

Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of)	
)	
Conditions Imposed in the Charter)	WC Docket No. 16-197
Communications-Time Warner Cable-)	
Bright House Networks Order)	
)	

COMMENTS OF WRITERS GUILD OF AMERICA, WEST, INC.

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I. INTRODUCTION

Writers Guild of America, West, Inc. (“WGAW”) respectfully submits the following Comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Public Notice regarding Charter Communications’ Petition to sunset merger conditions.¹ Charter Communications (“Charter”) is the second-largest multichannel video programming distributor (MVPD) and second-largest Internet Service Provider (ISP) in the country.² As a major ISP and competitor to online video distributors (“OVDs”), Charter continues to have the incentive and ability to discourage cord-cutting or promote favored online distributors through anti-competitive and anti-consumer policies, such as data caps (also known as usage-based pricing) and interconnection fees. The rationales and competitive concerns that led the FCC to impose the conditions at issue in this Petition remain relevant and timely, some even more so today than in 2016. For these reasons, the Commission should reject Charter’s petition to sunset its merger conditions early.

WGAW comments on this Petition as a labor organization representing more than 10,000 professional writers of film, television, online video, local news, and documentaries. Virtually all scripted entertainment seen on television and in theaters is written by members of WGAW and its affiliate, Writers Guild of America, East (jointly, “WGA”).

¹ Petition by Charter Communications, Inc. to Sunset Merger Conditions, FCC Public Notice, WC Docket 16-197 (June 22, 2020) (“*Petition*”).

² Press Release, Leichtman Research Group, About 1,165,000 Added Broadband in 1Q 2020 (May 13, 2020), <https://www.leichtmanresearch.com/about-1165000-added-broadband-in-1q-2020/> and Press Release, Leichtman Research Group, Major Pay-TV Providers Lost About 2,065,000 Subscribers in 1Q 2020 (May 14, 2020), <https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-2065000-subscribers-in-1q-2020/>.

II. CHARTER REMAINS A GATEKEEPER FOR OVDS AND A TERMINATING MONOPOLY FOR CONSUMERS

A key concern in the merger of Charter Communications, Time Warner Cable, and Bright House Networks was the ability and incentive of the merged company to interfere with its customers' Internet connections.³ This level of control and potential for anti-competitive conduct was enabled by a severe lack of competition in broadband Internet, leaving customers with no recourse if their ISP acted to manipulate or deter online video consumption, and OVDs without alternative routes to most of those customers.⁴ The continuing lack of competition in Broadband Internet Access Service ("BIAS") markets means that these concerns, and the conditions that attempted to address them, remain as vital as ever.

a. Broadband Internet Access Service Remains a Local Monopoly

Four years after the merger was approved, the Internet access industry remains a collection of regional monopolies with increasing power over Americans' access to vital information. MVPD/ISPs have a well-documented history of utilizing this control over consumer Internet connections to interfere with the online video distribution market in ways that harm competition. For all their successes, OVDs such as Netflix or Amazon Prime Video do not control millions of broadband connections with few competitive constraints. Charter, on the other hand, does.

Despite hopes expressed by the Commission in 2016 that fiber investment, wireless 5G technology, or BIAS overbuilding would increase competition in broadband, millions of

³ *In re Applications of Charter Communications, Inc., Time Warner Cable Inc., And Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 31 FCC Rcd. 6327 (2016) ("Merger Order").

⁴ *Merger Order*, ¶86.

Americans remain at the mercy of their ISP—if they can access high-speed broadband at all. BroadbandNow Research recently used a sample of over 11,000 addresses to estimate that 42 million Americans cannot purchase broadband service.⁵ In 2018, Microsoft found that almost 163 million Americans did not access the Internet at broadband speeds.⁶

Using data from the time of the Charter merger, the Institute for Local Self-Reliance estimated that approximately 38 million people in Charter’s footprint had no other choice for broadband access.⁷ Four years later, the company enjoys extremely high market share in many markets it serves, particularly those where its main competitor is DSL that cannot offer broadband-level speeds of 25/3 Mbps. For example, S&P Global Market Intelligence estimates that Charter has a 90% market share among subscribers offered 25/3 Mbps or faster broadband in Laredo, Texas, a 96% market share in Utica, New York, and an 81% share in Honolulu, Hawaii.⁸ Charter also has outsized market shares in larger markets: 64% in Los Angeles; 63% in Tampa-St. Petersburg; 48% in Dallas-Ft. Worth.⁹

Despite past hopes for next-generation fiber-to-the-home service, competition from fiber has largely failed to materialize except in wealthier enclaves. The most recent Form 477 data, which notably overstates competition by considering a census block as served by broadband if

⁵ John Busby, Julia Tanberk and BroadbandNow Team, *FCC Reports Broadband Unavailable to 21.3 Million Americans, BroadbandNow Study Indicates 42 Million Do Not Have Access*, BroadbandNow Research (Feb. 3, 2020), <https://broadbandnow.com/research/fcc-underestimates-unserved-by-50-percent>.

⁶ Steve Lohr, *Digital Divide Is Wider Than We Think, Study Says*, The New York Times (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/technology/digital-divide-us-fcc-microsoft.html>.

⁷ H. Trostle and Christopher Mitchell, *Profiles of Monopoly: Big Cable and Telecom*, Institute for Local Self-Reliance (July 2018), <https://ilsr.org/wp-content/uploads/2018/07/profiles-of-monopoly-2018.pdf>.

⁸ S&P Global Market Intelligence, *Broadband and Video Operators by DMA, Q4 2014-Q1 2020* (May 30, 2020). These figures include all broadband technologies, including satellite.

⁹ *Id.*

even a single household is passed, estimates that 61% of Americans still lack access to fiber broadband.¹⁰ The few new entrants in the high-speed broadband market have largely slowed or ceased expansion. Google Fiber largely paused its fiber expansions in 2016 and now serves only 18 markets,¹¹ while AT&T's fiber build-out is likely to slow significantly as the company's required expansion under its agreement to purchase of DirecTV concluded in 2019.¹² More generally, telco competition for cable incumbents is declining; the top telco Internet providers have collectively experienced net subscriber loss in each of the last three years, leaving cable companies with an increasing share of total wired Internet connections.¹³

Meanwhile, wireless cellular service continues to suffer from limitations that prevent it from replacing wireline broadband. During the pandemic, Internet use has increased to a monthly rate of over 480 GB.¹⁴ Yet Verizon, for example, charges \$150 for a 40 GB home plan with a fee of \$10 for each additional gigabyte.¹⁵ 5G home Internet service remains limited to a small

¹⁰ FCC, Fixed Broadband Deployment, accessed July 8, 2020, <https://broadbandmap.fcc.gov>.

¹¹ Nick Statt, *Google Fiber is dropping its TV package to focus solely on high-speed internet service*, The Verge (Feb. 4, 2020), <https://www.theverge.com/2020/2/4/21123050/google-fiber-tv-package-removed-internet-service-high-speed>.

¹² Martha DeGrasse, *AT&T looks to fiber for revenue growth*, Fierce Telecom (Jan. 9, 2020), <https://www.fiercetelecom.com/telecom/at-t-looks-to-fiber-for-revenue-growth>.

¹³ Press Release, Leichtman Research Group, 2.5 Million Added Broadband in 2019 (Mar. 5, 2020), <https://www.leichtmanresearch.com/2-5-million-added-broadband-in-2019/>; Press Release, Leichtman Research Group, 2.4 Million Added Broadband in 2018 (Mar. 7, 2019), <https://www.leichtmanresearch.com/2-4-million-added-broadband-in-2018/>; Press Release, Leichtman Research Group, 2.1 Million Added Broadband From Top Providers in 2017 (Mar. 13, 2018) <https://www.leichtmanresearch.com/2-1-million-added-broadband-from-top-providers-in-2017/>.

¹⁴ COVID-19 Broadband Usage “Reaching a Plateau,” Says OpenVault, OpenVault Blog (Apr. 7, 2020), <https://openvault.com/covid-19-broadband-usage-reaching-a-plateau-says-openvault/>.

¹⁵ *Plans for one device or a home*, Verizon, <https://www.verizon.com/plans/single-device-plan/> (last visited July 13, 2020); *T-MobileOne*, T-Mobile, https://www.t-mobile.com/content/dam/t-mobile/assets/pdf/T-Mobile_Rate_Card_January_2019.pdf (last visited July 13, 2020).

number of markets, and serious questions remain about its ability to compete with cable or fiber.¹⁶

Furthermore, cable executives and analysts remain confident that the new technology is not a threat. For example, CEO of Altice USA Dexter Goei recently stated, “As cable operators, we agree 5G technology works, but we don’t believe it’s a real threat to our business.”¹⁷ And Wall Street analyst Craig Moffett has noted that “[f]or now, it looks like 5G won’t pose much of a threat to wired broadband.”¹⁸

b. Data Caps and Interconnection Fees are Anticompetitive and Will Harm OVDs and Consumers

Despite the growth of the online video market, traditional MVPD video service remains a multi-billion-dollar industry. Residential video revenue at Charter was \$4.42 billion in Q1 of 2020, slightly exceeding revenue from residential broadband.¹⁹ Since 2016, the pace of cord-cutting has accelerated,²⁰ with consumers increasingly substituting online video subscriptions for MVPD service. Meanwhile, most of the major MVPDs now have at least one of their own online video services, such as Comcast’s Peacock streaming service, AT&T’s HBO Max, and Charter’s own Spectrum Originals. As a result, MVPDs including Charter have the incentive and ability to limit the growth of online video competitors or to guide customers to affiliated or preferred

¹⁶ Brian X. Chen, *What You Need to Know About 5G in 2020*, The New York Times (Jan. 8, 2020), <https://www.nytimes.com/2020/01/08/technology/personaltech/5g-mobile-network.html>.

¹⁷ Alex Sherman, *5G broadband is an existential threat to the cable industry, but executives and investors aren’t worried*, CNBC.com (Dec. 1, 2019), <https://www.cnbc.com/2019/12/01/5g-broadband-is-a-threat-to-cable-companies-but-execs-arent-worried.html>.

¹⁸ *Id.*

¹⁹ CCO HoldingsLLC/Charter Communications Quarterly Report (Form 10-Q) at 12 (May 4, 2020), *available at* <https://ir.charter.com/static-files/c00128f2-e082-443c-aa6b-4c0152d46113>.

²⁰ Press Release, Leichtman Research Group, Major Pay-TV Providers Lost About 4,915,000 Subscribers in 2019 (Mar. 3, 2020), <https://www.leichtmanresearch.com/major-pay-tv-providers-lost-about-4915000-subscribers-in-2019/>.

OVDs, such as those that make deals to integrate their service into an MVPD/ISP's user interface. Usage-based pricing and interconnection fees would allow Charter to exert its control over customers' Internet connections in ways that harm competition in online video.

Data caps and other usage-based pricing discourage subscribers from using more broadband data and guide them toward services that are exempt from those caps. This is particularly relevant given the increase in both the number of online video services available and their use of high-quality, high-data-consumption video. As video streaming, along with online gaming and working from home, consume increasing amounts of data, American households with data caps are incentivized to choose video options that will not incur additional fees from their broadband company. Often, this is an ISP-owned service or one with a business relationship to the ISP.

Broadband providers' use of data caps is unnecessary for both economic and functional reasons. ISPs already utilize price discrimination by charging more for higher speed plans, and consumers continue to upgrade to these higher tiers of service when available. Charter's CEO recently noted that increasing numbers of its residential and business customers were upgrading to higher speeds.²¹ The pandemic has also demonstrated that data caps are not necessary for network management purposes. Despite expected increases in residential broadband use, many

²¹ Casey Egan and Stefen Joshua Rasay, *Broadband ARPU growing as homes, businesses ask for faster speeds, analysts say*, S&P Global Market Intelligence (May 15, 2020), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/broadband-arpu-growing-as-homes-businesses-ask-for-faster-speeds-analysts-say-58637057>.

ISPs suspended their data caps beginning in March without major outages.²² Some ISPs, such as Sonic, did not have data caps to begin with.²³

As with data caps, interconnection fees can be used anti-competitively to degrade online video traffic. As consumers generally only have one fixed broadband connection at a time, ISPs are terminating access monopolies that OVDs must pass through to reach their customers. Broadband providers can thus leverage this monopoly to extract fees from OVDs and other websites for delivering Internet traffic that ISPs have already been paid to deliver by their own subscribers. This threat is particularly significant when a large ISP, like Charter, has tens of millions of Internet subscribers whose connections can be degraded.

c. New Entrants in the Online Video Market Still Need Protection from ISPs

While Charter argues that growth in the online video distribution market has made the need for data cap and interconnection prohibitions obsolete, this claim obscures the significant and ongoing potential for harm resulting from Charter's anti-competitive behavior on this relatively young market. Netflix, Amazon, and Hulu, established subscription OVDs that were operating when the Charter conditions were imposed, have since been joined by a growing segment of ad-supported OVDs such as the Roku Channel and Plex, as well as newer subscription services such as Quibi, launched in April 2020. The OVD market continues to develop as these new services launch, but data caps and interconnection fees would put emerging

²² See, for example, Jon Brodtkin, *Pandemic hasn't crushed broadband networks—even rural areas are doing OK*, Ars Technica (Apr. 8, 2020), <https://arstechnica.com/information-technology/2020/04/pandemic-hasnt-crushed-broadband-networks-even-rural-areas-are-doing-ok/>.

²³ Internet Service Features, Sonic (last accessed July 14, 2020), <https://www.sonic.com/residential>; Bill Snyder, *What big ISPs don't want you to know about data caps*, CIO.com (May 27, 2016), <https://www.cio.com/article/3075975/what-big-isps-dont-want-you-to-know-about-data-caps.html>.

OVDs at a competitive disadvantage to larger firms and those affiliated with MVPDs, which can avoid or easily afford to bypass these artificial limitations. Actions from ISPs that discriminate between OVD services would diminish competition and threaten this young and changing market.

In imposing the interconnection and data cap conditions, the FCC recognized the threats to emerging OVDs, consistent with its mandate to protect the public interest by considering future market developments, not only current ones. As the Memorandum Opinion and Order approving the merger states, “[T]he Commission considers whether a transaction would enhance, rather than merely preserve, existing competition, and often takes a more expansive view of potential and future competition in analyzing that issue.”²⁴ Likewise, the FCC should reject this Petition in order to protect competition, including from future emerging competitors, rather than considering the impact only on OVDs that existed in 2016.

III. LACK OF NET NEUTRALITY LEAVES CONSUMERS AND OVDs MORE VULNERABLE TO ANTICOMPETITIVE TACTICS

When the Commission approved this merger in 2016, the newly merged entity’s customers were protected from certain ISP abuses, not only by conditions placed on the merger, but by the 2015 Open Internet Order (“Order”).²⁵ With the repeal of the Order, consumers and OVDs have no backstop when ISPs use their monopoly power to interfere with Internet traffic in anti-competitive ways. For example, AT&T announced that its affiliated service HBO Max will be exempt from its mobile data caps under its sponsored data program once the temporary

²⁴ *In re Applications of Charter Communications, Inc., Time Warner Cable Inc., And Advance/Newhouse Partnership For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, 31 FCC Rcd. 6327 (2016).

²⁵ *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) (“2015 Open Internet Order”).

suspension of such caps prompted by the pandemic is lifted.²⁶ Although the Open Internet Order did not address data caps and zero-rating under its bright line rules, the Order allowed consumers to bring complaints under the “no unreasonable interference/disadvantage” standard; this protection is now unavailable.²⁷ The Commission should not remove what few critical consumer protections remain in the BIAS market, particularly given the urgent need for broadband during the pandemic and Charter’s poor past behavior.

IV. CHARTER HAS A HISTORY OF BAD FAITH BEHAVIOR REGARDING MERGER CONDITIONS

In addition to Charter’s arguments that market developments have obviated the need for the behavioral conditions at issue in its Petition, the company also claims that since the merger, “Charter has continued to make major investments in its network, products, employees, and the communities it serves,” citing a laundry list of accomplishments including broadband investment.²⁸ The company neglects to mention its well-documented failure to adhere to merger-related commitments for broadband expansion.

The FCC, in approving the merger, required the Applicants not only to refrain from using usage-based pricing and interconnection to impede broadband competition, but also to invest in expansion of its residential broadband facilities to an additional two million customer locations. The FCC wrote that the residential build-out condition was imposed in order to provide “an opportunity for increased competition from services that rely on wired BIAS to deliver video by creating more customer locations or more service options that can receive higher speed

²⁶ Jon Brodtkin, *AT&T exempts HBO Max from data caps but still limits your Netflix use*, Ars Technica (June 2, 2020), <https://arstechnica.com/tech-policy/2020/06/att-exempts-hbo-max-from-data-caps-but-still-limits-your-netflix-use/>.

²⁷ *2015 Open Internet Order*, 30 FCC Rcd. at 5668, ¶ 153.

²⁸ *Petition* at 3.

broadband service.”²⁹ This condition was echoed in state-specific commitments before the NY Public Service Commission (“NY PSC”) and California Public Utilities Commission (“CPUC”). However, the NY PSC found in 2018 that Charter had made little progress towards its legally-binding commitment in New York and rescinded regulatory approval for the merger,³⁰ eventually reaching a settlement wherein Charter agreed to meet its original commitment by 2021.³¹ In California, public advocates have similarly sought to compel disclosures from the company as Charter has refused to provide data to independently verify its broadband expansion progress.³² The FCC should not give a company with a history of bad faith behavior in broadband further license to harm competition by ending the Usage-Based Pricing and Interconnection Conditions early.

²⁹ *Merger Order*, Appendix B § V.1.

³⁰ New York Public Service Commission, Case 15-M-0388, Joint Petition of Charter Communications and Time Warner Cable for Approval of a Transfer of Control of Subsidiaries and Franchises, Pro Forma Reorganization, and Certain Financing Arrangements, Order Denying Petitions for Rehearing and Reconsideration and Revoking Approval, July 27, 2018, at 12.

³¹ Larry Rulison, *PSC, Charter reach settlement*, Times Union (Apr. 19, 2019), <https://www.timesunion.com/business/article/PSC-Charter-reach-deadline-on-Spectrum-deal-13780123.php>.

³² California Public Utilities Commission, Application 15-07-009, In the matter of Joint Application of Charter Communications, Inc.; Charter Fiberlink CA CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable Information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a Pro Forma Transfer of Control of Charter Fiberlink CA-CCO, LLC (U6878C), Motion of the Public Advocates Office to Compel Response to Data Request; [Proposed] Order, (Dec. 21, 2018), <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M259/K972/259972603.PDF>.

V. COVID-19 HAS MADE BROADBAND CUSTOMERS MORE VULNERABLE TO ISP ABUSE

In recent years, broadband Internet has become a functional utility, a necessary prerequisite for participating in society, as vital as water and electricity. It is a portal for access to job applications, education, entertainment, and connection. Even so, the COVID-19 pandemic has made accessible, reliable, and unimpeded Internet access an order of magnitude more necessary. With much of the country prevented from being physically present at workplaces and schools and foreclosed from in-person contact with friends and family, the Internet is the sole and primary mechanism for hundreds of millions for participating in the workplace, accessing entertainment, obtaining medical care, and having contact even among close family members. Americans are more vulnerable to ISP interference than they have ever been, with greater than ever need for data, making it even more urgent that the FCC use every tool at its disposal to protect consumer Internet connections. Despite the much-touted “Keep America Connected” pledges not to disconnect consumer Internet for non-payment, ISPs have continued to behave poorly. For instance, Charter’s Spectrum customers in multiple states have found that the company’s pledges of billing suspensions or discounted service have not been honored.³³ At a time when broadband is a critical necessity, the Commission should not allow ISPs to further burden consumers with higher prices or discriminatory Internet traffic practices.

VI. CONCLUSION

Lifting the merger conditions imposed on Charter will open the door to anticompetitive behavior that harms both consumers and online video distributors. Furthermore, the conditions

³³ Kelcee Griffis, *Despite Coronavirus Pledges, Customer ISP Issues Persist*, Law 360 (Apr. 24, 2020).

that led the Commission to adopt the data cap and interconnection fee prohibitions have not changed. The WGAW strongly encourages the Commission to uphold the public interest and deny Charter's petition to sunset these conditions early.