

**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 INCOMPAS**

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September 2, 2020

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**I. INTRODUCTION AND SUMMARY**

INCOMPAS, by its undersigned counsel, hereby submits further comments in response to the Reply Comments of Charter Communications, Inc. (“Charter”)<sup>1</sup>, as well as the Declaration of Jeffrey A. Eisenach, Ph.D. (“Eisenach Declaration”),<sup>2</sup> both of which attempt to provide evidence to encourage the Commission to prematurely sunset two of Charter’s merger conditions. INCOMPAS originally filed a Petition to Deny,<sup>3</sup> and in these further comments INCOMPAS continues to urge the Federal Communications Commission (“Commission” or “FCC”), and specifically the Wireline Competition Bureau, to deny Charter’s Petition.<sup>4</sup>

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<sup>1</sup> Reply Comments of Charter Communications, Inc., *Conditions Imposed in the Charter Communications-Time Warner Cable-Bright House Networks Order*, WC Docket No. 16-197 (“*Charter Reply Comments*”) (filed Aug. 6, 2020).

<sup>2</sup> *Charter Reply Comments*, Exhibit A, Declaration of Jeffrey A. Eisenach, Ph.D (“*Eisenach Declaration*”).

<sup>3</sup> INCOMPAS Petition to Deny, *Conditions Imposed in the Charter Communications-Time Warner Cable-Bright House Networks Order*, WC Docket No. 16-197 (filed July 22, 2020).

<sup>4</sup> 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*”) (filed June 17, 2020).

INCOMPAS commends the Commission for extending the comment period in this proceeding, but we strongly believe that the Commission should allow for a standard thirty-day comment period, rather than the additional fourteen days it has allotted, given the circumstances and recent events affecting this proceeding. In addition to the U.S. Court of Appeals for the D.C. Circuit's decision in *Competitive Enterprise Institute*, the public should be given more time to respond to the Eisenach Declaration given that Charter waited for the reply round to provide its economic analysis and therefore chose not to give the public a chance to properly address its arguments. In addition, the Commission should deny Charter's Petition because Charter's arguments remain deeply flawed.

**II. THE COMMISSION SHOULD ADOPT AN ADDITIONAL THIRTY-DAY STANDARD COMMENT PERIOD GIVEN THE SPECIFIC CIRCUMSTANCES AND RECENT EVENTS IN THIS PROCEEDING.**

On August 18, 2020, the Commission released a Public Notice announcing an additional period for comments in response to Charter's Petition and reply comments. In the Public Notice, the Commission invited commenters to address the U.S. Court of Appeals for the D.C. Circuit's decision on August 14, 2020 in *Competitive Enterprise Institute* on the Commission's consideration of Charter's Petition.<sup>5</sup> The Commission also explained that it was providing additional time "[t]o ensure that the Bureau has a full record upon which to evaluate the effects of the conditions[.]"<sup>6</sup> INCOMPAS appreciates the extended comment deadline and commends the Commission for taking this appropriate action; however, this is still not enough time to allow for a full record given Charter's failure to provide its economic analysis until the Reply round

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<sup>5</sup> Public Notice, *Wireline Competition Bureau Announces Additional Period For Comments In Response To Charter Communications, Inc. Petition To Sunset Merger Conditions* (rel. Aug. 18, 2020).

<sup>6</sup> *Id.*

and not when it originally filed its Petition. As such, on August 19, 2020, INCOMPAS, along with Entertainment Studios Networks, Free Press, Newsmax Media, Inc., Open Technology Institute, Public Knowledge, and Sports Fans Coalition filed an ex parte letter with the FCC requesting that the Commission allow for a standard thirty-day comment period under the circumstances.<sup>7</sup>

The Commission is correct that an extended comment period is necessary to allow the public to comment on the D.C. Circuit's recent decision;<sup>8</sup> however, the Commission should acknowledge that more time is also necessary to allow the public to comment on Charter's Reply Comments and the Eisenach Declaration. The Eisenach Declaration and its economic analysis should have been submitted along with Charter's Petition. Because it was not, it is only fair for the FCC to provide additional time for comments in response to the Declaration. In INCOMPAS' Petition to Deny, we explained that Charter's Petition is insufficient as it lacks the support and necessary analysis to determine that the conditions are no longer necessary to protect consumers and online competition.<sup>9</sup> If Charter had provided its economic analysis from Dr. Eisenach in its original Petition, INCOMPAS, and the rest of the public, would have had a full 30-day period to comment on its analysis. Instead, Charter waited until the Reply round to submit an economic analysis, and now commenters have had less than 30 days to respond, impacting the ability to fully conduct their own counter-analysis or to hire an economist to comment on the Eisenach Declaration. That is not enough time. In addition to Charter submitting

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<sup>7</sup> Ex Parte Letter of Entertainment Studios Networks, Free Press, INCOMPAS, Newsmax Media, Inc., Open Technology Institute, Public Knowledge, and Sports Fans Coalition, *Charter Sunset Petition*, WC Docket No. 16-197 (filed Aug. 19, 2020).

<sup>8</sup> *Competitive Enterprise Institute v. FCC*, No. 18-1281 (D.C. Cir. 2020).

<sup>9</sup> See INCOMPAS Petition To Deny, at 4-6.

its economic analysis in its Reply Comments, the D.C. Circuit's decision in *Competitive Enterprise Institute* is a second recent event that commenters will have to consider in this proceeding, and the two-week time period is insufficient for parties to fully address the legal implications. Overall, INCOMPAS urges the Commission to accept the request we, along with the other organizations, made in the ex parte letter to extend the additional comments period to thirty-days in order to give the public the opportunity to fully and properly comment in this proceeding on Charter's Reply Comments, the Eisenach Declaration, and the court decision.

**III. CHARTER CONTINUES TO FAIL TO MAKE THE NECESSARY DEMONSTRATIONS AND ARGUMENTS TO PROVE WHY THE COMMISSION SHOULD PREMATURELY SUNSET ITS MERGER CONDITIONS.**

Charter's Petition failed to provide the necessary factual evidence and arguments in order for the FCC to prematurely sunset Charter's merger conditions. Charter's Reply Comments and the Eisenach Declaration continue this pattern as they are insufficient and fail to provide the necessary economic analysis to demonstrate that the Commission should lift the conditions. Charter is still focused on the wrong aspects of the merger conditions, namely that the OVD market is "flourishing." For the sake of competition, low consumers prices, the current pandemic, and public interest overall, it is imperative that the merger conditions still apply.

**(a) Lifting Charter's Merger Conditions Is Not In The Public Interest.**

The merger conditions do in fact serve the public interest and were imposed for seven years based on direct evidence during the merger proceeding that the merging parties would engage in anticompetitive behavior. Consumers currently benefit by not being charged directly or indirectly for interconnection fees and data caps. Although the Eisenach Declaration states

that “[t]he Conditions generate no economic or public interest benefits,”<sup>10</sup> this is not true. If the Commission lifts the conditions there will be serious harms for the public interest, namely the increase of consumer prices. Charter did not even try to make a public interest case as its entire argument is based on the observation that the OVD market is growing.<sup>11</sup> However, Charter has not demonstrated how consumers will be better off if it can now charge interconnection fees and impose data caps and charge consumers for use of online services when they have reached their data cap limit.

In its Reply Comments, Charter states: “INCOMPAS is wrong to insist that the Commission must wait to rule on Charter’s Petition until it can conduct a separate economic analysis like the one performed in Appendix C of the *Merger Order*.”<sup>12</sup> INCOMPAS urges the Commission to conduct an economic analysis as it did when it reviewed the merger in order to be consistent with the FCC’s merger review standard. By doing so, the FCC will ensure that its decision is in the public interest by determining that “neither consumers nor competition will be harmed by prematurely sunseting the conditions.”<sup>13</sup> Of course, we are not surprised that Charter is asserting that the Commission should not engage in such an economic analysis because it knows that if the Commission does so, its Petition will not be granted. As we discussed in our Petition to Deny, Charter’s market power has grown by 30% since the merger as the number of

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<sup>10</sup> *Eisenach Declaration*, at 29-30.

<sup>11</sup> Reply Comments of Free Press, *Docket Established For Monitoring Compliance With The Conditions Of The Charter Communications-Time Warner Cable-Bright House Networks Order*, WC Docket No. 16-197 (filed Aug. 6, 2020) (“*Free Press Reply Comments*”), at 7.

<sup>12</sup> *Charter Reply Comments*, at 25.

<sup>13</sup> INCOMPAS Petition to Deny, at 4-6.

BIAS subscribers it serves today has increased by almost 9 million subscribers.<sup>14</sup> Accordingly, Charter has more incentive today than it did at the time of the merger to engage in behavior that will increase prices on consumers who often have no choice or only one other alternative for high-speed BIAS at home.

**(b) Charter Is Mischaracterizing The Merger Conditions As Being Conditioned Upon The OVD Market Development.**

Charter is mischaracterizing the merger conditions as focused solely on the OVD market and its development. However, as Roku explained in its Reply Comments, the *Merger Order*<sup>15</sup> was not focused on whether the OVD market was flourishing.<sup>16</sup> Rather, the FCC found that Charter has an incentive post-merger to act anti-competitively toward OVDs, edge providers, CDNs, and transit providers due to the lack of competition for high-speed terrestrial BIAS.<sup>17</sup> Indeed, the conditions were based “entirely on Charter’s incentives and the lack of competition constraining Charter’s abilities to act on those incentives,”<sup>18</sup> yet Charter has not adequately addressed these concerns. As evidenced by the substantial opposition in the docket to the Petition

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<sup>14</sup> *See id.* at 11.

<sup>15</sup> *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 (“*Merger Order*”) (rel. May 10, 2016).

<sup>16</sup> Reply Comments of Roku, Inc., *Conditions Imposed in the Charter Communications-Time Warner Cable-Bright House Networks Order*, WC Docket No. 16-197 (filed Aug. 6, 2020) (“*Roku Reply Comments*”), at 3-4; n.13.

<sup>17</sup> *Id.* at 4.

<sup>18</sup> *Id.* at 6-7.

from Charter's own customers who discuss the lack of competitive choice, the FCC's concerns still remain true and are even more serious today as Charter's market power continues to grow.

Moreover, one way Charter tries to focus away from the Commission's concerns in the underlying merger is by relying more heavily on the Commission's *Restoring Internet Freedom Order* ("RIFO") than the actual *Merger Order*. In fact, Charter states that the Commission's analysis in the *Merger Order* regarding data caps was "mistaken" due to what the Commission said in *RIFO*.<sup>19</sup> However, *RIFO* is not case-specific. Unlike the *Merger Order*, *RIFO* was considering the state of the industry in the context of whether the Commission should continue to apply net neutrality rules across the industry—both small and large BIAS providers. However, *RIFO* did not find that the *Merger Order*'s analysis and findings with respect to Charter were no longer valid.<sup>20</sup> Indeed, as we discussed in our Petition to Deny, not only was the *Merger Order* specific to the three merging parties, it was based on reams of highly confidential documents submitted by the merging parties and others in the industry. This evidence demonstrated that Time Warner Cable was already engaging in harmful behavior towards its consumers and that post-merger the New Charter would be able to engage in this same behavior that would cause price hikes on consumers through higher interconnection and usage-based pricing, thereby harming online competition and consumers.

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<sup>19</sup> *Charter Reply Comments*, at 9.

<sup>20</sup> In fact, in *RIFO*, the Commission stated that the Charter *Merger Order* was "based on a narrowly-focused analysis of specific issues raised in those adjudications" and that the Commission was "unpersuaded that the actions taken in the . . . *Charter/TWC Order* should guide our decisions here." See *Restoring Internet Freedom Order*, at n.628. The Commission did not overrule its *Merger Order* findings of fact and the need for the Charter conditions.

**(c) Charter Still Has Incentives To Discriminate Against OVDs.**

Throughout its Reply Comments, Charter writes that it has no incentive to discriminate against OVDs because OVDs are flourishing and Charter relies on OVDs for its own services.<sup>21</sup> Charter asserts that because it is a broadband provider, it has no incentive to keep its customers disconnected from OVDs or edge providers and that it works with OVDs to provide content over its platform. As Charter explained: “[i]t makes no business sense for Charter to harm OVDs or reduce its subscribers’ access to the edge content they want when edge providers drive demand for Charter’s broadband services.”<sup>22</sup> While Charter reiterates this notion throughout its Reply Comments, it does not provide any evidence to back up this claim. And the Commission should not just take Charter at its word here given the (1) prior evidence in the merger proceeding that demonstrated Charter *would* engage in harmful behavior; and (2) the FCC’s own economic analysis confirming that Charter would do so post-merger, but for the conditions.

It is especially noteworthy that Charter has never denied the fact that consumers will pay more when Charter imposes data caps and interconnection fees, and the Commission cannot simply just trust that Charter will not do so as Charter seems to imply. Charter’s ability to extract higher fees will mean that ultimately consumers will see price hikes without conditions in place. As we noted in our Petition to Deny, the FCC did not take Charter at its word then that it would

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<sup>21</sup> See e.g., *Charter Reply Comments*, at 8 (“Charter has no incentive to harm OVDs for the simple reason that they are essential to its most important business—broadband.”); at 11 (“Charter, like other broadband providers, lacks the incentive or ability to discriminate against OVDs.”); at 13 (“Charter has neither the market power nor the incentive to stymie the OVDs, which provide the increasing amount of video content Charter’s BIAS customers demand.”).

<sup>22</sup> *Charter Reply Comments*, at 9.

not impose higher interconnection fees and data caps/usage-based pricing, and it should not do so now.

In the *Merger Order*, when describing potential public interest harms, the FCC explained that “[OVDs] increasingly compete with MVPDs for ‘viewing time, subscription revenue, and advertising revenue.’ The potential for OVDs to place competitive pressure on New Charter, for all or portions of the MVPD bundle, is likely to increase and place pressure on New Charter’s video profits.”<sup>23</sup> As the Commission explained, “[b]ecause OVDs represent an increasingly competitive alternative to the Applicants’ video services, and the Applicants control broadband networks that many consumers use to access OVD service, we consider the record regarding the Applicants’ general views of OVDs and their increasing threat to New Charter’s business.” The Commission ultimately concluded that “New Charter will have an increased incentive to discriminate against or harm OVDs” and that it disagreed with the “contention that New Charter’s incentive to attract and retain broadband subscribers would preclude any incentives to engage in conduct that hinders consumers’ access to competing OVDs.”<sup>24</sup> The Commission’s views in the *Merger Order* are still very much relevant today. In fact, cord cutting has accelerated during the COVID-19 crisis, and because these subscriber losses have coincided with the continued growth of OVDs, there will likely be heightened incentives for MVPDs, like Charter, to protect their own video service revenues.<sup>25</sup> Moreover, it has incentive to replace these

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<sup>23</sup> *Merger Order*, at ¶ 34.

<sup>24</sup> *Id.* at ¶ 38.

<sup>25</sup> Janko Roettgers, *Cord cutting has accelerated under COVID-19*, Protocol (Aug. 7, 2020), available at: <https://www.protocol.com/cord-cutting-q2-2020>.

revenue losses. As a result, as MVPD subscribers decline, Charter's incentive to apply data caps and interconnection fees increases.

Charter cannot ignore the fact that the conditions have limited Charter's behavior and ability to act on its incentives. The Eisenach Declaration states: "[t]he concerns that motivated the Commission to impose the Conditions have not been borne out by events. In fact, the OVD marketplace has grown dramatically. As a result, [MVPDs] like Charter regard OVDs as complements and have no incentive to discriminate. Moreover, the continued growth and new entry of OVD providers makes it economically implausible that Charter (or any MVPD) has the ability effectively to discriminate against OVDs."<sup>26</sup> However, Eisenach has completely ignored the fact that the Commission's concerns would not have been able to be "borne out" *because* the conditions have been in place to limit Charter's behavior.

Eisenach's Declaration further states: "Charter is less likely to discriminate against OVDs than other MVPDs because it does not own significant stakes in nationwide broadcast or cable programming," unlike Comcast and AT&T, and therefore "Charter has no incentive to promote its own programming over the programming of OVDs like Amazon, Apple, Disney, or Netflix."<sup>27</sup> First, this is a major claim that is not supported by a declaration from a company executive—that, in itself, is telling. Second, the conditions are not just about discrimination. Both the interconnection and data caps conditions ensure that Charter's BIAS consumers, who have very little choice for alternative high-speed broadband service at home, do not face higher prices due to the higher interconnection fees Charter can extract from edge providers, CDNs,

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<sup>26</sup> *Eisenach Declaration*, at 4.

<sup>27</sup> *Id.* at 22-23.

transit providers, and OVDs—including those that Charter competes directly against with its MVPD service.

Eisenach’s Declaration also states that “[e]ven if MVPDs once had the incentive and ability to discriminate successfully against OVDs, they no longer do.”<sup>28</sup> Yet Charter’s size and market power has only increased since the merger. Even if Charter did view OVDs as complements, it is still Charter that has the gatekeeper power of whether its subscribers will view the OVD content and how much that OVD must pay (directly to Charter or indirectly through a transit provider or CDN) to gain access to Charter’s BIAS subscribers. Again, Eisenach’s Declaration claims that Charter has no incentive to harm OVDs without any definitive statements or evidence from Charter directly that it will never do so. Charter may claim that it “lacks ‘gatekeeper’ power over the OVD market” and that it has “neither the market power nor the incentive to stymie the OVDs.”<sup>29</sup> But in reality, Charter has the market power to dictate whether its subscribers will be able to access online content and at what price, and it has every incentive to maximize its profits by using its market power at the interconnection point as well as imposing data caps/usage-based pricing.

**(d) Charter Is Still A Dominant Player In The BIAS Market.**

The fact that the OVD market is “flourishing” does not help Charter’s case for why the Commission should lift its merger conditions. While the state of the OVD marketplace may show that there is successful competition and consumer choice in the OVD market, the same cannot be said about the BIAS market. In its Reply Comments, Charter states: “[o]pponents’

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<sup>28</sup> *Id.* at 24.

<sup>29</sup> *Charter Reply Comments*, at 13.

claims that the BIAS market is not competitive are beside the point and overstated. The conditions are unnecessary regardless of the level of BIAS competition because Charter, like other broadband providers, lacks the incentive or ability to discriminate against OVDs.”<sup>30</sup> But it is Charter here that misses the point and understates the importance of BIAS competition regarding the merger conditions. As we explained in our Petition to Deny, Charter still faces insufficient competition in the residential, high-speed BIAS marketplace to discipline its behavior and its size has only increased since the merger.<sup>31</sup> If customers face problems with Charter, they often do not have sufficient alternatives to turn to.<sup>32</sup> In fact, Leichtman Research Group recently reported that in 2Q of 2020, Comcast, which had the most amount of subscribers at the end of the quarter, gained 323,000 broadband internet subscribers, and Charter, which had the second highest total BIAS subscribers, gained 850,000 subscribers.<sup>33</sup> As Free Press explained in its Reply Comments, Charter and Comcast control more than half of all U.S. residential fixed terrestrial internet connections and are increasing their dominance over the MVPD market.<sup>34</sup> Moreover, “for more than one-quarter of the households in its footprint, Charter is the only available option for a 25 Mbps service. At speeds above 100 Mbps, which may be required for larger households using multiple 4K video streams, nearly half the households in Charter’s

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<sup>30</sup> *Id.* at 11.

<sup>31</sup> *See* INCOMPAS Petition to Deny, at 6-21.

<sup>32</sup> *Id.* at 7.

<sup>33</sup> Leichtman Research Group, *About 1,245,000 Added Broadband in 2Q 2020*, Press Release (Aug. 13, 2020), *available at*: <https://www.leichtmanresearch.com/about-1245000-added-broadband-in-2q-2020/>.

<sup>34</sup> *Free Press Reply Comments*, at 15.

footprint have no alternative wired ISP.”<sup>35</sup> Therefore, when Eisenach’s Declaration states: “[f]rom an economic perspective, it is simply not plausible that Charter (or any MVPD) could inflict meaningful competitive harm on the OVD sector,” that simply cannot be true.<sup>36</sup> It is in fact very plausible given that Charter now has over 28 million customers,<sup>37</sup> which has increased significantly since the merger when the Commission was concerned over Charter’s then-18.4 million BIAS subscribers.<sup>38</sup> Many of Charter’s 28 million customers do not have other residential BIAS options to switch to in order to avoid the price hikes Charter will impose if the conditions are lifted.

In addition, Charter’s dominance in the market has even more significance today as the nation continues to struggle through the COVID-19 pandemic. Charter is incorrect that the “COVID-19 pandemic also does not support maintaining the unjustifiable Conditions any longer[.]”<sup>39</sup>As INCOMPAS explained in our Petition to Deny, the Commission should not allow for additional fees from data caps especially after it encouraged broadband and phone providers to take the Keep Americans Connected Pledge with the understanding that customers today may not be able to pay their internet or phone bills due to the pandemic.<sup>40</sup> Moreover, as Roku explained: “[i]ncreased consumer dependence on broadband due to COVID-19 has, if anything,

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<sup>35</sup> *Id.* at 19.

<sup>36</sup> *Eisenach Declaration*, at 23.

<sup>37</sup> *See* Leichtman Research Group, *supra* note 33.

<sup>38</sup> *See* INCOMPAS Petition to Deny, at 9-11.

<sup>39</sup> *Charter Reply Comments*, at 22.

<sup>40</sup> INCOMPAS Petition to Deny, at 24-25.

heightened the incentive and ability for Charter to act anti-competitively, and those incentives are just as powerful, and the marketplace is just as ineffective at constraining Charter's ability to act, today as they were when the Commission adopted the *Merger Conditions*.<sup>41</sup> As more Americans adjust to life centered at home, they have no choice but to rely on their BIAS provider for video activities and other online-based necessities such as school, work, and entertainment. As Roku explained, "[s]treaming, as well as the broader array of all the services provided over the internet, is not possible without robust and open broadband internet access. It should thus come as no surprise that the surging demand for streaming video corresponds with increasing demand for bandwidth on broadband networks."<sup>42</sup> In addition, as the New York Public Service Commission explained: "Charter's request for early relief is ill-timed as our nation grapples with the challenges of the COVID-19 pandemic when the need for robust broadband connectivity is more vital than ever for telecommuting, telehealth and the general use of broadband for home-learning to maintain social distancing policies. There is certainly no guarantee that these important needs will discontinue anytime soon, and certainly not in 2021 when Charter proposes to be relieved of its data cap and UBP obligations."<sup>43</sup> The Commission should heed these facts and warnings and not lift the merger conditions earlier than necessary.

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<sup>41</sup> *Roku Reply Comments*, at 9.

<sup>42</sup> *Id.* at 11.

<sup>43</sup> Reply Comments of the New York Public Service Commission, *Docket Established For Monitoring Compliance With The Conditions Imposed In The Charter Communications-Time Warner Cable-Bright House Networks Order*, WC Docket. No 16-197 (filed Aug. 6, 2020), at 2.

**(e) Mobile Broadband Is Not A Substitute For Fixed Broadband.**

As support for Charter’s claim that the broadband marketplace is growing and is competitive, Charter’s Reply Comments focus on the increased competition in the marketplace due to mobile, 5G, and satellite services.<sup>44</sup> However, these services are not viable substitutes for fixed, high-speed broadband. Charter even goes as far to state that “mobile broadband is already substituting for fixed broadband” even though this is not true.<sup>45</sup> In fact, the Commission has said so itself. The Commission’s 2020 Broadband Deployment Report states: “[w]hile users may substitute between mobile and fixed broadband when accessing certain services and applications, the record indicates that they are not yet functional substitutes for all uses and customer groups.”<sup>46</sup> Moreover, AT&T CEO’s John Stankey recently said: “I personally do not believe that 5G is a replacement in the near term for suburban residential single family living units.”<sup>47</sup> The Commission and the industry understand that mobile, 5G, and satellite are not yet substitutes for fixed broadband, which significantly undermines Charter’s arguments of the competition it faces.

**(f) Charter’s Language Clearly Shows That It Would Impose Data Caps And Higher Interconnection Fees If The Conditions Are Lifted.**

Throughout its Reply Comments, Charter states that while it has no plans to impose data caps or interconnection fees, it would like the “flexibility” that sunseting conditions would

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<sup>44</sup> *Charter Reply Comments*, at 24-29.

<sup>45</sup> *Id.* at 25.

<sup>46</sup> 2020 Broadband Deployment Report, *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 19-285, (rel. Apr. 24, 2020), at 6.

<sup>47</sup> Mike Robuck, *Tale of the tape: Verizon’s 5G Home vs. AT&T’s fiber-fed broadband service*, Fierce Telecom (July 24, 2020), available at: <https://www.fiercetelecom.com/telecom/tale-tapeverizon-s-5g-home-vs-at-t-s-fiber-fed-broadband-service>.

provide. For example, Charter claims that while it “currently has no plans to change its business strategy, these Conditions ultimately could harm both Charter’s broadband subscribers and the public interest by removing any flexibility and forcing Charter to run its network based on arbitrary merger conditions instead of market conditions.”<sup>48</sup> However, the Commission should not overlook the hypocrisy and contradiction in this statement. Charter first tells the Commission it has no plans to change its business plans, but then says it still wants the flexibility to change its business plans. By asking the Commission for “flexibility” throughout its Reply Comments, Charter is essentially saying that it wants the discretion to impose data caps and interconnection conditions, and most likely because it will do so. As explained above, Charter provides no declaration that it will not impose data caps/usage-based pricing on consumers or higher interconnection fees on OVDs, edge providers, CDNs, and transit providers.

While Charter suggests in its Reply Comments that that broadband customers want data caps and that they are “popular” for consumers who do not consume a lot of data,<sup>49</sup> Charter “neglected to mention that home-Internet providers generally don’t charge customers less when they don’t use much data.”<sup>50</sup> Moreover, large BIAS providers tend not to use data caps where they face fiber competitors. As INCOMPAS noted in our Petition to Deny, data caps are not needed to manage networks, and small broadband providers, including INCOMPAS members,

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<sup>48</sup> *Charter Reply Comments*, at 16; *see also Charter Reply Comments*, at 15 (“Charter should have the same flexibility as its competitors to deploy these policies as needed in an increasingly competitive market.”), at 19 (“Charter reasonably seeks the same flexibility that all of its competitors and peers have to manage data usage.”); at 26 (“Charter must seek the flexibility now that sunseting the Conditions will provide”).

<sup>49</sup> Jon Brodtkin, *Charter tries to convince FCC that broadband customers want data caps*, Ars Technica (Aug 11, 2020), *available at*: <https://arstechnica.com/tech-policy/2020/08/charter-tries-to-convince-fcc-that-broadband-customers-want-data-caps/>.

<sup>50</sup> *Id.*

do not impose them. The only reason to do so is to create scarcity so that additional fees can be charged when customers use all their data. In other words, Charter will use it to increase prices as other large BIAS providers have done where they do not face effective competition.

#### **IV. CONCLUSION**

Charter has failed to demonstrate throughout this proceeding that its anticompetitive incentives that the Commission found in its *Merger Order* and accompanying economic analysis have altered so that consumers will not be harmed if the conditions are no longer in force. As such, the Commission should deny Charter's Petition.

Respectfully submitted,

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