

**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)	

PETITION TO DENY

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I. INTRODUCTION AND SUMMARY

INCOMPAS, by its undersigned counsel, hereby submits a petition to deny in response to the Petition of Charter Communications, Inc. (“Charter”), which requests the Commission prematurely sunset two of its merger conditions—a prohibition on its use of data caps/usage-based pricing and a requirement that Charter provide settlement-free interconnection.¹ INCOMPAS urges the Federal Communications Commission (“Commission” or “FCC”), and specifically the Wireline Competition Bureau, to deny Charter’s Petition.

INCOMPAS is the preeminent national industry association for providers of Internet and competitive communications networks, including internet edge providers, streaming services, and both wireline and wireless providers in the broadband marketplace. We represent fixed broadband companies, including small local fiber and fixed wireless providers that provide residential broadband internet access service (“BIAS”), as well as other mass-market services, such as video programming distribution and voice services in urban, suburban, and rural areas.

¹ Petition of Charter Communications, Inc., *Conditions Imposed in the Charter Communications-Time Warner Cable-Bright House Networks Order*, WC Docket No. 16-197 (“*Charter Petition*”).

We also represent companies that are providing business broadband services to schools, libraries, hospitals and clinics, and businesses of all sizes, including regional fiber providers; transit and backbone providers that carry broadband and Internet traffic; online video distributors (“OVDs”) which offer video programming over BIAS to consumers, in addition to other online content, such as social media, streaming, cloud services, and voice services.

On June 25, 2015, Charter submitted its application to the Commission seeking approval of its merger with Time Warner Cable (“TWC”) and Bright House Networks, LLC (“Bright House”), stating that Charter is “an industry leader” in implementing customer and Internet-friendly business practices.² Charter specifically highlighted its practice of high-speed broadband service with no data caps or usage-based pricing and interconnection practices, and promised it would extend Charter’s “customer-friendly” business model as New Charter to TWC’s and Bright House’s service territories.³ While the FCC’s *Merger Order* rightly credited Charter for its sentiment, the Commission found that the evidence presented in the eleven-month review process did not align completely with Charter’s perspective, and the Commission implemented merger conditions that specifically addressed the harms it found would result from the merger and to ensure that Charter would keep its promises made.⁴

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*, Charter Public Interest Statement, MB Docket No. 15-149 (“*Charter Public Interest Statement*”) (June 25, 2015), at 1.

³ *Charter Public Interest Statement*, at 1-2.

⁴ *See 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, MB Docket No. 15-149 (rel. May 10, 2016) (“*Merger Order*”), at ¶¶ 3-12.

Almost five years exactly to the date that Charter made its promises, it now seeks the opportunity to walk away from some of them. At the time of the merger, the two practices at issue—interconnection charges and data caps—were established among the very largest residential BIAS providers, including TWC. Charter’s argument was that if allowed to merge, New Charter would follow the better practices of smaller and more responsive providers, including Old Charter. Now, post-merger, New Charter argues that it should be allowed to return to the ways of TWC and other large BIAS providers like Comcast. However, this argument is not based on a showing of changed circumstances, rather it is a direct repudiation of Charter’s advocacy and support for the merger. It is now requesting that the Commission allow Charter to shift from its customer-friendly practices that promote the use of high-speed broadband and access to online content and competitive services. Rather, it would now like to be free to adopt TWC’s prior practices of data caps and access charges at interconnection—creating scarcity that would allow Charter to charge more money that customers and interconnecting parties ultimately will have to pay. Neither of these practices is customer-friendly.

As we discuss at length below, Charter has not provided the necessary evidence for the Bureau to grant its petition and prematurely sunset the conditions that currently prohibit Charter from implementing data caps/usage-based pricing or implementing access charges on edge providers at interconnection. Upon closer examination, Charter has gained more market power since the merger four years ago, and there is insufficient broadband competition to discipline Charter’s behavior. Thus, INCOMPAS strongly encourages the Wireline Competition Bureau to deny Charter’s Petition, hold Charter accountable for the promises it made not to impose data caps and usage-based pricing and interconnection access charges, and stand with consumers and creators who are only beginning to benefit from the streaming revolution.

II. CHARTER’S PETITION IS INSUFFICIENT AND LACKS THE EVIDENTIARY SUPPORT AND NECESSARY ANALYSIS TO DETERMINE THAT THE CONDITIONS ARE NO LONGER NEEDED TO PROTECT CONSUMERS AND ONLINE COMPETITION.

On May 10, 2016, the Commission approved the merger of Charter, TWC, and Bright House, subject to conditions.⁵ Prior to the FCC publishing its *Merger Order*, its merger review was extensive. In coming to its decision, the Commission conducted a review over a period of eleven months, relying on significant evidence submitted by the merging parties and third parties, which resulted in a detailed merger analysis. This analysis included a Commission-led economic analysis in “Appendix C” of the *Merger Order*, which found that New Charter would engage in behavior that would harm consumers and competition post-merger.⁶ As we address further below, Charter’s Petition does not fully address the Commission’s concerns. Charter does not provide sufficient evidence that it no longer has the harmful incentives the FCC found it to have post-merger, or that the marketplace has changed such that Charter’s incentives will be effectively checked by competitive BIAS alternatives. Accordingly, Charter’s Petition should be dismissed for failure to provide the necessary evidence to support its request.

In the alternative, in order to determine whether the Commission should grant or deny Charter’s Petition, the Wireline Competition Bureau and the Office of Economics and Analytics (collectively, “the Bureaus”) should gather the necessary evidence by issuing a request for information to Charter so the Bureaus can replicate the analysis done in the *Merger Order*, including the economic analysis in Appendix C, in order to determine that the concerns

⁵ See *Merger Order*, at ¶ 1.

⁶ See *id.*, Appendix C, at 238 ¶ 1 (“This Appendix considers certain economic analyses submitted into the record as well as additional analyses to support our conclusions on the likelihood of competitive harms that may result from this transaction.”).

described therein are no longer warranted. For efficiency, the Bureaus could use the same request for information in the underlying proceeding, identifying those questions focused on the current state of the market for residential BIAS, interconnection, and OVD that the Bureaus should request.⁷ It is imperative that the Bureaus fully evaluate Charter’s current incentives and the state of the marketplace, including updating its analysis in Appendix C, to determine that neither consumers nor competition will be harmed by prematurely sunseting the conditions.

Updating its economic analysis and evaluating the current marketplace is consistent with the FCC’s merger review standard.⁸ During a merger, the Commission evaluates the competitive harms and addresses them through specific conditions.⁹ In the *Merger Order*, the Applicants were the ones to “bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.”¹⁰ Given the FCC found merger-specific harms, the *Merger Order* explained that if Charter petitions to shorten the term of its conditions, the Wireline Competition Bureau “must seek public comment on whether the

⁷ See, e.g., FCC Information and Data Request to Charter Communications, Inc., MB Docket No. 15-149, (Sept. 21, 2015).

⁸ See *T-Mobile/Sprint Merger Order*, FCC 19-103, at ¶ 40 (rel. Nov. 5, 2019) (“The Commission’s public interest standard is somewhat broader. Notably, the Commission has determined it may impose and enforce narrowly tailored, transaction-specific conditions that address the potential harms of a transaction. Specifically, the Commission has repeatedly held that it will impose conditions ‘only to remedy harms that arise from the transaction (i.e., transaction-specific harms)’ and ‘related to the Commission’s responsibilities under the Communications Act and related statutes,’ and that it ‘will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.’”).

⁹ See *Merger Order*, at ¶ 8 (“Because we find that the transaction will likely cause public interest harms, we impose conditions that ensure New Charter adheres more closely to Charter’s prior consumer-friendly approach, and reduce the risk of public interest harms.”).

¹⁰ *Id.* at ¶ 26.

Company has demonstrated that those Conditions are no longer in the public interest.”¹¹ The Bureaus should continue to require Charter to bear the burden of providing, by a preponderance of the evidence, that the removal of the conditions serves the public interest. As we discuss below, Charter has not met that burden. Accordingly, its Petition should be denied.

(a) Charter Still Faces Insufficient Competition in the Broadband Internet Access Service Marketplace to Discipline Its Behavior.

The FCC’s economic analysis in the *Merger Order* and Appendix C found that post-merger Charter has an incentive to increase interconnection fees on edge providers¹² and to introduce data caps and usage-based pricing on consumers.¹³ Indeed, Charter’s Petition admits that it would at least consider imposing data caps and usage based pricing, stating:

As data usage skyrockets, the DC/UBP condition artificially hamstrings Charter’s ability to allocate the costs of maintaining its network in a way that is efficient and fair for all its customers—above average, average, and light users alike. Charter should be afforded the same flexibility as other broadband providers to respond to developments in the market.¹⁴

Likewise, with respect to interconnection, Charter’s Petition states that “broadband providers other than Charter have been free to negotiate for interconnection,” asserting that the current interconnection condition is inefficient for Charter’s management of its network.¹⁵ Therefore, the

¹¹ *Id.*, Appendix B, at 232.

¹² *See id.*, Appendix C, at ¶ 20 (“We first find that New Charter would have an increased ability to raise quality-adjusted interconnection prices. A corollary of our finding is that New Charter would also have an increased ability to engage in anticompetitive action aimed at OVDs and other edge providers.”).

¹³ *See id.* at ¶ 7 (“New Charter’s increased broadband footprint and desire to protect its video profits will increase incentives to impose data caps and usage-based prices in order to make watching online video more expensive”).

¹⁴ *Charter Petition*, at 23.

¹⁵ *Id.* at 26-27.

Bureaus should have no doubt that if the conditions prematurely sunset, Charter will engage in imposing data caps and usage-based pricing on its customers and will use its gatekeeper power to its BIAS customers to impose excessive interconnection fees on CDNs, transit providers, OVDs, and other edge providers.

As part of its analysis, the Commission also found that Charter's customers have limited competitive options for BIAS.¹⁶ Thus, when Charter's customers face these harms, they do not have sufficient alternative options to avoid them. As such, the Bureaus must review the current state of the BIAS marketplace as well as the behavior of Charter's customers since the merger. More specifically, it is critical to determine whether Charter's customers now have alternative BIAS offerings that would discipline Charter's behavior, including facilities-based, high-speed offerings that sufficiently compete with Charter at speeds of 25/3 Mbps and above, as well as the churn rate of Charter customers and whether they can and do switch providers in response to harmful behavior. In other words, do customers have sufficient alternatives in the BIAS marketplace, and if so, do they switch providers when prices rise?

Unfortunately, Charter's Petition fails to adequately address BIAS competition in its footprint. The Petition suggests providers, including mobile, are all upgrading their networks to handle consumer demand for OVDs (and presumably other online services), and that the introduction of new OVDs and competition among OVDs has increased since its merger.¹⁷ However, the Petition does not offer any evidence to demonstrate that, in the face of harmful behavior by Charter, consumers have sufficient BIAS alternatives, especially high-speed BIAS

¹⁶ See *Merger Order*, at ¶ 108 (“because there is limited competition in its BIAS footprint and BIAS subscribers switch providers infrequently, New Charter will be able to pressure edge providers without fear of harming its retail BIAS business.”).

¹⁷ See *Charter Petition*, at 19-21.

options that are actual substitutes for Charter’s service rather than complements, such as mobile service, which often offers slower speeds, has data caps and usage-based pricing, and is not sufficient for significant online video consumption due to costs. Moreover, many consumers who are now working and schooling from home as a result of COVID-19 are heavily relying on the high-speed, fixed BIAS service of cable providers, like Charter, due to the various online video applications (e.g., Zoom, Microsoft Teams) and cloud computing (e.g., Azure) that is necessary for the economy to continue to function as numerous members in a household all need high-speed broadband availability at the same time. In addition, as customers rely more heavily on cable and fiber services due to the higher speeds offered, the use of DSL services has declined.¹⁸ As DSL providers continue to lose subscribers and receive nearly no new customers, DSL has continued to decline as a competitive constraint on large BIAS providers since Charter’s merger.

Indeed, a number of consumers have specifically addressed the issue of lack of choice in their comments explaining that they do not have an effective alternative competitive provider to switch to if Charter engages in harmful behavior. Many commenters opposing the Petition already have filed in the docket to express their frustrations with this lack of competition. For example:

- “I have zero choice for internet providers . . . no one else but Spectrum/Charter/Time Warner. They’ve already raised prices on me twice.” – David Kindred (Raleigh, NC).
- “I live in an area where there is virtually no competition and therefore they always charge the maximum amount.” – Paul Zimmerman (Sanford, NC).”

¹⁸ See Sean Buckley, *AT&T, Verizon lose combined 176K DSL subscribers in Q2, but ramp fiber, IP deployments*, FIERCE Telecom (July 27, 2017), available at: <https://www.fiercetelecom.com/telecom/at-t-verizon-loose-combined-176k-dsl-broadband-sub-q2-but-ramp-fiber-ip-deployments>; see also Karl Bode, *The Nation’s Telcos Are Hemorrhaging Customers Because They Refuse To Upgrade Their Networks*, TechDirt (Aug. 10, 2017), available at: <https://www.techdirt.com/articles/20170808/10281837957/nations-telcos-are-hemorrhaging-customers-because-they-refuse-to-upgrade-their-networks.shtml>.

- “As a current Charter subscriber with no other viable option for internet service, I respectfully request that you deny Charter's petition[.]” – Jason Mann (Pasco, WA).
- “[The internet] is already prohibitively expensive for many, especially for those of us in areas that are always victims of monopolies and have no choices for real competition.” – Leslie Shaip (Raleigh, NC).

It is important for the Bureaus to heed these ominous warnings that prematurely sunsetting the conditions will result in harmful behavior that Charter’s customers will not be able to overcome by switching to another comparable BIAS provider.

(b) The Interconnection Condition Addresses Charter’s Significant Gatekeeper Power And Should Not Be Prematurely Removed, Especially Given That Charter’s Market Power Has Increased Since The Merger.

In the *Merger Order*, the FCC found that Charter would have increased bargaining power for interconnection due to the increased number of BIAS subscribers it represents in the national interconnection marketplace.¹⁹ It found that the transaction would enable New Charter to impose unwarranted higher costs on edge providers, transit services, and CDNs due to its increased market power, which would allow Charter to raise costs to consumers and disrupt the virtuous cycle of online innovation by diverting funds towards interconnection fees that would have otherwise been used for further innovation or price reduction for consumers.²⁰ The Commission also found that because there is minimal competition in the BIAS marketplace, large BIAS providers like Charter do not fear losing subscribers in the event of an interconnection dispute.²¹

¹⁹ See *Merger Order*, at ¶ 113.

²⁰ See *id.* at ¶ 108.

²¹ *Id.* at 53 n.346 (“Because BIAS providers often face minimal competition, they have little fear of losing subscribers in the event of an interconnection dispute.”).

The Commission determined that there were two related ways that Charter had increased power. First, that the combination of TWC, Charter, and Bright House would give New Charter a total of 18.4 million subscribers, which would significantly increase the number of BIAS subscribers it controls to 20% of the national market for interconnection.²² In other words, Charter would act as a gatekeeper to 18.4 million BIAS subscribers and control 20% of the subscribers in the U.S that edge providers, transit providers, CDNs, and OVDs need to reach in order to deliver their online content. Second, increasing Charter's ability to control interconnection traffic into its own network would allow Charter to constrain routes and extract fees.²³ The Commission found that most bandwidth intensive edge provider services, including high-definition real time gaming and online back-up, in addition to OVD services, face intense pressure to access cable or fiber BIAS subscribers and thus will be more susceptible to imbalanced bargaining power with cable or fiber BIAS providers.²⁴ The FCC's economic analysis also showed that the ability of a BIAS provider to charge for access to their subscribers increases with the number of BIAS subscribers they have. In other words, the greater the number, the more the BIAS provider can charge on a per-subscriber basis.²⁵ At the time of the *Merger Order*, New Charter would be gaining additional bargaining power due to the 35% increase in subscribers it would represent in the interconnection marketplace.²⁶ Because New

²² *See id.* at ¶ 113.

²³ *See id.*

²⁴ *See id.* at ¶ 114.

²⁵ *See id.* at ¶ 115.

²⁶ *See id.*

Charter would face little competition to retain its BIAS subscribers, there was little competitive restraint on its efforts to extract excessive interconnection fees using its gatekeeper power to its BIAS subscribers.²⁷ In fact, the Commission found that when TWC degraded interconnection in order to collect fees from an OVD for access to its BIAS subscribers, those subscribers did not abandon TWC.²⁸

(1) Charter’s gatekeeper power has increased since the merger.

With respect to the FCC’s concern of market power in the national interconnection market, Charter’s market power has increased since the merger. As explained, at the time of the merger in 2016, New Charter had 18.4 million BIAS subscribers—20% of the national interconnection market. Today, according to Leichtman Research, Charter has 27.2 million BIAS subscribers—almost 9 million more subscribers than at the time of the merger.²⁹ As a result, Charter now has 26% of the national interconnection market—a growth of 30% since the merger. Charter’s total growth of subscribers in the national interconnection market is now 65% compared to pre-merger. Thus, the Commission’s prior finding that Charter will be able to extract excessive interconnection fees still holds true. Accordingly, the FCC should expect that

²⁷ *Id.* at ¶¶ 111, 115.

²⁸ *Id.* at ¶ 111 (“The available evidence suggests that consumers . . . do not switch BIAS providers when confronted with poor edge provider performance.”). This is due to the fact that often BIAS subscribers do not know that is their BIAS provider that is the problem. Even if they become aware of it and have an alternative BIAS provider, switching costs are high.

²⁹ See Leichtman Research Press Release, About 1,165,000 Added Broadband in 1Q 2020 The Most Quarterly Broadband Additions Since 1Q 2015 (May 13, 2020), *available at*: <https://www.leichtmanresearch.com/about-1165000-added-broadband-in-1q-2020/> (“Leichtman 1Q 2020 Research”). Charter reports on its website that it has 27 million BIAS subscribers. See *Charter by the Numbers*, *available at*: <https://corporate.charter.com/about-charter>.

edge providers, CDNs, and transit providers will be subjected to these interconnection fees as Charter will use its market power in the national interconnection market to extract them.

The FCC's concern regarding New Charter's increased bargaining power dealt with New Charter's degree of control over the number of routes that would be available into Charter's network, its ability to determine who it would peer with on a settlement-free basis, and that New Charter was well positioned to charge access fees to its BIAS subscribers.³⁰ The FCC found that TWC personnel have experience managing the company's interconnection business to generate revenue and that they likely will do so post-merger.³¹ The Commission rejected relying solely on Charter's promise that it would not do so, and the *Merger Order* specifically rebutted Charter's claims that it would not act as badly as Comcast (which, like TWC, had used its gatekeeper control to extract fees from a national OVD).³² The Commission determined that without the interconnection condition, New Charter would be able to extract higher interconnection fees as a result of the transaction.³³ As demonstrated above, Charter's ability to do so has only increased since the merger as the number of its BIAS subscribers is now 30% higher than it was at the time of the FCC's merger review. Therefore, the Commission should be even more concerned today of Charter's gatekeeper ability than it was at the time of the *Merger Order*.

The Commission also determined that because New Charter would not face substantial competition for BIAS subscribers, it would not be incented to pass through a significant portion

³⁰ *Merger Order*, at ¶¶ 116-117.

³¹ *Id.* at ¶¶ 118-119.

³² *Id.* at ¶ 120.

³³ *Id.* at ¶ 121.

of these additional fees to its subscribers.³⁴ The FCC found that the vast majority of edge providers have no market power when dealing with BIAS providers, and that even the largest of these would likely only have limited, if any, market power when dealing with a large BIAS provider like Comcast or New Charter.³⁵ It also rejected the argument that imposing higher interconnection fees would lead to lower BIAS subscriber fees (thereby benefiting Charter's BIAS customers).³⁶ Thus, while New Charter would take into account the negative effect of its actions on edge providers and the extent that influences demand for its BIAS offerings, the net effect of the increase in New Charter's economic power would be to harm consumers and economic efficiency.³⁷

The FCC's analysis then turned to reviewing the harm that New Charter would be able to impose to OVDs through interconnection. It found that New Charter would have the ability and incentive to harm video competition by harming OVDs due to its enhanced control over interconnection than either Charter or Time Warner Cable could individually. New Charter would have a greater incentive to use interconnection to harm these OVDs because OVDs are especially vulnerable due to the gatekeeper function of New Charter to reach the then-20% of BIAS subscribers (which is now 26% of BIAS subscribers). The Commission found that New Charter's affiliated video services are likely to pick up subscribers dissatisfied with a congested OVD, and that OVDs are more susceptible to interconnection-related harms than other edge

³⁴ *Id.*

³⁵ *Id.* at 120 n.390.

³⁶ *Id.*

³⁷ *Id.*

providers.³⁸ The Commission determined that the transaction will empower New Charter to force OVDs that are currently able to reach Charter and Bright House subscribers via transit to directly bargain with New Charter for access to those subscribers and begin charging interconnection fees when it previously had not done so. The FCC found that the transaction will force OVDs to come to New Charter for access to its subscribers sooner in the development of their businesses and will increase the fees they are asked to pay for that access. As the Commission stated:

This could retard upstart OVDs that subscribers might prefer to New Charter’s affiliated video services. Therefore, we find that New Charter would be more likely and better able to use interconnection to interfere with OVD service delivery with the purpose of inhibiting or eliminating OVD competition.³⁹

All of these concerns remain, and Charter has failed to adequately address them.

Contrary to Charter’s Petition, the interconnection condition was not solely based on OVD concerns.⁴⁰ As explained above, the Commission was also concerned about Charter using its gatekeeper power to impose interconnection fees on all types of edge providers, CDNs, and transit providers.⁴¹ Charter claims that there are a number of interconnection alternatives

³⁸ *Id.* at ¶¶ 125-126.

³⁹ *Id.* at ¶ 129.

⁴⁰ *See, e.g., Charter Petition*, at 2 (“The flourishing OVD marketplace also justifies allowing the Interconnection Condition to sunset in 2021.”).

⁴¹ *See, e.g., Merger Order*, at ¶ 66 (“The broadband provider’s position as gatekeeper is strengthened by the high switching costs consumers face when seeking a new service.”); at ¶ 95 (“BIAS providers like the Applicants function as gatekeepers between their subscribers and the rest of the Internet; all traffic going to or from a subscriber must pass through the BIAS provider.”); at ¶ 109 (“New Charter will be well positioned to leverage its larger BIAS subscriber base and increased control of interconnection traffic to act as a gatekeeper between edge providers and their customers.”); at ¶ 118 (“New Charter will have a valuable base of BIAS subscribers and will be able to act as a gatekeeper. . .”).

available now, transit prices are decreasing, and CDNs are growing market share.⁴² However, Charter has failed to account for the fact that in order to interconnect with Charter and reach Charter's subscribers, it does not matter that other product markets may be growing. Each of these providers must still reach Charter's customers through Charter. Thus, transit providers and CDNs that deliver traffic to Charter face Charter's gatekeeper power to reach its BIAS subscribers. As the Commission recognized in the *Merger Order*, it is still true today that a transit provider or CDN that sells access to the Internet will not be able to flourish in the U.S. without access to Charter's BIAS subscribers.

(2) Charter's Petition focuses on the wrong market.

Charter argues that the OVD market is flourishing, and the Commission no longer needs to be concerned about it.⁴³ In support of its Petition, Charter explains that the OVD subscribership and the number of OVD platforms is growing; streaming of OVD content is increasing; OVDs are offering and producing significant amounts of content, and that the quality of OVD content is impressive.⁴⁴ Charter also asserts that BIAS providers, including Charter, have responded to the growth of OVDs by investing in their networks to increase speeds offered over their BIAS networks.⁴⁵ However, Charter's Petition is focused on the wrong market.

Charter suggests that an expanding OVD market shows that any interconnection fees forced on OVDs by the handful of very large ISPs are benign. Charter appears to be hoping that

⁴² *Charter Petition*, at 25.

⁴³ *Id.* at 9-19.

⁴⁴ *Id.*

⁴⁵ *Id.* at 19. As the Commission is aware, it is not inconsistent for monopolists to invest in network upgrades.

it can shift the Commission's attention to the OVD market and away from the BIAS market that necessarily must be its focus. But it is impossible to draw the conclusion Charter proposes when AT&T/Time Warner and Comcast/NBCUniversal are among the most prominent OVD entrants. Furthermore, the fact that the OVD market has increased and become more competitive may be in significant part *because* Charter is currently prohibited from imposing access fees on OVDs, CDNs, transit providers, and other edge providers. As mentioned above, Charter represents 26% of the high-speed BIAS subscribers in the nation and therefore 26% of the national interconnection marketplace—that is more than a quarter of residential BIAS subscribers. The FCC has previously explained that OVDs need to reach at least 20% of subscribers to succeed.⁴⁶ This too may be having a disciplining effect in the national interconnection marketplace. In addition, interconnection agreements were negotiated for several years while the Commission was enforcing net neutrality and had asserted jurisdiction over interconnection. For example, AT&T was subject to a merger condition until July 2019 requiring it to submit its interconnection agreements to the Commission.⁴⁷ In order to analyze how these agreements disciplined the BIAS market, the Commission can use the interconnection agreements that AT&T filed in order to analyze the marketplace *during* the conditions compared to the marketplace *after* the conditions expired. To better its analysis, the FCC can seek information regarding AT&T's current interconnection behavior. This would help shed light on what the marketplace would look like if the Commission were to lift Charter's conditions. In fact,

⁴⁶ *Merger Order*, at ¶ 115.

⁴⁷ See *Applications of AT&T Inc. and DIRECTV For Consent to Assign or Transfer Control of Licenses and Authorizations*, Memorandum Opinion and Order, MB Docket No. 14-90 (rel. July 28, 2015), at 5 ¶ 7, 171 Appendix B.

settlement-free interconnection among peers has been the industry norm, but it was when some large BIAS providers began to use their market power in the interconnection market against their online competitors and their transit providers that the FCC stepped in via net neutrality policy and merger conditions.⁴⁸

Moreover, the number of OVDs competing with Charter's video services and other bandwidth intensive applications that have been introduced since 2016 that Charter points to in its Petition make it *more* likely that Charter would use its gatekeeping position and power to extract access fees at its interconnection points if the condition is lifted, not less. Charter claims that the "[s]eemingly insatiable consumer demand for content only bolsters their [OVDs] already strong interconnection negotiating positions."⁴⁹ However, Charter does not demonstrate any evidence on how this is so. In fact, Charter continues to separately maintain, rather than integrate, the legacy networks of Charter and TWC, which requires interconnecting parties to continue supporting multiple interconnection points in overlapping coverage areas in order to separately reach customers served by the legacy Charter and TWC networks. Charter committed to "ensur[ing] that broadband customers receive high-quality service no matter how data-intensive their consumption choices are," touting that "the success of online video will drive demand for better, more reliable broadband service."⁵⁰ However, Charter now appears to argue that the success of OVDs and consumer demand is driving Charter's need to impose additional

⁴⁸ See generally, Letter from Joseph C. Cavender, Vice President & Assistant General Counsel, Federal Affairs, Level 3 to Marlene H. Dortch, Secretary, FCC, WC Docket No. 17-108 (Sept. 15, 2017) ("Level 3 Letter").

⁴⁹ *Charter Petition*, at 24.

⁵⁰ *Charter Public Interest Statement*, at 23 & n.57.

costs on those consumers and interconnecting providers. This demonstrates that an “insatiable consumer demand” provides more opportunities for Charter to use its gatekeeping power to extract new revenue.

Charter also asserts that OVDs have thrived even though other large BIAS providers have not been subject to an interconnection condition and have negotiated interconnection agreements.⁵¹ However, Charter does not offer any concrete evidence to support this claim. Rather, it relies on information the Commission obtained during its merger review that some large BIAS providers used their market power over interconnection to extract access charges.⁵² In fact, these interconnection agreements were discussed by the FCC in the *Merger Order* as evidence supporting the interconnection condition.⁵³

One likely reason that OVDs have been successful in bringing greater competition to the video marketplace is that they have been able to deliver these innovative services via broadband connections with interconnection conditions on the Charter/TWC merger and the AT&T/DirecTV merger, and interconnection arrangements that were negotiated during the net neutrality regime.⁵⁴ OVDs and other online content, including edge providers’ services, are

⁵¹ *Charter Petition*, at 24.

⁵² *Id.*

⁵³ *See, e.g., Merger Order*, at ¶¶ 120, 128 n. 415.

⁵⁴ *See* Cogent Comments, WC Docket No. 17-108, at 3, 8 & 16-18 (noting that congestion improved after the *2015 Open Internet Order* was issued: “Shortly after it became apparent that the Commission would reclassify the provision of BIAS and provide a forum for interconnection disputes to be resolved, previously recalcitrant ISPs agreed to augment capacity at the points where they exchange traffic with transit/content providers.”). *See also* Level 3 Letter at 1 (“the Commission’s 2015 Open Internet Order, also known as the Title II Order, went a long way toward addressing a very real problem. Prior to the order, some of the largest consumer ISPs were intentionally congesting their interconnections to other networks in a game of chicken to force those other networks to pay unjustifiable access tolls. Following the order’s assertion of

subject to the practices of large BIAS providers who are no longer obligated to abide by net neutrality rules or policies that offered some protections from discriminatory practices and FCC oversight. If the Bureaus remove the interconnection condition now, Charter will use its gatekeeper power to extract interconnection fees. It is irrelevant that there may be some large OVD companies or other edge providers, transit or CDNs that will have more bargaining power than others. Small OVDs and new entrants have little bargaining power and will have no choice but to go through Charter to reach Charter's subscribers and be subject to Charter's gatekeeping power. The Bureaus must protect consumers foremost and ensure that video competition and competition in other online services are not thwarted.

Indeed, this is an important area where the Bureaus should gather more evidence about the interconnection market given that a number of agreements likely were negotiated under the net neutrality regime. The Bureaus should review those agreements and provide the necessary insight needed given the lack of information provided in the Petition. The Commission already has access to the AT&T interconnection agreements given the merger condition on AT&T and could assess them, but in addition, the Bureaus should seek additional information from CDNs, transit, and other edge providers, as well as other large BIAS providers not subject to conditions to assess the current state of the interconnection marketplace, and the impact of Charter's request, if granted.

jurisdiction over consumer ISPs' interconnection practices, those big providers changed their conduct dramatically, and Level 3 was able to enter into new interconnection agreements with them, benefiting the consumer ISPs' customers, Level 3's own customers, and the Internet more broadly. Because the biggest consumer ISPs have gotten even bigger since 2015, there is every reason to believe that they would revert to their anti-consumer ways if the Commission were to relinquish its authority over their interconnection practices.”).

As part of their assessment of the interconnection marketplace, the Bureaus should also determine whether OVDs would have flourished *even more* if the interconnection conditions applied more broadly to other large BIAS providers. To assess this, the Commission would need the comparative evidence of how independent OVDs have fared in Charter territory versus the territory of providers not subject to the settlement free interconnection condition. In any event, a highly concentrated BIAS market and an increase in OVD competition actually shows the increasing importance of interconnection, especially as Charter maintains a significant position in the video market with 27.2 million residential BIAS customers.

(3) Lifting the interconnection condition will likely lead to unwarranted higher fees for consumers at a time when more Americans are relying on the Internet during a global pandemic.

It is not just OVDs and video competition that the Bureaus should be concerned about. Rather, during COVID-19, more consumers are working and schooling from home, requiring real-time video connectivity. The higher costs that ultimately will be imposed on these services will be paid for by consumers. Consumers already pay high fees for their BIAS service given the lack of effective competition in the residential BIAS marketplace, and they ultimately will be the ones who will pay higher costs for their online services that will face Charter's interconnection fees. Just as the Commission found in the *Merger Order*, Charter will not have any incentive to pass along these interconnection fees to their BIAS consumers,⁵⁵ and its behavior will negatively impact innovation and investment of online services.⁵⁶ Because of this, Charter's BIAS

⁵⁵ *Merger Order*, at ¶ 121 “Because New Charter would not face substantial competition for BIAS subscribers, it would not be incited to pass through to its subscribers a significant proportion of these additional fees.”).

⁵⁶ The Bureaus also need to wrestle with the fact that for voice service, the FCC has and is in the process of extracting access charges, such as in the 8YY proceeding, under the policy that it is more efficient and effective for each provider to charge their own customers and not exchange

consumers would not have direct visibility into Charter’s interconnection strategy and pricing, so the Commission should not rely on these BIAS consumers to adequately discipline Charter’s anticompetitive behavior (even if those consumers had competitive BIAS options). The Bureau should heed the warnings of consumers who recognize that they ultimately will pay higher costs for Charter’s imposition of interconnection fees on OVDs. For example, consumers have filed the following in response to Charter’s Petition:

- “ISP’s are trying to double dip. They already get usage fees from users to access the internet. This should be enough to cover internet access. But double dipping and charging interconnect fees the[] way they are doing is against the design of the Internet.” – Kevin Fox (Pasco, WA).
- “Charter should not get a reduction in term on the merger requirements. There is not enough competition in broadband access and this would exacerbate the problem. No ISP should be allowed to charge interconnection fees as the customers have already paid for this access and it is double dipping to charge interconnection fees.” – Donald J. Howard (Golden, CO).
- “Conditions that were put in place to protect consumers. What is the point of imposing these rulings in the first place if they will be removed whenever there is a change in leadership? Fees for video services just means that Charter would be double dipping, they are already paid by us consumers.” – Ethan Hill (Temple, TX).

Charter also alleges that the interconnection condition prevents it from managing its network efficiently.⁵⁷ Yet, again, Charter fails to demonstrate this claim with any supporting evidence and analysis. To the extent that Charter can make such a demonstration, it could request that the Commission modify the condition to address the issue rather than request an early sunset of the condition. Settlement-free interconnection must be maintained to continue to promote online innovation, growth, and competition.

payment with each other for the delivery of traffic. The FCC should not be blessing access charges by large BIAS providers when the traffic is being delivered to Charter’s POPs.

⁵⁷ *Charter Petition*, at 26.

(c) Prematurely Removing The Data Caps/Usage-Based Pricing Condition Will Harm Consumers, Innovation, And Investment In High-Bandwidth Services, And Should Be Denied.

In the *Merger Order*, the FCC found that New Charter would have a strong incentive to protect its own programming at the expense of OVDs.⁵⁸ After reviewing significant internal documents from the companies, the Commission concluded that Charter was keeping its options open regarding data caps,⁵⁹ which is especially noteworthy because this is what the Petition suggests as well.⁶⁰ The FCC found that it would be more profitable for Charter to impose data caps and engage in usage-based pricing due to the fact that it has significant video revenue to protect, including its MVPD revenue and its VOD/PPV revenue.⁶¹ The *Merger Order* observed how Comcast continues to expand its data caps and usage-based pricing and that together Comcast and Charter could operate cooperatively to harm online competition.⁶² Again, the *Merger Order* focused on the lack of competition that Charter faces in the BIAS market to show that its customers likely would not switch providers even if they face data caps/usage-based pricing.⁶³ The Commission issued a seven-year condition specifically stating that this may

⁵⁸ See, e.g., *Merger Order*, at ¶ 38 (“[W]e conclude that New Charter will have an increased incentive to discriminate against or harm OVDs.”); at ¶ 40 (“New Charter will have an increased incentive to protect that business against perceived threats); at ¶ 74 (“We find that post-transaction, New Charter may be more likely to use data caps or UBP to curb current and future OVD-consumption levels with the purpose of inhibiting or eliminating OVD competition.”).

⁵⁹ *Id.* at ¶ 81 (“Overall, it seems that Charter is keeping its options open regarding data caps”).

⁶⁰ *Charter Petition*, at 23.

⁶¹ *Merger Order*, at ¶ 83.

⁶² *Id.*

⁶³ *Id.* at ¶ 67 (“Between this lack of alternatives and high switching costs, New Charter is unlikely to lose many BIAS subscribers if the company were to adopt retail terms on residential BIAS that consumers find incompatible with use of an OVD.”).

provide time for competition to develop by wireline fiber providers and wireless 5G providers in the hopes that the use of data caps in an anticompetitive manner could then be curtailed.⁶⁴

However, rather than directly address these concerns in the *Merger Order*, Charter argues that data caps are a reasonable use, the ones already imposed by other BIAS providers have not impeded the OVD marketplace, and there is therefore no reason to prevent Charter from using them.⁶⁵ Yet, Charter provides little to no evidence for certain claims, such as “[y]et the use of data caps by these companies has not stifled the growth of OVD services.”⁶⁶ In reality, the FCC tied the data cap condition expiration to two factors, only the first of which is addressed by Charter: the maturing of the OVD market. Charter only cites investments by the incumbents, not additional BIAS competitive options that its customers have available to them that would constrain its use of data caps/usage-based pricing. Nor has Charter demonstrated that its customers are switching to these competitive options. As such, the Bureaus should gather evidence directly from OVDs to determine whether this market has matured sufficiently to withstand data caps by cable and fiber BIAS providers. Moreover, as noted above, it is critical that the Bureaus update the economic analysis in Appendix C of the *Merger Order*, including analyzing the competitive alternatives Charter faces in its footprint and whether those options constrain Charter’s incentives.

Moreover, imposing data caps and metering broadband use is an inherently unfriendly practice that encourages scarce use of online services, which can impede the development and

⁶⁴ *Id.* at ¶ 86.

⁶⁵ *Charter Petition*, at 9-23

⁶⁶ *Id.* at 2.

growth of edge providers. More importantly, it gives large BIAS providers an anticompetitive opportunity to hurt their online competitors (especially OVDs), and it can deter consumers from cutting the cord to use online video as a substitute for traditional MVPD service.

Data caps are also often unnecessary as they do not effectively impact network congestion.⁶⁷ The effect of data caps is especially concerning during the COVID-19 pandemic. More people are now using their broadband services for working and schooling from home, videoconferencing, online gaming, streaming movies, and much more. Since everything one does on the internet requires the use of data, it will be much easier now for people to hit their data limit and have to pay more. For example, for a data cap plan below 600 GB, watching a few hours of Hulu a day and scrolling through social media can blow through your allotted data cap.⁶⁸ A household of multiple users that love watching TV, especially 4K content, may end up paying more.⁶⁹

As a result, imposing data caps and its additional pricing will likely affect many more consumers today and make internet access more expensive at a time when customers may not be able to pay their internet or phone bills due to the global pandemic. The Commission should not allow for these additional fees especially after it encouraged broadband and phone providers to

⁶⁷ See Jeff Baumgartner, *Small US cable op scraps its data cap*, LightReading (June 2, 2020), available at: <https://www.lightreading.com/services/small-us-cable-op-scraps-its-data-cap-/a/d-id/761435>; see also Jon Brodtkin, *Analysis: Wireless data caps more about profit than congestion* (Oct. 8, 2014), available at: <https://arstechnica.com/staff/2014/10/analysis-wireless-data-caps-more-about-profit-than-congestion/> (explaining that data caps can prevent overuse of a provider's network, but, in reality, companies use data caps as a profiting tool without regard for whether the network is congested at a particular time or place).

⁶⁸ See Rachel Oaks, *Data caps and other fees waived during the coronavirus pandemic*, Cabletv.com, available at: <https://www.cabletv.com/blog/which-brands-have-data-caps>.

⁶⁹ See *id.*

take the Keep Americans Connected Pledge with the understanding that customers today may not be able to pay their internet or phone bill due to the pandemic. While many broadband and phone providers took the Keep Americans Connected Pledge, some additionally removed data caps and lowered bills in response to COVID-19.⁷⁰ In fact, Charter announced that it would offer free Spectrum broadband and Wi-Fi access for 60 days to households with K-12 and/or college students who do not already have a broadband subscription. In this same announcement, Charter highlighted that “Spectrum does not have data caps or hidden fees.”⁷¹ Even small broadband providers have recently decided to relax their data cap policies for customers.⁷² If small providers do not need to impose data caps, Charter certainly does not.

Furthermore, large BIAS providers have the incentive and ability to harm unaffiliated OVDs as they have done in the past and likely will continue to do so. INCOMPAS is concerned that there already are a number of practices that large BIAS providers are engaged in that favor their own content to the disadvantage of online competitors. The four largest residential BIAS providers—Comcast, Charter, AT&T, and Verizon—have almost 77% of the residential BIAS

⁷⁰ Mark Hachman, *Which Internet providers are lifting data caps during the coronavirus, and which aren't*, PCWorld (June 19, 2020), available at: <https://www.pcworld.com/article/3532817/which-internet-providers-are-lifting-data-caps-during-the-coronavirus-and-which-arent.html>.

⁷¹ Charter Communications, Press Release, *Charter to Offer Free Access to Spectrum Broadband and Wi-Fi For 60 Days For New K-12 and College Student Households and More* (March 13, 2020), available at: <https://corporate.charter.com/newsroom/charter-to-offer-free-access-to-spectrum-broadband-and-wifi-for-60-days-for-new-K12-and-college-student-households-and-more>.

⁷² Jeff Baumgartner, *Small US cable op scraps its data cap*, LightReading (June 2, 2020), available at: <https://www.lightreading.com/services/small-us-cable-op-scraps-its-data-cap-/a/d-id/761435>.

marketplace.⁷³ With each of these companies having a significant share of BIAS subscribers—and in the case of AT&T and Verizon, an additional large number of mobile BIAS subscribers⁷⁴—they are in the unique position of being able to favor their own content and discriminate against third-party content over their BIAS networks.⁷⁵ Thus, when these companies implement policies like data caps and usage-based pricing, they can favor their own content and discriminate against their competitors’ content.⁷⁶ The *Merger Order* likewise was concerned about large BIAS provider concerted behavior would deter online competition⁷⁷—an issue that Charter’s Petition failed to address.

As a result of past and current behavior, we cannot and should not trust large BIAS providers’ incentives. They have previously been caught congesting interconnection, and they are bigger and more powerful in the marketplace today.⁷⁸ In fact, the Commission has repeatedly recognized that broadband providers have the incentive to harm unaffiliated OVDs, and the FCC, U.S. Department of Justice, and the U.S. Court of Appeals for the D.C. Circuit all agree that

⁷³ See Leichtman 1Q 2020 Research.

⁷⁴ Although, as explained above, mobile broadband is not an adequate substitute for fixed broadband. See *supra* at 7-8.

⁷⁵ See Karl Bode, *How the new AT&T could bully its way to streaming domination*, THE VERGE (Dec. 18, 2018) available at: <https://www.theverge.com/2018/12/18/18146186/att-time-warner-streaming-video-net-neutrality>.

⁷⁶ For example, AT&T’s use of data caps includes zero rating its own affiliated programming. See Nilay Patel, *HBO Max won’t hit AT&T data caps, but Netflix and Disney Plus will*, The Verge (June 2, 2020), available at: <https://www.theverge.com/2020/6/2/21277402/hbo-max-att-data-caps-netflix-disney-plus-streaming-services-net-neutrality>.

⁷⁷ *Merger Order*, at ¶ 83.

⁷⁸ See generally, INCOMPAS Ex Parte, *Restoring Internet Freedom*, WC Docket No. 17-108 (Nov. 20, 2017).

large broadband providers have the ability and incentive to harm online competition.⁷⁹ Moreover, with respect to 5G, Charter cites T-Mobile's 3-year 5G commitment.⁸⁰ However, it is still far from certain that 5G will compete directly against residential BIAS service. Moreover, T-Mobile's merger condition will not come into fruition until 2023. As such, this militates for a full 7-year term for Charter's conditions, not a premature sunset at the 5-year mark in 2021.

III. THE BUREAUS SHOULD LISTEN TO WHAT CONSUMERS ARE SAYING AND DENY THE PETITION.

If the FCC prematurely sunsets the condition, consumers will be harmed. Moreover, the FCC should not sunset the conditions during a global pandemic when people are relying on the Internet more than ever. Consequences of granting this Petition are too unknown for the FCC to grant at a time when so many Americans are relying on their residential Internet service.

Hundreds of customers agree, and the Bureaus should listen to what these consumers are saying in their comments and deny the Petition. For example, the following comments have been filed in response to Charter's Petition:

- "Competition is supposed to bring prices down and during my time under Charter, my bill has only gone up and is now about 30% higher than when they bought Time Warner." – Richard Mach (Austin, TX).
- My neighborhood has only one provider, which is Spectrum. Any data cap implemented by this company would severely impact my family's ability to work and online school learning. This company was approved to merge with no data caps and this should remain." – Justin Finn (Denton, TX).
- "Workers and students without reliable or affordable connections have been left behind. Data caps would make the digital divide worse." – Denise Speicher (Rochester, NY).

⁷⁹ See Comments of INCOMPAS, *Office of Economics and Analytics Seeks Comment on the State of Competition in the Communications Marketplace*, GN Docket No. 20-60 (Apr. 27, 2020), at 19-20.

⁸⁰ *Charter Petition*, at 20.

- “With the current pandemic and the sharp increase in the number of people teleworking, attending classes online, streaming entertainment, and using video conferencing tools to stay in touch with loved ones, a data cap would further punish those who rely on their internet for the jobs, school, and social contact. Please do not allow Charter to void the deal they agreed to.” – Jason Mann (Pasco, WA).

IV. CONCLUSION

INCOMPAS urges the Commission, the Wireline Competition Bureau, and the Office of Economics and Analysis to deny Charter’s Petition. It is clear from the record and the lack of analysis in Charter’s Petition that Charter did not sufficiently prove that the removal of the conditions serves the public interest. As a result, Charter should still be required to keep the promises it made not to impose data caps and usage-based pricing and interconnection access charges. Interconnection helped launch the streaming revolution, and streaming brings greater choice, lower prices, and more opportunities for consumers and creators.

Respectfully submitted,

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