

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

**OPPOSITION TO PETITION BY CHARTER COMMUNICATIONS
OF PUBLIC KNOWLEDGE AND SPORTS FANS COALITION**

John Bergmayer
Legal Director
PUBLIC KNOWLEDGE
1818 N St. NW Suite 410
Washington, DC 20036

Brian Hess
Executive Director
SPORTS FANS COALITION
208 I St NE
Washington, D.C. 20002

July 22, 2020

TABLE OF CONTENTS

I.	THE MERGER COMMITMENTS ARE TRANSACTION-SPECIFIC AND DESIGNED TO COUNTER CHARTER'S INCENTIVES.....	2
II.	DATA CAPS ARE MERELY A FORM OF PRICE HIKE AND SERVE LITTLE TO NO NETWORK MANAGEMENT PURPOSE	4
III.	CHARTER'S REQUEST TO CHARGE ONLINE VIDEO SERVICES TO REACH ITS CUSTOMERS SHOULD BE REJECTED	9
IV.	CHARTER HAS SHOWN THAT IT IS WILLING TO GO TO COURT RATHER THAN REACH ACCOMMODATIONS WITH PROGRAMMERS OR COMPLY WITH OTHER MERGER OBLIGATIONS	10
V.	LIFTING THESE MERGER CONDITIONS WOULD HARM INDEPENDENT PROGRAMMERS THAT DISTRIBUTE CONTENT ON THE INTERNET, AS WELL AS SMALLER ONLINE SERVICES	12
VI.	THE COVID-19 PANDEMIC MAKES CHARTER'S REQUEST ESPECIALLY INAPPROPRIATE.....	13

Charter’s request to the Commission that it be permitted to impose data caps on its customers, and to charge online video distributors (OVDs) fees to reach its captive customer base should be denied.

In 2016 the Commission found that it was necessary to impose conditions on the merger of Charter and Time Warner Cable that went beyond the Open Internet rules that then applied to every broadband ISP. It found that the merger, by increasing Charter’s number of subscribers, would increase its incentive to engage in behavior designed to disadvantage video services that compete with its own MVPD video offering. It further found that Charter’s expanded size would increase its ability to disadvantage video programmers and rival video distributors.¹ Charter’s vast number of subscribers simply make it difficult for video services to say “no” to its demands—they cannot afford to lose access to its approximately 26 million broadband and 16 million video subscribers.² The Commission did not specifically require that Charter follow Open Internet principles more broadly. As the time of the transaction, the 2015 *Open Internet Order*, with its bright-line prohibitions on blocking, throttling, and paid prioritization, and rules against discrimination, unreasonable interference, and disadvantaging internet content were the “law of the land.”³

Charter does not provide evidence that, in 2020, it lacks the incentive and ability to restrict its customers’ ability to access competing video services that the Commission found

¹ Applications of Charter Communications, Time Warner Cable, and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, 31 FCC Rcd 6327, ¶ 7 (2016) (“Merger Order”).

² Charter Communications, Charter Announces First Quarter 2020 Results (May 1, 2020), <https://ir.charter.com/static-files/8fcc568f-9121-4781-b5a8-c946b310f36f>

³ Merger Order ¶ 138.

in 2016. Its argument is merely that online video is popular, and that other ISPs may have also engaged in anticompetitive actions. Both of these things are true, but they miss the point. Charter has the incentive and ability to restrict its customers from accessing the online video services of their choice, charging them more if they do so through the discriminatory application of data caps, and through causing OVDs to raise their rates to consumers by charging them access fees. The merger conditions were designed to address just Charter's incentives—broader industry issues will have to be addressed some other way.

I. The Merger Commitments Are Transaction-Specific and Designed to Counter Charter's Incentives

Charter argues that it has no incentive to behave anticompetitively. But its attempt to point to the growing OVD market or the behavior of other ISPs as evidence of this misses the point. Charter's business structure and the competitive pressures it faces in the video marketplace ensure that it will, at a minimum, have the incentive to favor its own video services over those of rivals.

This incentive derives from the lack of competition in broadband as opposed to video. To be sure online video is not a full replacement for traditional MVPD service for some users, since some kinds of programming remain cable-only, and even virtual MVPDs (VMVPDs) like Sling TV or Hulu Live may not carry the full complement of local stations that many viewers require. That being said there are more video choices than ever before, and many former cable TV subscribers have "cut the cord" and switched to online-only viewing, or perhaps simply watch less TV than before. This is not to say that online video is a competitive utopia. Among other things, high content costs have caused most vMVPDs to

drastically raise their prices,⁴ certain video device operating system vendors have begun to act as a new kind of bottleneck.⁵ But consumers do have more options when it comes to online video services.

By contrast, in most of the markets it serves, Charter is the only broadband provider that offers reasonable speed, or one of only two, as some telecom companies offer fiber broadband. Customers may be able to switch between video services, or to subscribe to more than one. This is a far cry from what obtains in the broadband market, where customers are largely captive.

This dynamic means that it can be profitable for Charter to make its broadband offering worse—limiting its usefulness by restricting access to online video, charging customers more of the same thing, and so on—without losing customers. Such behaviors can pay themselves out twofold, in that Charter not only extracts rents from its uncompetitive broadband service, but encourages people to switch to its video offering. To the extent that OVDs have been successful, it is through competition on the merits. Charter does not have to go that route, and can instead simply raise the costs of rival services, make it more costly for customers to use them, and to leverage interconnection arrangements to degrade the quality of OVDs. To be sure the merger commitments along are not enough to fully stop this dynamic—a full complement of industry-wide Open Internet rules, such as were in place when these merge commitments were imposed, also play a vital part. But

⁴ Chaim Gartenberg, *YouTube TV Sharply Increases Monthly Subscription to \$64.99*, THE VERGE (June 30, 2020), <https://www.theverge.com/2020/6/30/21308449/youtube-tv-price-increase-64-99-viacom-hbo-new-channels>.

⁵ Todd Spangler, *Why HBO Max, Peacock Are Deadlocked in Talks with Roku and Amazon*, VARIETY (July 14, 2020), <https://variety.com/2020/digital/news/hbo-max-peacock-roku-amazon-streaming-1234703977>.

even standing alone these commitments put a check on some of the more egregious behaviors that Charter’s structure and market conditions incentivize.

Merger commitments are designed to address the harms caused by a merger. The fact that some of the companies whose services Charter might restrict from accessing, or charge to access, are also sophisticated companies is besides the point, and should not give Charter the ability to “compete” by leveraging its control of broadband infrastructure rather than improving the cost, quality, and programming selection of its cable TV offering.

II. Data Caps Are Merely a Form of Price Hike and Serve Little to No Network Management Purpose

The cable industry has a habit of speaking vaguely about the purpose and effect of data caps, attempting to make them seem like a rational way to manage network resources. For example, Charter writes that “broadband providers need to be able to manage their networks in a way that ensures that moderate and heavy users of broadband alike can receive the speeds, and data plans, that are best for them.”⁶ But data caps have always been primarily a form of price discrimination— a way of charging more to some users for the same service (while not offering offsetting discounts to light internet users). The COVID-19 pandemic has starkly illustrated not just how data caps are not necessary for network functioning but how, as deployed in the broadband industry, they are contrary to the public interest in general.

⁶ Charter Petition 23.

First, the cable industry has long admitted in a variety of contexts that data caps are a form of price discrimination, not a means to manage network congestion.⁷ On the assumption that people who use the internet more value it more, and would be willing to pay more for broadband, they are a way to extract more money from some customers for what is effectively the same service. They are, in other words, a form of price hike. Pricing measures of this kind are often sold as a way to offer some users—light bandwidth users, in this case—cheaper service than would otherwise be possible, by allocating more of the ongoing costs of running the network to those users who get the most out of it. However, where there are numerous examples of broadband providers imposing data caps as a means to charge customers more money—Charter’s own filing lists some—the examples of ISPs using these new revenues to offer cheaper service to other customers, or to roll out new service to customers who could not afford the old rates, are scarce. There are other problems with using bandwidth use as form of price tiering, as well. People who buy premium cable packages or higher-end configurations of various products (which typically carry higher margins for sellers) may have more disposable income. High bandwidth users might not—they may have to use a high amount of bandwidth for school, work, or medical reasons, and thus cannot simply “choose” to use less bandwidth to save money. A young family with children might use more bandwidth than a wealthy retiree, and less ability to pay a higher price. Additionally, bandwidth use can be a moment-to-moment choice, and charging based on bandwidth use can lead to fluctuating, unpredictable bills. Unlike speed

⁷ Dante D’Orazio, *Leaked Comcast Memo Reportedly Admits Data Caps Aren’t About Improving Network Performance*, THE VERGE (November 7, 2015), <https://www.theverge.com/smart-home/2015/11/7/9687976/comcast-data-caps-are-not-about-fixing-network-congestion>.

tiers or other premium features, a customer doesn't choose once what level of service she can afford, but must monitor her use throughout the month. Leaving aside the basic fairness of price discrimination schemes in uncompetitive markets like broadband, as price discrimination goes, bandwidth caps are a poor method.

Usage caps are not a form of network management because bandwidth is not scarce. It can't be used up, and a network that is going unused is wasted. (An ISP might make more money from an inefficiently-used network than one that was near capacity more often, but this simply shows that the incentives of an ISP are not aligned with those of the public at large, which benefits from the positive spillover effects of infrastructure.) There can be congestion issues on IP networks, of course, when too many people try to use the network at once. But bandwidth caps do nothing to solve this: they don't encourage people to use the network less just during peak times. They apply whether a user is trying to watch Netflix at 7 pm, download podcasts at 7 am, hop on a Zoom call at 3 in the afternoon, or running automated backups at 3 in the morning. Additionally, congestion problems are rare on modern broadband networks to begin with (except, occasionally, at interconnection points, which will be discussed below), and it may be better to encourage ISPs to expand network capacity rather than allowing them to monetize problems that should simply be fixed.

It is not particularly surprising that Charter is seeking creative new ways to raise prices on consumers, while trying to hide what it's doing. It is also adding a variety of unadvertised extra fees to consumer bills—fees consumers have no choice but to pay—while omitting these fees from its advertised prices. For example Charter has recently

added a \$197 annual “broadcast TV” fee to subscriber’s bills.⁸ Broadcast TV is not an add-on feature—subscribers have to pay it, and fees of this kind should be part of a company’s advertised rates.⁹ Data caps are simply another way to hike prices on consumers while continuing to advertise lower rates than what people actually pay.

Especially as video moves to 4K resolution, streaming can use up significant amounts of data. For example, one calculation found that streaming video at 4K could take up as much as 6 to 16 GB of data per hour.¹⁰ Over a month, a family with multiple users streaming 4K video as well as music, playing online games, and using video conferencing tools for school and work can easily use multiple terabytes of data, well in excess of standard data caps.¹¹ As many broadband providers charge fees of \$10 per 50 GB in excess of the cap, a household that used 3 TB of data in a month with a 1 TB cap might have to pay an addition \$400 per month. Faced with bills of this magnitude it would be completely rational for users to stick with Charter’s traditional cable television offering, or with affiliated online services it may have exempted from usage caps, rather than risk paying Charter more for bandwidth than they pay to subscribe to the online video services to begin with.

⁸ Jon Brodtkin, *Charter’s Hidden “Broadcast Fee” Now Adds \$197 A Year to Cable Bills*, ARS TECHNICA (July 10, 2020), <https://arstechnica.com/information-technology/2020/07/charter-raises-spectrum-prices-again-boosting-broadcast-tv-fee-to-16-50>.

⁹ Cable companies should be free to break down for users what they are paying for, of course. But transparency does not require cable operators to mislead customers as to the cost of service.

¹⁰ Dan Price, *How Much Data Does Streaming Video Use?*, MAKE USE OF (December 13, 2019), <https://www.makeuseof.com/tag/how-much-data-does-streaming-video-use>.

¹¹ Dave Schafer and Peter Holslin, *Which Internet Service Providers Have Data Caps?*, HIGH SPEED INTERNET.COM (July 7, 2020), <https://www.highspeedinternet.com/resources/which-internet-service-providers-have-data-caps>.

This is particularly pertinent for sports fans, many of whom consume sports online through apps such as ESPN+, league-specific apps, and apps owned by broadcasters. Charter's own filing shows the importance of live streaming for sports fans by listing the 15 streaming platforms on which a fan could watch the Super Bowl in 2020. However, to use the growing number of options now available to consumers as a reason to charge usage caps is flawed. If the same family from the above paragraph wanted to stream an average, three-hour-long baseball game in 4K, that family could use between 18 and 48GB. Generally, a professional baseball team plays about 28 games per month during the regular season. If this family has a superfan who watches every game their team plays, they could exceed their cap by the third week of the month. The risk of exceeding a cap increases drastically for this family when you factor in the rising popularity of e-sports. Video gaming can use between 40 and 300MB per hour, depending on the game.¹² If this family has an average gamer who plays for six hours per week, the family must use seven more GBs of data per month. However, what makes e-sports so unique is how it encourages the fans to interact with the professionals through streaming apps such as Twitch. Watching videos of your favorite e-sports athlete can quickly burn through data at rates similar to other online video platforms, depending on the resolution.

¹² Alex Choros, *How Much Data Do You Need for Gaming?*, WHISTLEOUT (March 27, 2020), <https://www.whistleout.com.au/Broadband/Guides/how-much-data-do-I-need-for-online-gaming>; Limelight Networks, *The State of Online Gaming 2020*, <https://www.limelight.com/resources/white-paper/state-of-online-gaming-2020>.

III. Charter's Request to Charge Online Video Services to Reach Its Customers Should Be Rejected

It may sound attractive to an ISP to first charge users for access to the internet, and then charge the internet for access to users, but it does not serve the public interest.

Charter's merger commitment specifically forbid it from doing this with respect to online video distributors, who compete with its own cable TV service, and whose services are particularly sensitive to the technical details of interconnection. This commitment is especially important as Time Warner Cable, now part of Charter, was one of the most notorious offenders when it comes to interconnection disputes, even having admitted in an email, "We really want content networks paying us for access and right now we force those through transit that do not want to pay."¹³ Given this history, this commitment should stay in place.

There is no way to reach Charter's users except through Charter's network. This is a tautological point but one that is important to reiterate in light of Charter's claim that there are "alternatives" to interconnecting with its network for reaching Charter users.¹⁴ There are not. Charter controls the one bridge that reaches its base of millions of users, and it would like for that to be a toll bridge. The fact that OVDs and other content providers can take different routes to get to that bridge—through direct interconnection, through content delivery networks, through peer networks, or through transit providers, through backbone operators—doesn't change this fact. The interconnection methods and business

¹³ Jake Swearingen, *How Time Warner Cable Broke its Promise and Kept Your High-Speed Internet Slow*, NEW YORK MAGAZINE (February 7, 2017), <https://nymag.com/intelligencer/2017/02/time-warner-cable-lawsuit-says-twc-lied-about-internet-speed.html>

¹⁴ See, e.g., Charter Petition 27.

agreements that may be in place for different kinds of interconnection may affect who pays who for what, and how well online services perform, but fundamentally there is no way to avoid dealing with Charter if you want to reach Charter users. As referenced above, cable companies might interconnect with “transit” providers that online services can use to access cable users, but even that is in the control of the cable company—nothing would stop a cable company from cutting off any given transit company, or even filtering some traffic from a transit connection, and requiring direct negotiations.

Interconnection is not free, and who pays for the actual costs of connecting two networks together, and any special arrangements, are a proper subject for business arrangements. The various examples of interconnection agreements that Charter provides in its filing are largely examples of this. The problem arises when an ISP goes beyond covering the reasonable costs of interconnection to basing its negotiations on the value to an online service provider of reaching its user base. Large ISPs with millions of captive users have a very strong negotiating position, especially with respect to online services that must reach its customers to be financially viable. “Interconnection” fees of this kind are not reasonable ways of allocating costs, but rent-seeking—an ISP taking advantage of its position in the network and its market power in the last mile, as opposed to adding value. While public policy should discourage interconnection shakedowns like this more broadly, a merger condition prohibiting them specifically should not be lifted.

IV. Charter Has Shown That It Is Willing to Go to Court Rather Than Reach Accommodations with Programmers or Comply with Other Merger Obligations

Charter asks to be relieved of FCC merger requirements despite its record of noncompliance with other merger conditions it is subject to. Most notoriously, Charter was

almost denied permission to operate in New York state due to its refusal to meet its commitment to broadband expansion in that state.¹⁵

Charter also has a record of playing hardball with programmers. It has gone to the Supreme Court to make it more difficult for programmers who allege racial discrimination to have their day in court,¹⁶ and has argued that the First Amendment permits it to make business decisions about what programming to carry free of any regulatory oversight, even in the face of claims of racial discrimination.¹⁷ And while concentration in the media marketplace among programmers, broadcasters, and cable operators has made blackouts and last-minute negotiations unfortunately common, the existing merger conditions designed to protect independent programmers have not prevented these disputes from recurring.¹⁸

¹⁵ Jon Brodtkin, *Charter Gets Final Approval to Stay in NY Despite Breaking Merger Promise*, ARS TECHNICA (July 12, 2019), <https://arstechnica.com/tech-policy/2019/07/charter-gets-final-approval-to-stay-in-ny-despite-breaking-merger-promise/>

¹⁶ *Charter Communications v. National Association of African American-Owned Media*, No. 18-1185, March 30, 2020 (judgment below vacated and remanded).

¹⁷ Jon Brodtkin, *Charter, Comcast Don't Have 1st Amendment Right To Discriminate, Court Rules*, *Ars Technica* (November 19, 2018), <https://arstechnica.com/tech-policy/2018/11/charter-cant-use-1st-amendment-to-refuse-black-owned-tv-channels-court-rules>.

¹⁸ Brian Fung, *Spectrum TV's Weeklong Blackout Ends as Charter and Tribune Reach New Agreement*, WASHINGTON POST (January 11, 2019), <https://www.washingtonpost.com/technology/2019/01/11/spectrum-tvs-blackout-ends-charter-tribune-reach-new-agreement>; Brian Fung, *NFL Playoff Games Could Go Dark on Verizon and Spectrum Thanks to Disputes with Big Media Companies*, WASHINGTON POST (December 27, 2018), <https://www.washingtonpost.com/technology/2018/12/27/massive-media-company-disputes-could-keep-millions-tv-viewers-watching-football-playoffs>; J. Craig Anderson, *With Talks Stalled, NBC Shows Could Soon Drop from Spectrum's Cable Lineup*, PORTLAND PRESS HERALD (October 2, 2019), <https://www.pressherald.com/2019/10/02/spectrum-may-drop-nbc-programming-in-maine>; Alex Sherman, *Disney and Charter Blow Through Deadline But Keep Talking About a New Carriage Agreement*, CNBC (August 2, 2019), <https://www.cnn.com/2019/08/02/disney-charter-still-talking-on-new-carriage>

V. Lifting These Merger Conditions Would Harm Independent Programmers That Distribute Content on the Internet, as Well as Smaller Online Services

The conditions that Charter seeks to be rid of were primarily designed to protect users, by ensuring that they could continue to access OVDs despite Charter's incentive and ability to restrict access to them. The Commission also imposed a condition on Charter preventing it from requiring that independent programmers limit online distribution as a condition of carriage. The purpose of this condition—ensuring that consumers can not only access a variety of competing video services, but a variety of diverse and independent programming on those services, and on traditional cable as well, would be undermined by waiving the data cap and interconnection requirements.

Many programmers are choosing to distribute online, bypassing the traditional cable TV gatekeeper. Even those that still primarily depend on MVPD distribution can find the option of online distribution valuable in carriage negotiations. Data caps and interconnection fees would reduce their ability to do this, strengthening the hand of cable operators when it comes to the terms of carriage deals.

Not all of the online services that would be harmed by the FCC waiving these merger conditions are OVDs with tens of millions of subscribers. Data caps do not apply only to the major OVDs who might be able to afford to strike special deals with major ISPs like Charter. Niche services like The Criterion Channel, which streams classic films, and the Urban Movie Channel, which streams movies and television of interest to African-American audiences, would be harmed as well. Of course, the harms of data caps would extend beyond just the

agreement.html; Michael Balderston, *Tegna, Charter Reach Extension on Retrans Talks*, TVTECHNOLOGY (October 1, 2019), <https://www.tvtechnology.com/news/teгна-charter-communications-reach-extension-on-retrans-talks>.

programming markets the merger conditions sought to protect, such as online gaming, telemedicine, music streaming, and videoconferencing for work and school, which simply underlines how waiving the data cap and interconnection conditions is contrary to the public interest.

VI. The COVID-19 Pandemic Makes Charter's Request Especially Inappropriate

It has hard to imagine a worse time for Charter to ask for permission to hike prices on consumers and restrict broadband service.

The importance of affordable broadband has become even more apparent during the COVID-19 pandemic. Charter joined FCC Chairman Pai's "Keep Americans Connected" program, which called on broadband providers to not terminate service, and to waive late fees, for subscribers whose ability to pay was impacted by the pandemic, as well as opening WiFi hotspots for public use. During the pandemic, broadband has shown itself to be an essential utility service. Broadband is essential to keeping Americans informed about the state of the pandemic and local restrictions. Broadband is essential for public safety agencies to communicate with the public, as well as essential for allowing people to access emergency services and telemedicine. Broadband also promotes public safety in that it makes it possible for people to accomplish more things while staying at home, which is essential for slowing the spread of this dangerous virus. Millions of people are working from home remotely, using video-conferencing software and cloud services to stay in communication with their colleagues even as everyone is in individual lockdown. Schools at every level, from kindergartens to postgraduate, have shifted to remote learning. People stay entertained by streaming video and music. Even the ability of people to order food and groceries for delivery helps people maintain the distance needed to prevent contagion.

During this time, many broadband providers waived their bandwidth caps. Despite the much-higher-than-normal level of broadband usage, and the very different daily usage patterns, ISPs have not needed to manage network congestion or usage with usage limits.¹⁹ Many ISPs waived their existing usage caps, recognizing that it is unfair to hit customers with unexpectedly large bills due to internet usage they might not be able to limit, due to circumstances beyond their control.

The pandemic is ongoing, and many lockdowns are planned to continue until at least early next year. In the Washington DC area, for instance, Prince George's County schools will be completely remote until at least January. In Charter's service area, New York City public schools will not fully reopen in the fall, and students will continue to rely on remote learning, requiring reliable and affordable connectivity.

Among the myriad of ways the pandemic has affected consumers, the cancellation of sports is among the most impactful. Sports often serve as a way for people to come together and unite around a common interest, and over the years, sports have played a vital role in maintaining our nation's morale. In one of the most difficult times in recent history, however, sports have been unavailable. On July 23rd, Major League Baseball will return for an abridged season, but with no fans. The National Basketball Association will follow suit a week later. These fans must cheer from their living room on either cable or over-the-top. To lift the merger conditions, which make their fandom affordable when fans need sports the most is dangerous.

¹⁹ Jon Brodtkin, *Comcast Waiving Data Caps Hasn't Hurt Its Network—Why Not Make It Permanent?*, ARS TECHNICA (March 31, 2020), <https://arstechnica.com/tech-policy/2020/03/comcast-waiving-data-cap-hasnt-hurt-its-network-why-not-make-it-permanent>.

Even in normal circumstances merger conditions designed to limit the anti-competitive, anti-consumer effects of continued concentration in the broadband market should be kept in place. But it would be positively perverse to lift them during a global emergency where broadband is essential for public health and safety and to keep the economy functioning.

For the above reasons, Charter's petition should be denied.

Respectfully submitted,

John Bergmayer
Legal Director
PUBLIC KNOWLEDGE
1818 N St. NW Suite 410
Washington, DC 20036

July 22, 2020