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.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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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.

Introduction

The Federal Communications Commission ("FCC") does not dispute that it had a 90-day statutory duty to respond to CEI's petitions for reconsideration. Nor does the FCC dispute that the Administrative Procedure Act ("APA") requires a court to issue mandamus if agency action is unreasonably delayed or unlawfully withheld. Instead, the FCC seeks to erase the word "shall" from both statutes. The FCC's interpretation would forever insulate itself from mandamus by downgrading its 90-day statutory duty to a mere congressional suggestion. The interpretation also violates separation of powers, because there would be *no* law that Congress could pass to require the FCC to review CEI's petition. Constitutional principles require the FCC to abide by congressional mandate, even when it believes it knows better. Further, the equities overwhelmingly favor mandamus here because the FCC offers no competing agency activity that justifies its 21-month delay or that currently prevents the FCC from fulfilling its duty.

Argument

I. Article III standing is satisfied because the FCC's own findings demonstrate a causal link between the alleged harm of increased costs to Petitioners and the Order's challenged merger conditions, and this Court's elimination of those conditions would redress Petitioners' injuries.

The FCC challenges the Article III standing of the individual subscriber Petitioners, claiming that they have not shown "causation—that their monthly

broadband bills increased as a result of the conditions imposed by the Commission or that they would likely decrease if the challenged conditions were lifted." OB7-8.[1] The FCC's argument, that causation fails because Petitioners have not shown they were "actually harmed" by the challenged conduct, OB8, misstates the law and imposes a standard higher than Article III demands.

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). Contrary to the FCC's argument, "the 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*"). 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.* Similarly, "a plaintiff seeking a writ of mandamus must plead facts that, when accepted as true, show he has a 'clear and indisputable right' to relief." *Bond v. U.S. Dep't of Justice*, 828 F. Supp. 2d 60, 75 (D.D.C. 2011) (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988)). Here, Petitioners exceed their

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[1] OB refers to the FCC's Opposition Brief, PB refers to Petitioners' Petition for Mandamus, and "Axyz" refers to page xyz of Petitioners' Addendum.

burden by submitting not just factual allegations, but also record evidence of their standing.

First, the Petitioners have established Article III causation because the record demonstrates a "fairly traceable" connection between their increased monthly bills and the FCC's merger conditions. OB9. "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*, 901 F.2d at 113. And, when injury hinges on reaction 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 *CEI v. NHTSA*, petitioner Consumer Alert alleged that the more 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. The agency itself had evidence that the fuel standards would restrict the availability of larger vehicles. *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 v. NHTSA* with the weak record in *Chamber of Commerce of U.S. v. EPA*, 642 F.3d 192 (D.C. Cir. 2011). The Court confirmed that petitioner affidavits and the agency's own record like those produced in *CEI* 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 642 F.3d 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*, a similarly strong record of petitioner declarations and agency findings is present here. Thus, the "causal link" between the FCC's conditions and Petitioners' injuries is established by "the evidence in the administrative record itself." *CEI*, 901 F.2d at 114. 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…." 2016 Charter Order, Statement of Comm'r Michael P. O'Rielly, A108. 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." 2016 Charter Order, Dissenting Statement of Comm'r Ajit Pai, A101. Furthermore, as the individual Petitioners attest, New Charter has increased prices since consummating its merger, to the detriment of the individual Petitioners and countless other consumers. *See* Declaration of Dr. John

France, A125; Declaration of Charles Haywood, A130. Further, the FCC's contention that the harms are speculative because Charter was in the process of implementing the conditions of its own accord, *see* OB8, is wrong. *See* Section II.B below.

The injuries that Petitioners suffered due to the 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 ("Crandall Decl.") (attached).[2] 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.

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

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[2] Dr. Crandall's Declaration is included to further support jurisdiction. *See Cobell v. Salazar,* 679 F.3d 909, 919 (D.C. Cir. 2012) (relying on declaration in response to government challenge to appellant's standing, citing, *inter alia*, 28 U.S.C. § 1653 ("Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.")).

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 Petitioners here more than satisfy causation because the FCC *required* New Charter to engage in conduct that caused injury to Petitioners.

Second, Petitioners have sufficiently demonstrated that a reversal of the conditions would redress the injury. Where, as here, petitioners 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*, 901 F.2d at 113. In *CEI*, 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.,* 2016 Charter Order, Statement of Comm'r Michael P. O'Rielly, A108 ("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. ¶ 13.

Given the standing of the individual petitioners, this Court's standing inquiry can end here. *See Military Toxics Project v. E.P.A.*, 146 F.3d 948, 954 (D.C. Cir. 1998) ("[i]f one party has standing in an action, a court need not reach the issue of standing of other parties…" (citation omitted)). But in any case, CEI itself has standing as well because individual Petitioner Jean-Claude Gruffat is on CEI's Board of Directors, *see* A115 n.4. As noted in *CEI*, "[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*, 901 F.2d at 111. As a CEI Director, Mr. Gruffat satisfies similar prerequisites.

In short, both the individual subscriber Petitioners and CEI have standing.

II. Equities support mandamus because the FCC has provided no reason to excuse the 21-month delay in light of the 90-day statutory timetable and the prejudice to CEI and consumers.

The FCC argues that the (now) 21-month delay is not unreasonable based on the "*TRAC* six-factor test." OB9 (citing *Telecomms. Research & Action Ctr. v. FCC* (*TRAC*), 750 F.2d 70 (D.C. Cir. 1984)). But the *TRAC* principles are not a checklist that the Court need simply mark off. "Because these factors function not as a hard and fast set of required elements, but rather as useful guidance as to whether a delay is 'so egregious as to warrant mandamus,' their roles may differ depending on the circumstances." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189-90 (D.C. Cir. 2016).

For example, the FCC argues that mandamus is not warranted because under the third *TRAC* factor, there is no threat to human health or welfare. OB12. Under the FCC's reading, mandamus is only warranted in life or death situations, meaning the FCC would nearly *never* be subject to mandamus. While delay is "less tolerable" when human health is involved, *TRAC*, 750 F.2d at 80, this does not mean that delay is reasonable unless human health is involved. *See, e.g., In re People's Mojahedin Org. of Iran,* 680 F.3d 832, 837 (D.C. Cir. 2012) ("*PMOI*") (holding 20-month delay unreasonable with no finding of human health issues). Similarly, while impropriety is *sufficient* for mandamus, it is not *necessary*; "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 80.

Review of the *relevant* TRAC principles demonstrates that the equities weigh in favor of mandamus.

A. The FCC offers no justification for the unreasonable 21-month delay that is now *seven times* its 90-day statutory deadline.

The FCC illogically splits its discussion of the first two *TRAC* principles. But where, as here, the agency had a statutory duty to act within a certain time frame, the second principle provides the content for the first principle: "(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." *TRAC*, 750 F.2d at 80. Accordingly, the FCC's discussion of the first principle in the abstract has no application here. The FCC cites to *Mashpee*, *Ontario*, and *Monroe* (OB10), but none of those cases involved statutory timetables.

The FCC does not dispute that under *TRAC's* second principle, the 90-day statutory deadline supplies the "rule of reason" for determining whether a delay is reasonable. Instead, the FCC merely states that a statutory deadline does not necessarily warrant a grant of mandamus. OB11. But *In re United Mine Workers of Am. Int'l Union*, 190 F.3d 545 (D.C. Cir. 1999), which the FCC cites, supports mandamus here. There, this Court found unreasonable delay where the agency failed to meet its statutory deadline, but the Court was concerned that the agency would not comply if mandamus were ordered; thus, the Court specifically retained jurisdiction to ensure the agency's compliance. 190 F.3d at 556.

Barr, which the FCC also cites (OB11), also further supports mandamus considering the undisputed lack of interfering priorities in this case. *In re Barr Labs.*, 930 F.2d 72, 74 (D.C. Cir. 1991)). There, delay in generic drug applications was

"unreasonable" in light of the FDA's 180-day statutory deadline. 930 F.2d at 75. While *Barr* refused to order mandamus, it was because of the fourth *TRAC* factor regarding competing agency priorities in the face of a personnel crisis at the agency. *Id.* Here, by contrast, the FCC has offered no reason that mandamus should not issue. The FCC has not identified a single activity of competing priority (*TRAC* factor four) that prevents it from deciding CEI's petition for reconsideration. OB13. The FCC claims that the other petitions regarding the merger that the FCC already decided were more targeted requests, whereas CEI's petition is a broader request regarding the merger conditions. OB13. While this may explain why it was easier for the FCC to first respond to those other petitions nearly a year ago, it does not explain what activities since then preclude the FCC's action on CEI's petition. Thus, unlike *Barr*, where compliance was literally physically impossible, the FCC provides no explanation why it is unable to comply with its statutory duty.

Nor does *Western Coal Traffic League v. Surface Transportation Board* support the agency's inaction. OB11. *Western Coal* concluded that, under *Chevron,* the Board appropriately placed a moratorium on railroad merger applications under its statutory authority. 216 F.3d 1168, 1176 (D.C. Cir. 2000). But there are no similar statutory grounds for a moratorium on deciding petitions within the statutory deadline.

More importantly, the FCC's argument that, in allocating resources, *it* knows best is a poorly-veiled attempt to rewrite federal law. Section 405 provides that the FCC "shall" enter an order deciding CEI's petition and "shall take such action within ninety days." 47 U.S.C. § 405. While the FCC may like to create its own timetable, federal law requires 90 days. The FCC's dismissal of this timetable is an affront to

separation of powers. Basic constitutional principles require that the executive agencies must abide by statutory mandates. *In re Aiken Cty.*, 725 F.3d 255, 259 (D.C. Cir. 2013).

PMOI does not support the FCC's argument (OB11) that the statutory timetable only applies to parties to the transaction. *PMOI* did not involve a merger or transaction and nothing in *PMOI* supports the FCC's argument. 680 F.3d at 833. Moreover, the harms related to the unlawful merger conditions are not limited to those involving the parties to the merger transaction; because the unlawful merger conditions also harm Petitioners, the FCC's unreasonable delay is clearly relevant.

B. The merger conditions harm consumers and Petitioners because New Charter had neither the duty nor the incentive to implement the merger conditions.

The FCC claims that Petitioners' interests are not prejudiced because New Charter was "in the process of implementing—of their own accord—a version of each of the conditions petitioners challenge." OB13. But if New Charter was going to implement the conditions on its own, then why require those conditions for the merger? In reality, the FCC knew that New Charter would not implement those conditions unless they were mandatory. In fact, the FCC created a "monitoring system" to ensure New Charter's compliance. A15-16. And if the FCC had not adopted the conditions, New Charter was financially incentivized to abandon them:

- **Usage-based pricing**. The FCC contends that the Order "merely extended" New Charter's commitment to refrain from imposing data caps or charging usage-based pricing. OB13. The merger approval

prohibited such pricing, however, because the agency concluded that New Charter would have an "increased incentive … to use these practices to hinder the development of [online video distributors] as a competitive option to its own video offerings." A77.

- **Settlement-free interconnection**. The FCC recognized New Charter's "sufficient power in the interconnection market to raise prices," A77. If it were not bound by the merger condition to offer free interconnection until 2023, New Charter could pursue a variety of agreements that would generate additional revenue.
- **Overbuild requirement**. The FCC argues that requiring New Charter to expand its network to two million new customer locations "was an extension of the applicants' own plans." OB14. Yet the FCC created the build-out condition specifically to exceed New Charter's "estimated *natural* growth rate." A53-A54 (emphasis added). In fact, the FCC *doubled* the size of the network expansion. *Id.* In 2017, the FCC modified the overbuild condition in response to the American Cable Association's ("ACA's") petition for reconsideration. A110. If, as the FCC contends, New Charter was going to implement the overbuild condition on its own, then the FCC would not have needed to modify the requirement in response to ACA's concerns.
- **Low-income broadband program**. The FCC contends that requiring New Charter to offer a low-income broadband package is "merely a gloss on Charter's own proposal," citing a 2015 letter that Charter filed

> with the agency. OB14. The agency significantly expanded Charter's proposal, however, "incorporat[ing] multiple enforcement mechanisms and hold[ing] New Charter accountable for achieving specific enrollment figures at regular intervals." *Id.* Without this condition, it is unlikely that New Charter would offer standalone broadband for $14.99 to certain households, as this price is probably too low to cover the costs of offering the service and would thus require reduced service to existing customers. Crandall Decl., ¶ 8-9.

The FCC argues that "the applicants themselves proposed versions of each condition of their own accord" and that Charter could have avoided these conditions by "withdraw[ing] their transaction." OB15. By the same logic, any company should avoid undesirable regulation by refraining from conduct subject to such rules. The fact that Charter showcased its willingness to live by those conditions before the agency finalized the transaction does not mean they would have implemented these conditions absent the FCC's adoption, but instead, reflects the "high-stakes regulatory dance in which applicants 'volunteer' to take certain actions or to refrain from certain actions as the quid pro quo for favorable agency consideration." 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, 52-53 (2000).

The merger conditions result in lost revenue or increased expense that harms Petitioners and other consumers. *See* Section I. As in *CEI*, removing the mandatory

conditions will permit New Charter to appropriately respond to market incentives. 901 F.2d at 117.

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

Forest Guardians v. Babbitt, 174 F.3d 1178, 1190 (10th Cir. 1999), holds that courts must compel agency action under the APA when an agency fails to comply with a statutorily imposed deadline, but the FCC requests a circuit split, asserting that "there is no evidence that in enacting Section 706, Congress intended to withdraw the broad discretion agencies have always been afforded in determining how to set priorities." OB17. But Section 706 provides that courts "*shall*—(1) compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706 (emphasis added). As the Supreme Court holds, "the word 'shall' usually creates a mandate, not a liberty" telling us there is "some nondiscretionary duty to perform." *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). The FCC has no response to the multiple Supreme Court authorities cited by CEI, PB23, that hold that Congress may curb this Court's equitable discretion and make equitable relief (such as mandamus) mandatory.

Under the FCC's interpretation, there is *no* law that Congress could pass that could create a nondiscretionary duty. The executive branch would have unfettered power to override legislatively-created priorities. "It is no overstatement to say that our constitutional system of separation of powers would be significantly altered if we were to allow executive and independent agencies to disregard federal law…." *Aiken Cty.*, 725 F.3d at 267.

Finally, the FCC claims that *Barr* is the law of this Circuit and cannot be overruled. OB17. But *Barr* never considered whether Section 706 limits a court's equitable discretion and it would contradict Supreme Court precedent to the extent it does. PB23. The FCC provides no reason why this Court cannot decide the issue.

Relief Sought

Petitioners respectfully urge this Court to issue a writ of mandamus compelling the FCC to expeditiously enter an order granting or denying CEI's petition for reconsideration.

March 16, 2018

Respectfully submitted,

/s/ Theodore H. Frank
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Certificate of Compliance

I hereby certify that the foregoing reply 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 brief 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 word limits of this Court's Order of January 31, 2018, because it contains 3,835 words.

/s/ Theodore H. Frank
Theodore H. Frank

March 16, 2018

Certificate of Service

I certify that on March 16, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

March 16, 2018

/s/ *Theodore H. Frank*
Theodore H. Frank

ATTACHMENT

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.

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