Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF
THE FREE STATE FOUNDATION*

I. Introduction and Summary

These comments are filed in response to the Commission's Notice seeking comments on a petition filed by Charter Communications, Inc., for termination of the restrictions on usage-based pricing and IP network interconnection agreement terms that were imposed as conditions of the agency's approval of Charter's merger with Time Warner Cable, Inc., and Bright House Networks, LLC. Because the market for online video distribution (OVD) services is competitive and the harms that the Commission speculated might occur have never materialized, the Commission should sunset those conditions. As these comments emphasize, both merger conditions, to the extent they ever were valid at all, reflect general industry-wide matters rather than merger-specific concerns. And the order reflected an incorrect view of usage-based pricing and regulation of interconnection agreements that is now contrary to Commission policy. Because continued imposition of the two conditions risks putting Charter at a disadvantage

* These comments express the views of Randolph J. May, President of the Free State Foundation, and Seth L. Cooper, Director of Policy Studies and Senior Fellow. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is an independent, nonpartisan free market-oriented think tank.

compared to its competitors and deprives consumers of the benefits of Charter having more flexibility in devising its service offerings, the Commission should sunset those conditions. Indeed, given the compelling reasons supporting termination, the Commission should terminate them prior to May 2021.

In the *Charter Merger Order* (2016), the Commission imposed certain conditions on its approval of the transaction. At issue now are the merger conditions that (1) prohibit Charter from utilizing data caps and usage-based pricing in offering broadband Internet access services; and (2) require Charter to interconnect its IP network with any qualifying entity free of charge and on standardized terms. The *Charter Merger Order* provided that those conditions would remain in force for seven years following the transaction's closing date on May 18, 2016. However, the order permits Charter to petition for relief from the usage-based pricing and interconnection conditions as of five years after the closing date.

The competitiveness and abundance of choice that characterize the OVD market should dictate that the Commission sunset the usage-based data and interconnection conditions. Since the date of the order, OVD services such a Netflix, Amazon, Hulu, as well as YouTube have experienced astonishing subscriber growth. The OVD market also has expanded due to new entrants such as Disney+ and Apple TV+. Over that same period, cable operators, including Charter, have lost multichannel video programming distributor (MVPD) subscribers. Cable operators have facilitated the rise of OVDs as a complementary product to their broadband Internet access services by investing in broadband network infrastructure and increasing speeds, with Charter having rolled out DOCSIS 3.1 technology across its footprint.

Whatever the merits of the *Charter Merger Order*'s claims that Charter possessed some kind of market power at the time the conditions were imposed, Charter clearly does not possess market power today. As the Commission found in the 2018 *Restoring Internet Freedom Order,* "fixed broadband Internet access providers frequently face competitive pressures that mitigate their ability to exert market power." Charter competes with non-cable wireline broadband service providers. Also, 4G and 5G mobile broadband wireless networks increasingly are viable options for video delivery. And the market capitalization of OVDs such as Apple, Amazon, Alphabet (YouTube), and Netflix are significantly larger than Charter's market cap of $124 billion, making it decidedly unlikely Charter could exercise market power – even if it possessed it – to harm OVDs.

The lack of evidence of anticompetitive practices by Charter to inhibit OVD competition or consumer access to OVD services also should dictate termination of the conditions. Given this, it is highly unlikely Charter would risk undermining its good will, alienating its broadband subscribers, and losing return-on-investment in its broadband networks by engaging in such sure-to-fail efforts as impairing OVD competitors.

Furthermore, the Commission should sunset the two conditions because they do not target any potential harm arising directly from the Charter/TWC/BNH merger. Any of those cable operators, standing alone, could have adopted usage-based pricing, which is widely incorporated today into ISP service offerings. Or they could have enjoyed the same freedom that other ISPs possess today to enter into voluntary interconnection agreements that allow them to operate their broadband networks more efficiently and less burdensomely than under regulatory diktat. It is wrong for Charter to be singled out for regulatory burdens that are unnecessary to protect consumers or competition, especially when other market participants are not subject to those same restrictions.

Moreover, the usage-based pricing ban was based on a faulty view of usage-based pricing. Broadband Internet service providers (ISPs) routinely offer pricing based on volume of use, such as a monthly allowance of 1TB of high-speed data. Despite use of the term "data caps," such usage-based plans don't halt connectivity but rather reduce speeds or charge extra when subscribers exceed their allowances. Usage-based plans allow lower-volume users to keep their charges down and avoid paying extra to recover costs that the heavy-volume users cause to be incurred. And the *Charter Merger Order*'s ban produces an anti-consumer result that is contrary to Commission policy. According to the *Restoring Internet Freedom Order*: "Usage allowances may benefit consumers by offering them more choices over a greater range of service options, and, for mobile broadband networks, such plans are the industry norm today, in part reflecting the different capacity issues on mobile networks." Also, the restriction on interconnection agreements is contrary to the RIFO's free market policy and its finding that many edge providers are "sophisticated entities with significant market power due to high demand for their content, with additional leverage in negotiating interconnection."

In sum, the competitiveness of the OVD market and Charter's lack of market power should require the Commission to terminate the usage-based pricing and IP network interconnection conditions. Due to the non-merger specific nature of both conditions, Charter's competitive disadvantage under those conditions, the order's misguided view of usage-based pricing and the lack of need for regulatory intervention regarding interconnection agreements, as well as the glaring inconsistencies between the Commission's findings and policy in the *RIFO* and the *Charter Merger Order*, the Commission should sunset both conditions. And there is no good reason for the Commission to allow them to remain in effect until May 2021.

II. The OVD Market Is Competitive and Thriving

The robust competitiveness of the nationwide OVD market should dictate that the Commission terminate the usage-based data and interconnection conditions imposed by the *Charter Merger Order*. The market for OVD services is effectively competitive and thriving. OVD services have experienced astonishing growth in the time since the order was released. Since mid-2016, subscriptions to major OVDs such as Netflix, Hulu, and Amazon Prime Video have increased significantly. Also, new major entrants like Disney+, YouTubeTV, and Apple TV+ have made substantial subscriber gains in only a short period of time. The May 27, 2020, launch of HBO Max and NBC's July 15 launch of its Peacock streaming service provide additional evidence that the OVD market is flourishing.[1]

According to a report by Parks Associates, as of 2019, 46% of U.S. broadband households subscribed to two or more OVD services.[2] An early 2020 survey by Deloitte found that 80% of U.S. consumers subscribe to a paid streaming services, and "[s]ubscribers pay for an average of four services, up from three pre-COVID-19.[3]

Conversely, since mid-2016, cable MVPDs have experienced continuing subscriber losses. According to a recent Leichtman Research Group (LRG) report, total cable MVPD subscriptions dropped to 45.8 million in 2019.[4] The top seven cable operators lost 1.56 million

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[1] *See* Erik Kain, "What's The Difference Between HBO And HBO Max?," Forbes (April 22, 2020), at: https://www.forbes.com/sites/erikkain/2020/04/22/hbo-max-release-date-content-and-so-much-more-revealed-in-two-new-trailers/#441684f42253.
[2] Broadband TV News, "Sharp increase in number of OTT subscribers in the US" (October 4, 2019), at: https://www.broadbandtvnews.com/2019/10/04/sharp-increase-in-number-of-ott-subscribers-in-the-us/.
[3] Deloitte, Press Release: "Deloitte: COVID-19 Accelerates Cycle of Paid Entertainment Subscriptions and Cancellations" (June 23, 2020), at: https://www2.deloitte.com/us/en/pages/about-deloitte/articles/press-releases/digital-media-trends.html.
[4] LRG, Press Release: "Major Pay-TV Providers Lost About 4,915,000 Subscribers in 2019," (March 3, 2020), at: https://www.leichtmanresearch.com/wp-content/uploads/2020/03/LRG-Press-Release-03-03-2020.pdf.

subscribers in 2019, compared to 920,000 in 2018.[5] Charter's cable video subscribership declined from 16.7 million as of March 2017 to 15.6 million as of March 2020.[6]

Moreover, while cable video subscribership has declined since the *Charter Merger Order*, cable residential broadband subscribership has increased. As of March 2017, Charter had 2l.18 million residential broadband Internet service subscribers.[7] That number grew to 27.2 million as of March 2020.[8] In 2017, Charter began its rollout of gigabit connections using DOCSIS 3.1 technology, and by the end of 2018, Charter's deployment of DOCSIS 3.1 extended to 99% of its footprint. Today, Charter's Spectrum Internet gig service offer speeds of up to 940 Mbps in select areas. Also, Charter has incorporated OVDs into its video service menus. These facts suggest that Charter, like other cable operators, far from impeding the rise of unaffiliated OVDs, has facilitated their growth with ongoing network investment and speed increases.

III. Charter Does Not Possess Market Power to Harm OVD Competition

Whatever the merits of the *Charter Merger Order*'s claims that Charter possessed some kind of market power at the time the two conditions were imposed, Charter does not possess market power today. As the Commission found in the *Restoring Internet Freedom Order*, "fixed broadband Internet access providers frequently face competitive pressures that mitigate their ability to exert market power."[9] Charter competes with non-cable wireline broadband service providers, consistent with the *RIFO*'s finding that "even two competing wireline ISPs place

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[5] *Id*. The top seven cable operators are Comcast, Charter, Cox, Altice, Mediacom, Cable One, and Atlantic Broadband. The top three Telco TV providers are Verizon FiOS, AT&T U-verse, and Frontier.

[6] *See* "Charter Communications (CHTR) Disappoints in Q1 Earnings," Nasdaq (May 2, 2017), at: https://www.nasdaq.com/articles/charter-communications-chtr-disappoints-in-q1-earnings-2017-05-02.

[7] *Id.*

[8] Leichtman Research Group, Inc., Press Release: "About 1,165,000 Added Broadband in 1Q 2020" (May 13, 2020), at: https://www.leichtmanresearch.com/about-1165000-added-broadband-in-1q-2020/.

[9] *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order ("*RIFO*") (released January 4, 2018), at ¶ 123.

competitive constraints on each other."[10] Additionally, 4G and 5G mobile wireless networks are increasingly viable options for video delivery.[11] And the market capitalization of OVDs – exceeding $1 trillion for Apple, Amazon, and Alphabet (Google), and over $200 billion for Netflix – is significantly larger than Charter's market cap of $124 billion.[12]

Indeed, a survey released this month by Cowen & Co. reportedly indicates that leading OVD Netflix has gained pricing power due to consumers high interest in their service.[13] This is consonant with the *RIFO*'s finding that "there is ample evidence that major edge providers, including Netflix, YouTube, and other large OVDs, are some of the 'most-loved' brands in the world" and its conclusion that deliberate actions by ISPs to reduce the demand of complementary products like OVDs would reduce demand for ISPs' services.[14]

Sunset of the IP network interconnection condition is consistent with the *RIFO*'s finding that "there are substantial pro-competitive and pro-consumer benefits to alternative Internet traffic exchange arrangements, including content delivery networks (CDNs).[15] According to the *RIFO*, many edge providers are "sophisticated entities with significant market power due to high demand for their content, with additional leverage in negotiating interconnection," enabling them to "efficiently negotiate mutually-acceptable arrangements to meet end user demands for

[10] *RIFO*, at ¶ 126.
[11] *RIFO*, at ¶ 130 ("With the advent of 5G technologies promising sharply increased mobile speeds in the near future, the pressure mobile exerts in the broadband market place will become even more significant.")
[12] *See* Conditions Imposed in the Charter Communications-Time Warner Cable-Bright House Networks Order, WC Docket No. 16-197, Petition of Charter Communications, Inc. ("Petition") (filed June 17, 2020), at 26; *RIFO*, at ¶ 134 (recognizing significant advantages and higher market cap of the five largest edge providers compared with Comcast and also recognizing the likely spill-over effects of those advantages for smaller edge providers).
[13] *See, e.g.*, Todd Spangler, "Would You Pay More for Netflix? Growing Number of Its U.S. Subscribers Are OK With Higher Prices," *Variety* (July 3, 2020), at: https://variety.com/2020/digital/news/netflix-higher-prices-subscriber-survey-1234697737/.
[14] *RIFO*, at ¶ 171.
[15] *RIFO*, at ¶ 168-169.

network usage."[16] Moreover, maintenance of the interconnection agreement tends to require Charter to operate its broadband network less efficiently than it otherwise would.

In sum, market conditions are far different now than those that prevailed when the Commission imposed the usage-based pricing and interconnection conditions. The competitiveness of the OVD market should require that the Commission sunset conditions at the soonest possible date. Importantly, even if the usage-based pricing and IP network interconnection conditions are terminated, any allegations of anticompetitive actions by Charter, if properly proven, would still be subject to antitrust or consumer protection enforcement.[17]

IV. There Is No Evidence That the OVD Market Has Been Harmed by Anticompetitive Practices

The lack of evidence that any anticompetitive practices have inhibited OVD competition or consumer access to OVD services also supports termination of the usage-based data and interconnection conditions. When the *Charter Merger Order* was issued, there was no reason to think that Charter/TWC/BHN had the incentives *and* ability to impair their own broadband subscribers' access to OVD services. Charter faces competition from other sources, and even in 2016 it was highly unlikely that Charter would risk alienating its subscribers and losing them to competitors in an attempt to prop up MVPD offerings.

Indeed, rather than impeding access, Charter has facilitated the growth of OVD services while its own MVPD subscribership has declined. Given its track record since entry of the order, it is highly unlikely Charter would risk undermining its good will, alienating its growing broadband subscriber base, and losing return-on-investment for its broadband networks by engaging in such sure-to-fail efforts as attempting to impair competitors' services.

[16] *RIFO*, at ¶ 169.
[17] *RIFO*, at ¶ 172.

V. The Conditions on Usage-Based Pricing and IP Network Interconnection Are Not Merger-Specific

The Commission should sunset the usage-based pricing ban and the restrictions on IP network interconnection agreement terms because those merger order conditions do not target a potential harm that arises directly from the merger. Even assuming for the sake of argument that the concerns about usage-based pricing and IP network interconnection agreements for OVD services posed by the *Charter Merger Order* had validity, such concerns are not specific to the merger. Charter's proposed acquisition of Time Warner Cable and Bright House Networks did not actually increase any risk of harm to OVD services. There was nothing inherent in the merger that would have made impairment of OVD services more likely. Any of those cable operators, standing alone, could have adopted usage-based pricing or attempted to force OVDs to enter into unreasonable interconnection agreements. Many other cable as well as non-cable broadband Internet service providers incorporate usage-based pricing options into their offerings and they are free to negotiate voluntary interconnection agreements. Thus, conjecture about OVD impairment could just as easily be made against any video service provider that also provides broadband Internet services.

The conditions imposed by the merger order reflect time-worn beefs held by various online edge providers or interest groups about the communications marketplace or communications policy. Generalized concerns about the broadband and video markets should be considered in the course of industry-wide rulemakings, if at all. And if deemed necessary, any claimed concerns may be addressed in those rulemakings.

Where a merger allegedly gives rise to a unique set of harms or potential harms, those may be targeted with a merger-specific remedy if convincing evidence is presented. But it is unfair for merging parties to be singled out by the Commission for special regulatory burdens based on admittedly market-wide concerns. For the Commission to use the merger review process to achieve broader regulatory goals not specific to the merger is an abuse of the merger review process.

VI. The *Charter Merger Order* Wrongly Disregarded the Pro-Consumer Benefits of Usage-Based Pricing

The usage-based pricing ban was based on an incorrect view. Charging consumers based on the volume of a service they use is a common economic practice across businesses and industries. Broadband service providers routinely offer subscribers usage-based pricing options which may, for example, include monthly allowances whereby a customer pays for 500 GB, 1 TB, or more data per month. Although such plans sometimes are subsumed under the term "data caps," this is somewhat of a misnomer. Connectivity isn't halted when allowances are exceeded; rather, subscribers may experience slower speeds or incur extra charges for use exceeding their allowances.

Usage-based plans generally are a means for lower-volume users to keep their charges down while avoiding subsidizing heavy-volume users who cause more costs to be incurred by the ISP. An absolute ban on usage-based pricing options may foster an undesirable anti-consumer result. Commission policy also recognizes that usage-based pricing can enhance consumer welfare. According to the *Restoring Internet Freedom Order*: "Usage allowances may benefit consumers by offering them more choices over a greater range of service options, and, for mobile broadband networks, such plans are the industry norm today, in part reflecting the different capacity issues on mobile networks."[18] The merger order's ban on offering usage-based pricing options is squarely at odds with Commission policy.

In light of the *Charter Merger Order*'s misguided view of usage-based pricing, the harm to low-volume users of Charter's broadband services by banning such options, the inconsistency between the Commission's policy in the *RIFO* and the merger order, the uniqueness of the ban which singles out Charter but not its competitors, the Commission should sunset the ban on Charter offering usage-based pricing. And it should do so sooner than next May.

VII. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

Respectfully submitted,

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[18] *RIFO*, at ¶ 153.