'[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ….'" *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* § 46.06, at 181-86 (rev. 6th ed. 2000)).

Second, the FCC's delay also has significant implications for consumers. The agency has repeatedly emphasized that a robust broadband market is of crucial importance to America's consumers. For instance, the FCC stated in 2015 that "America needs more broadband, better broadband, and open broadband networks." *Protecting and Promoting the Open Internet*, *Report and Order on Remand, Declaratory Ruling, and Order*, 30 FCC Rcd 5601, 5606, para. 11 (2015). In his statement accompanying this order, then-FCC Chairman Tom Wheeler wrote that "[b]roadband is reshaping our economy and recasting the patterns of our lives. Every day, we rely on high-speed connectivity to do our jobs, access entertainment, keep up with the news, express our views, and stay in touch with friends and family." *Id.* at 5914 (statement of Tom Wheeler). And in one recent proceeding involving Internet regulation, the FCC received 3.7 *million* comments from the public. *Id.* at 5624, para. 74. How the Internet is regulated is no mundane regulatory matter.

The petition for reconsideration seeks to alleviate regulatory obstacles to broadband access in the United States. Specifically, CEI urges the FCC to eliminate conditions that threaten the quality and affordability of Internet service for New Charter's broadband consumers, of whom there are 22 million. *See* Charter Communications, *Charter Announces Second Quarter 2017 Results*, July 27, 2017.[5] As the nation's second-largest cable operator, *id.*, New Charter must make decisions every day about where to invest and how to prudently expand its network and upgrade its services while offering competitive prices to consumers. *See* 2016 Charter Order, Statement of Comm'r Michael P. O'Rielly, A108. CEI contends that the conditions imposed by the FCC on New Charter distort the firm's ability to make investments that align with the welfare of broadband consumers, and its ability to set prices so as to make its services more affordable for low- and moderate-usage consumers. *See* A115-A118.

Third, the FCC's undue delay prejudices New Charter. The company is already well underway in making long-term capital commitments to abide by the condition requiring it to expand its footprint by two million households, as the Charter-TWC-BHN merger was finalized on May 18, 2016. Meg James, *Charter Completes Purchase of Time Warner Cable, Bright House*, L.A. TIMES, May 18, 2016, *available at* https://goo.gl/dR5vS8. New Charter soon began "executing on [its] plans" to rebrand its services in legacy markets, update its cable facilities, and make major capital expenditures related to the transaction. Charter Communications, *Press Release*, *Charter*

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[5] *Available at* http://ir.charter.com/phoenix.zhtml?c=112298&p=irol-newsArticle&ID=2289398.

Announces Second Quarter 2016 Results, Aug. 9, 2016.[6] The company's regulatory filings reveal that it is already in the process of satisfying the FCC-imposed conditions to expand its network footprint, operate a low-income broadband program, and offer settlement-free interconnection to online video distributors, among other conditions. For example, in the first six months of 2017, New Charter spent $545 million on "line extensions," which the company defines as the "network costs associated with entering new service areas." CCO Holdings, LLC, *Quarterly Report on Form 10-Q for the Period Ended June 30, 2017*, at 45-46, Aug. 1, 2017, *available at* https://goo.gl/Jc2jjz. This expenditure represents more than a doubling of the $218 million that Charter spent on line extensions during the first six months of 2016, a period that ended shortly after the transaction was finalized. *Id.*

The dangers forewarned by FCC Commissioner O'Rielly are being realized. In May 2016, Commissioner O'Rielly predicted that New Charter may "divert[] capital that the merged company could use to improve service to their existing customers or expand service to households without advanced services, harming these consumers." 2016 Charter Order, Statement of Comm'r Michael P. O'Rielly, A108. And New Charter is continuing to make long-term investments and other operational commitments that may limit or foreclose its ability to retreat from price hikes in the event the FCC conditions are ultimately adjudged unlawful. *See id.* To the extent that working to meet these conditions has caused the company to incur substantial costs and forego

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[6] *Available at* http://ir.charter.com/phoenix.zhtml?c=112298&p=irol-newsArticle&ID=2194073.

promising new revenue sources, consumers—including Petitioners—have already been harmed by the FCC's conditions.

The FCC's inaction is particularly prejudicial because the conditions imposed by the agency on the transaction are not only harmful, but they are also unlawful. The FCC used the merging companies' applications as "vehicles to accomplish policy goals that it could not achieve through rulemakings alone." 2016 Charter Order, Statement of Comm'r Michael P. O'Rielly, A106. Several of the agency's conditions, such as the build-out requirement and the low-income broadband program, have "[n]othing" to do with the transaction. 2016 Charter Order, Dissenting Statement of Comm'r Ajit Pai, A100. As Commissioner Ajit Pai wrote in 2016, the 2016 Charter Order is the epitome of "fact-free, dilatory, politically motivated, non-transparent decision-making" that is part of a "broken" merger review process. *Id.* at A103. Moreover, the order's conditions far exceed the scope of the FCC's limited authority under the Communications Act, 47 U.S.C. §§ 214, 310(d), to review the transfer of wireless and telecommunications licenses.

* * *

The FCC's failure to respond to CEI's petition for reconsideration is "unreasonable delay" given the egregious length (over *six times* its statutory 90-day deadline), the prejudice to CEI from being unable to seek appellate review of the 2016 Charter Order, and the prejudice to consumers resulting from the conditions imposed by the 2016 Charter Order. This Court should compel the FCC to satisfy its statutory duty by expeditiously entering an order responding to CEI's petition for reconsideration.

III. This Court must grant the writ of mandamus for the independent reason that agency action has been unlawfully withheld.

Under the *TRAC* principles, this Court should grant the petitioner's request for a writ of mandamus because the egregious 18-month delay and the resulting prejudice amounts to "unreasonable delay." But there is no need to engage in multi-factor balancing tests. The Court must issue the writ for the independent reason that the FCC's action has been unlawfully withheld.

A. The FCC's failure to meet its statutory deadline is unlawful.

The Administrative Procedure Act (APA) requires that this Court "***shall***—(1) compel agency action ***unlawfully withheld*** or unreasonably delayed." 5 U.S.C. §§ 706, 706(1) (emphasis added). Because the FCC failed to meet its 90-day statutory deadline to respond to CEI's petition for reconsideration, the FCC's inaction is also unlawful.

The seminal case applying Section 706 to an agency's failure to meet a statutory deadline is *Forest Guardians v. Babbitt*, 174 F.3d 1178 (10th Cir. 1999). The Tenth Circuit confronted the Secretary of the Interior's failure to issue a final rule regarding the critical habitat of the silver minnow, despite a one-year statutory deadline to issue the final rule. *Id.* at 1181, 1183. The Tenth Circuit held that when an agency does not have a "concrete deadline" then it must act within the APA's general admonition to conclude matters "within a reasonable time" and "a court must compel only action that is delayed unreasonably." *Id.* at 1190. "Conversely, when an entity governed by the APA fails to comply with a **statutorily imposed absolute deadline, it has *unlawfully withheld* agency action** and courts, upon proper application, must compel the agency to act."

Id. The Tenth Circuit found that the Secretary's failure to meet the one-year statutory deadline meant that agency action was unlawfully withheld and the court must compel the Secretary to act.

The Tenth Circuit found support in *Sierra Club v. Thomas*, 828 F.2d 783 (D.C. Cir. 1987). In *Sierra,* this Court too recognized a distinction between "unlawfully withheld" and "unreasonably delayed." 828 F.2d at 794-95 & nn. 77-80 (citing cases). In *Sierra*, this Court explained the difference between delay and withholding action: "Unlike claims alleging agency recalcitrance in the face of a 'clear statutory duty,' the petitioner alleging 'unreasonable delay' does not contend that agency inaction violates a clear duty to take a particular action by a date certain." 828 F.2d at 794. When agency inaction is in violation of a clear statutory duty, this "type of inaction represents action that has been 'unlawfully withheld.'" *Id.* at 793.

Here, the FCC's failure to respond to CEI's petition within the 90-day statutory deadline—the date certain of September 7, 2016—means that the FCC abdicated its statutory responsibility; the FCC's inaction is unlawful. Indeed, the fact that 18 months have passed since CEI's petition, that the FCC responded to two *other* petitions for reconsideration regarding the *same* challenged order over seventh months ago, and that the FCC declines to comment on whether or when it will respond to CEI's petition, there is no indication that the FCC will ever fulfill its statutory duty. The FCC has unlawfully withheld action and should be compelled to act.

B. Because the FCC's inaction is both unreasonably delayed and unlawfully withheld, this Court must compel agency action under Section 706 of the APA.

In Section 706 of the APA, Congress decreed that when federal courts review agency actions, they "*shall* . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1) (emphasis added). If a court finds that a delay is unreasonable or if a court finds that agency action is unlawfully withheld, then under the APA, a court *must* compel agency action.

While a court has equitable discretion to issue a petition for mandamus, that discretion is limited by Congress' clear expression that agency action *must* be compelled if unreasonably delayed or unlawfully withheld. *Forest Guardians*, 174 F.3d at 1187.[7] In *Forest Guardians*, the Tenth Circuit rejected the argument that even if action was "unlawfully withheld" under Section 706, the court had the equitable discretion not to compel such action. 174 F.3d at 1187. The Secretary pointed to Supreme Court opinions holding that even in the face of a government statutory violation, the power to grant or deny injunctive relief rests in the sound discretion of the court. *Id.* The Tenth Circuit disagreed, observing that those Supreme Court opinions *also* hold that a court's equitable discretion may be curbed by Congress: "these cases also unmistakably hold that Congress may 'restrict[] the court's jurisdiction in equity' by making injunctive relief ***mandatory*** for a violation." *Id.* (emphasis added) (citing *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313, 102 S.Ct. 1798 (1982); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531,

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[7] *See also Rosemere Neighborhood Ass'n v. U.S. Envtl. Prot. Agency*, 581 F.3d 1169, 1172 n.2 (9th Cir. 2009) (citing *Forest Guardians* and noting that § 706 "demarcates what relief a court may (or must) order").

542-43 & n.9, 107 S.Ct. 1396 (1987); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194, 98 S.Ct. 2279 (1978)).

The Tenth Circuit concluded that a court's traditional equitable power was curbed by the APA's mandatory language that agency inaction "shall" be compelled. *Forest Guardians*, 174 F.3d at 1187. "Through § 706 Congress has stated unequivocally that courts must compel agency action unlawfully withheld or unreasonably delayed." *Id.* Simply put, "'[s]hall' means shall." *Id.*

In reaching its holding, *Forest Guardians* rejected this Court's decision in *In re Barr Laboratories*, 930 F.2d 72 (D.C. Cir. 1991) ("*Barr*"). *Forest Guardians,* 174 F.3d at 1190-91. In *Barr*, this Court denied petitioner's request for writ of mandamus regarding the Food and Drug Administration's ("FDA") failure to comply with a 180-day statutory deadline to approve or disapprove generic drug applications. 930 F.2d at 73. Despite the FDA's statutory violation, the *Barr* panel reviewed the *TRAC* factors and held that "a finding that delay is unreasonable does not, alone, justify judicial intervention." *Id.* at 75. The Court reasoned that "[e]quitable relief, particularly mandamus, does not necessarily follow a finding of a violation." *Id.* at 74. The *Barr* panel, however, *never* considered Section 706 and its mandate to compel agency action, nor did it consider the Supreme Court precedent holding that Congress may limit a court's equitable discretion. This Court has never considered whether the "shall" language in 5 U.S.C. § 706(1) *requires* a court to compel agency action. *See Cobell v. Norton*, 240 F.3d 1081, 1096 & n.4 (D.C. Cir. 2001) (citing *Forest Guardians* as contrary precedent but failing to address or discuss § 706).

While a panel cannot overrule a prior panel decision of this Court, *see, e.g., Humane Society of U.S. v. E.P.A.*, 790 F.2d 106, 110 (D.C. Cir. 1986), the fact that this Court has never squarely considered whether the Court's equitable discretion is limited by the mandatory language of § 706(1) indicates that it is an issue suitable for this panel's review. This Court should follow *Forest Guardians* and hold that a court *must* compel agency action under 706 if unreasonably delayed or unlawfully withheld. To the extent this Court concludes that under *Barr*, Section 706 does not limit a court's equitable discretion in compelling agency action, CEI preserves its position to seek *en banc* review to overrule *Barr* and reconcile that decision with Supreme Court precedent recognizing congressional limitations on equitable discretion.

"In the end, although courts must respect the political branches and hesitate to intrude on their resolution of conflicting priorities, our ultimate obligation is to enforce the law as Congress has written it." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 193 (D.C. Cir. 2016). As written, "shall" means shall and the law requires courts to compel agency action that is unlawfully withheld or unreasonable delayed. 5 U.S.C. § 706(1). "To hold otherwise would be an affront to our tradition of legislative supremacy and constitutionally separated powers." *Forest Guardians*, 174 F.3d at 1190; *see also In re Aiken Cty.*, 725 F.3d 255, 267 (D.C. Cir. 2013) (granting mandamus and holding that "constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law"). If courts find that action was unreasonably delayed or unlawfully withheld, and they refuse to act, they legitimize agency non-compliance with mandatory congressional deadlines.

Because the FCC's egregious 18-month delay here is "unreasonable" and its failure to meet the statutory deadline is "unlawful," the APA mandates this Court to compel agency action.

Relief Sought

For the reasons set forth above, Petitioners respectfully urge this Court to issue a writ of mandamus compelling the Federal Communications Commission to expeditiously enter an order granting or denying CEI's petition for reconsideration.

December 12, 2017

Respectfully submitted,

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Certificate of Compliance

I hereby certify that the foregoing petition 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 petition has been prepared in a proportionally spaced typeface, 14-point Garamond, using Microsoft Word 2013. I further certify that the foregoing petition complies with the page limits of Circuit Rule 21(d).

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December 12, 2017

Certificate of Service

I certify that, on this 12th day of December 2017, I caused one copy each of the foregoing petition to be served by U.S. mail and e-mail on counsel for respondent listed below. As Circuit Rule 21(c) requires, I will also cause to be filed with the clerk of this Court, by hand delivery, four paper copies of the foregoing document.

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No. 17-1261

IN THE 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.

On Petition for a Writ of Mandamus

ADDENDUM

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