

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

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

**COMMENTS OF
THE FREE STATE FOUNDATION***

These comments are filed in response to the Commission's Notice seeking comments on the effects of the D.C. Circuit's August 14, 2020, decision in *Competitive Enterprise Institute v. FCC* in connection with the Commission's consideration of the petition by Charter Communications, Inc., seeking termination of two conditions imposed on Charter when the agency approved the Charter/Time Warner Cable/Bright House Networks merger. The two conditions that Charter seeks to have eliminated involve restrictions on usage-based pricing and IP network interconnection agreements. The D.C. Circuit set aside the interconnection condition. These comments emphasize that the D.C. Circuit's failure to set aside the usage-based pricing condition related solely to the court's determination that CEI and the other plaintiffs lacked legal standing to challenge it. The result had nothing to do with the merits of that merger condition. As we stated in the Free State Foundation comments filed in this proceeding on July 22, on the merits, the usage-based pricing ban should be terminated prior to May 2021 because it puts Charter at a

* 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.

competitive disadvantage and it potentially deprives consumers of more flexible and less expensive service offerings.¹

In *CEI v. FCC*, the D.C. Circuit concluded that "the consumers have shown a substantial likelihood that their bills are higher because of the prohibition on paid interconnection agreements."² Because the Commission's legal defense focused on standing and the agency declined to defend the merits of the challenged merger conditions, the court vacated the prohibition on paid interconnection agreements. This should prompt the Commission to formally terminate the interconnection condition.

The D.C. Circuit did not set aside the *Charter Merger Order's* condition banning usage-based pricing or so-called "data caps." But this is because the court found the plaintiffs in *CEI v. FCC* were unable to show they had established standing to sue. In other words, the court ruled that the plaintiffs lacked the ability to challenge the usage-based pricing ban. But the court did not purport to rule on the merits of the usage-based pricing ban. This result based on standing should in no way preclude the Commission from sunseting the usage-based pricing ban. As we showed in our July 22 comments, on the merits, the merger condition is anti-consumer, contrary to Commission policy, unnecessary, anti-competitive, and unrelated to the specific transaction before the Commission.

Notably, albeit in dicta, the D.C. Circuit recognized the anti-consumer impact of the *Charter Merger Order's* ban on usage-based pricing. According to the court: "The

¹ Comments of the Free State Foundation, Conditions Imposed in the Charter Communications-Time Warner Cable-Bright House Networks Order, WC Docket No. 16-197 (July 22, 2020), at <https://freestatefoundation.org/wp-content/uploads/2020/07/FSF-Comments-Eliminating-Charter-Merger-Conditions-072220.pdf>.

² *Competitive Enterprise Institute v. FCC*, Case No. 18-1281 (D.C. Cir. Aug. 14, 2020), Slip. Op. at 18 (hereinafter "*CEI*").

customers persuasively argue that such pricing forces rare Internet users to subsidize frequent ones."³ And, tellingly, the court quoted then-Commissioner Ajit Pai's statement dissenting to the ban: "The elderly woman on a fixed income who uses the Internet to exchange e-mail messages with her grandchildren must pay more so that an affluent family watching online HD video for many hours each day can pay less."⁴ The court observed that "the majority offered no response" to this point when it adopted the order.⁵

As pointed out in the Free State Foundation's initial comments on Charter's petition, the usage-based pricing ban is contrary to Commission policy expressly set forth in the 2018 *Restoring Internet Freedom Order*: "Usage allowances may benefit consumers by offering them more choices over a greater range of service options."⁶ Those choices enable low income and other cost-conscious consumers to enjoy lower prices compared to heavy-volume users.

For reasons set forth more fully in our initial comments,⁷ the Commission should sunset the *Charter Merger Order*'s ban on usage-based pricing and do so prior to May 2021. Competitive conditions in the broadband and video markets, and an abundance of choice in the online video distributor ("OVD") market, weigh heavily in favor of a sunset. Since the order was issued, the number of subscribers to OVDs such as Netflix, Amazon Prime, Hulu, and Disney+ has climbed sharply, while Charter's multi-channel video programming distributor ("MVPD") service subscriptions have declined. Charter also

³ *CEI*, at 20.

⁴ *CEI*, Slip. Op. at 20 (internal cite omitted).

⁵ *CEI*, Slip. Op. at 20.

⁶ *Restoring Internet Freedom*, WC Docket No. 17-108, Declaratory Ruling, Report and Order, and Order ("*RIFO*") (released January 4, 2018), at ¶ 153.

⁷ Comments of the Free State Foundation, WC Docket No. 16-197 (July 22, 2020), at <https://freestatefoundation.org/wp-content/uploads/2020/07/FSF-Comments-Eliminating-Charter-Merger-Conditions-072220.pdf>.

competes with non-cable wireline broadband service providers, and 4G as well as 5G mobile broadband networks increasingly offer viable options for video delivery.

Charter clearly does not possess market power. There is no evidence of anticompetitive practices by Charter that harm OVD competition or consumer access to OVD services. And it is bad policy to subject only Charter to regulatory burdens that are not needed to protect consumers or competition.

Furthermore, the usage-based pricing condition does not target any harm arising directly from the Charter/TWC/BNH merger or any harm even claimed to be unique to the merger applicants. Indeed, the D.C. Circuit showed disfavor toward merger conditions unrelated to specific license transfers under review. It quoted Commissioner Michael O'Rielly's dissenting statement that "[o]nce delinked from the transaction itself, such conditions reside somewhere in the space between absurdity and corruption."⁸

In sum, for all the foregoing reasons, the Commission should terminate the usage-based pricing condition promptly.

Respectfully submitted,

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⁸ *CEI*, Slip. Op. at 25 (internal cite omitted). For a recent critique of FCC-imposed merger conditions that are not specific to the transactions before it, see Randolph J. May, "Involuntary Volunteers at the FCC," *Notice and Comment* blog (*Yale Journal on Regulation*), (Aug. 20, 2020), at: <https://www.yalejreg.com/nc/involuntary-volunteers-at-the-fcc-by-randolph-j-may/>.