INCOMPAS
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1200 G STREET, NW, SUITE 350 PH: 202.296.6650
WASHINGTON, DC 20005 FX: 202.296.7585

INTERCONNECTION: The First Amendment of Networks

The Facts on Internet Interconnection and Traffic Exchange—FCC Open Internet Policy and Recent Merger Condition Benefit Consumers

The Internet is not one network; it is a network of networks. What makes the Internet the Internet—and what has enabled the Internet to transform the world—is that these networks are able to share information with each other, so a subscriber of one network has access to the vast resources of the entire global Internet. In order to reach the resources available on the Internet, broadband Internet access service ("BIAS") providers, like the Internet provider you subscribe to at home, must connect their networks with the other networks that make up the global Internet. Without interconnection, BIAS providers would only be able to offer their customers access to information and services carried solely on their own networks. As such, interconnection is critical to the delivery of BIAS to consumers. At INCOMPAS, we believe interconnection is the First Amendment of networks—it allows consumers to communicate with one another no matter their service provider. Interconnection incentivizes faster deployment of new networks and eliminates the need for customers to subscribe to multiple networks.

The Federal Communications Commission's open Internet Order ("*Open Internet Order*"[1]) prevents a BIAS provider from blocking, throttling, or prioritizing Internet traffic in exchange for payment by the edge provider. There is widespread support for such protections, including support from BIAS providers that say they have no intention of blocking, throttling, or prioritizing traffic in exchange for payment. The Commission also recognized in its *Open Internet Order*, however, that a BIAS provider can circumvent the open Internet rules by blocking or throttling Internet traffic at the point where the BIAS provider's network connects to the Internet. Consequently, the Commission appropriately determined that it would oversee interconnection practices of BIAS providers to ensure that the open Internet protections are not undermined at the point of interconnection.

Three years ago, millions of consumers were harmed when Internet traffic (including traffic from Netflix) was degraded by certain BIAS providers. BIAS providers have been able to sell consumers more expensive, faster broadband packages due in large part to consumers' demand for video content from providers such as Amazon, Netflix, Hulu, YouTube, and others. Unfortunately, at the same time BIAS providers were upselling their consumers for more robust broadband packages, they refused to allocate sufficient capacity at the point where their networks connected to the Internet in order to permit Internet video to reach their consumers properly. Instead, the BIAS providers demanded that Netflix and others pay them a new Internet toll to permit the content that the BIAS providers' consumers were requesting (and had paid the BIAS provider to receive) to reach the consumers.

[1] *Protecting and Promoting the Open Internet*, *Memorandum Opinion and Order*, 30 FCC Rcd. 5601 (2015) ("*Open Internet Order*").

Ultimately, Netflix and other Internet companies acquiesced and paid the demanded tolls so that consumers could get the content they were requesting. Recognizing this harm to consumers and the broader Internet, the Commission created a mechanism in its *Open Internet Order* to oversee and act in future interconnection disputes. Specifically, a BIAS provider's interconnection practices are required to comport with Sections 201 and 202 of the Communications Act, as amended. These sections require a BIAS provider's practices to be "just and reasonable" and prohibit such provider from engaging in "unjust or unreasonable discrimination."

On May 10, 2016, the Commission approved, subject to conditions, the applications of Charter Communications, Inc. ("Charter"), Time Warner Cable, Inc. ("TWC"), and Advance/Newhouse Partnership ("Bright House") for consent to merge.[2] The conditions adopted in the *Charter/TWC Order* address potential public interest harms "New Charter" could impose post-transaction. Importantly, the Commission adopted a condition that prevents New Charter from using its increased power and size to charge interconnection tolls and prevent Internet companies from delivering the content its subscribers request.

Broadband providers like New Charter have incentives to disadvantage third-party Internet services that compete with their own services—particularly online video distributors ("OVDs"). Consumers continue to adopt online video services as complements to and substitutes for traditional pay-TV. New Charter has an incentive to push both types of customers toward its own services by harming OVDs. OVDs and other edge providers must interconnect with New Charter in order to reach customers inside New Charter's network. By charging for interconnection, refusing to augment interconnection capacity, or using other tactics, broadband providers can harm the quality of OVD services.

The just-approved transaction allows New Charter to emerge as a "leader in the interconnection market," with nearly 20 million broadband subscribers under its control. Given its increased subscriber count and control over interconnection capacity into its network, New Charter will now have sufficient market power to impose interconnection tolls on edge providers. Further, it will have the incentive to use its new leverage to hinder the delivery of online content to consumers, and to slow the development of video competition from OVDs.

In its approval order, the Commission adopted a seven-year settlement-free interconnection condition to mitigate New Charter's power to act as a gatekeeper between edge providers and consumers.[3] The condition imposes two important requirements: settlement-free interconnection to New Charter's network for all qualifying companies and disclosure of interconnection agreements to the Commission. Both prongs of the condition are crucial to protecting edge providers and consumers from the harms New Charter has the incentive and ability to impose post-transaction.

The Commission's emphasis on fair, pro-competitive, and transparent interconnection practices in its *Open Internet Order* and its *Charter/TWC Order* interconnection condition will support the continued development and growth of content providers like OVDs as well as the broader Internet. The mandatory

[2] *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, MB Docket No. 15-149, *Memorandum Opinion and Order*, FCC 16-59 (2016) ("*Charter/TWC Order*").

[3] Charter may seek Commission review of the condition in five years.

interconnection condition will ensure customers receive the Internet service they paid for rather than being used as leverage against edge providers. And allowing Internet companies to deliver the content requested by consumers without paying high interconnection tolls will enable them to invest in innovation and new content. These are important steps toward protecting the Internet economy and promoting video competition and consumer choice.